

THE
ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.

VOLUME XXVIII:

THE ENGLISH AND EMPIRE DIGEST

WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXVIII.

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SIMILAR SOCIETIES.*

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In this Volume English Cases reported up to 1st January, 1926, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.

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See EVIDENCE.

INFORMER.

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INLAND REVENUE.

See ESTATE AND OTHER DEATH DUTIES; INCOME TAX; LAND TAX; REVENUE.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T. ...	Australian Law Times	Aus.
A. R. ...	Ontario Appeals	Can.
Act. ...	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam ...	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add. ...	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra ...	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
lc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1818—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn ...	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
Alta. L. R.	New Brunswick Reports (Allen)	Can.
Amb. ...	Alberta Law Reports	Can.
And. ...	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
Andr. ...	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Anst. ...	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
App. Cas.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Ct. Rep.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—	Eng.
Architects' L. R.	Appeal Court Reports	N.Z.
Argus L. R. ..	South African Law Reports, Appellate Division	S. Af.
Arkley	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Arm. M. & O. ..	Argus Law Reports	Aus.
Arn. ...	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arn. & H.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Ashb. ...	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Asp. M. L. C.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ayl. Pan.	Ashburner's Principles of Equity, 1902	Eng.
Ayl. Par.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
B.	Atkins' Reports, Chancery, 3 vols., 1736—1754	Eng.
B. Ad.	Ayliffe's New Pandect of Roman Civil Law	Eng.
B. & Ald.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B. & C.	Barber's Gold Law	S. Af.
B. & C. R. (preceded by date)	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. C. R.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—	Eng.
B. Dig.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. L. R.	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (<i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
B. L. R. A. C. ...	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. L. R. P. C. ...	British Columbia Reports	Can.
B. L. R. Sup. Vol.	Bose's Digest	Ind.
B. W. C. C. ...	Bengal Law Reports	Ind.
Bac. Abr. ...	Bengal Law Reports, Appeal Cases	Ind.
Bail Ct. Cas. ...	Bengal Law Reports, Privy Council	Ind.
	Bengal Law Reports, Supp. Vol.	Ind.
	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
	Bacon's Abridgment	
	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	

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Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	E
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	
Bankr. & Ins. R.	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	En
Bar. & Arn.	Barron and Arnold's Election Cases, 1 vol., 1843—1846	En
Bar. & Aust.	Barron and Austin's Election Cases, 1 vol., 1842	En
Barn. Ch.	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	En
Barn. K. B.	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	En
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	En
	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	En
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol.,	
		En
Beaw.	Beawes's Lex Mercatoria	En
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	En
Bell, Ct. of Sess.	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot
Bell, Ct. of Sess. fol.	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794	Scot
Bell, Dict. Dec.	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot
Bellewe	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	Eng
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng
Benl.	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng
	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng
	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng
Bing. N. C.	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng
Biss. & Sm.	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas.	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch.	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com.	Blackstone's Commentaries	Eng.
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S.	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bluett	Bluett's Isle of Man Cases	I. of M.
Bom.	Bombay High Court Reports	Ind.
Bom. A. C.	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca.	Bombay Reports, Crown Cases	Ind.
Bom. O. C.	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R.	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bott.	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827	Eng.
Bourke	Bourke's Reports	Ind.
Br. & Col. Pr. Cas.	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract.	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr.	Sir R. Brooke's Abridgement	Eng.
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep.	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol.,	
		Eng.
Bro. N. C.	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas.	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor.	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819	Eng.
Brod. & F.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lush.	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Eng.

Buch. ...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. C.	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan. ...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck ...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P.	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst. ...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—	Eng.
Bunb. ...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr. ...	Burrow's Reports, King's Bench, 5 vols., 1756—1772 ...	Eng.
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell ...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A. ...	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P. ...	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B. ...	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S.	Common Bench Reports, New Series, 20 vols., 1856—1865 ...	Eng.
C. B. R. ...	Canadian Bankruptcy Reports Annotated, 1920—(current) ...	Can.
C. C. Ct. Cas. ...	Central Criminal Court Cases (Sessions Papers), 1834—1913 ...	Eng.
C. L. Ch. ...	Common Law Chambers	Can.
C. L. J. ...	Cape Law Journal	S. Af.
C. L. J. N. S. ...	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S. ...	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
C. L. R. ...	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R. ...	Commonwealth Law Reports	Aus.
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C. L. T. Occ. N.	Canadian Law Times, Occasional Notes	Can.
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C. P. D. ...	Law Reports, Common Pleas Division, 5 vols., 1875—1880 ...	Eng.
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C. T. R. ...	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N....	Calcutta Weekly Notes	Ind.
Cab. & El. ...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
Cald. Mag. Cas.	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth. ...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas. ...	Cameron's Supreme Court Cases	Can.
Cam. I rac. ...	Cameron's Supreme Court Practice	Can.
Camp. ...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas. ...	Commercial Law Reports of Canada	Can.
Can. Crim. Cas.	Canadian Criminal Cases, Annotated	Can.
Can. Gaz. ...	Canadian Gazette	Can.
Can. Ry. Cas. ...	Canadian Railway Cases	Can.
Car. & Kir. ...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M. ...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Car. C. L. ...	Carrington's Treatise on Criminal Law	Can.
Card. Doc. Ann.	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	Eng.
Carp. Pat. Cas. ...	New Brunswick Reports (Carleton)	Can.
Cart. ...	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Carth. ...	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673 ...	Eng.
Cary ...	Cases on British North America Act (Cartwright)	Can.
Cas. in Ch. ...	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700 ...	Eng.
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Cas. Sett. ...	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
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Cas. temp. Talb.	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680 ...	Eng.
Cass. Dig. ...	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733 ...	Eng.
Ch. (preceded by date)	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737 ...	Eng.
Ch. App. ...	Cassells' Digest	Can.
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Char. Cham. Cas.	Law Reports, Chancery Division, 45 vols., 1875—1890 ...	Eng.
Char. Pr. Cas. ...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1803	Eng.
Chip. ...	Charley's Chamber Cases, 2 vols., 1875—1876	Eng.
	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
	New Brunswick Reports (Chipman)	Can.

xviii **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

Chit. ...	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822	Eng.
Cl. & Fin. ...	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—	Eng.
Cl. & Sc. Dr. Cas.	Clark and Scully's Drainage Cases ...	
Clay. ...	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650 ...	
Clif. & Rick. ...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph. ...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. Ent.	Cook's Lower Canada Admiralty Court Cases ...	Can.
Co. Inst.	Coke's Entries ...	Eng.
Co. L. J.	Coke's Institutes ...	N.Z.
Co. Litt.	Colonial Law Journal ...	Eng.
Co. Rep.	Coke on Littleton (1 Inst.) ...	Eng.
	Coke's Reports, 13 parts, 1572—1616 ...	Eng.
	Nova Scotia Reports (Cochran) ...	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833 ...	Eng.
Coll. ...	Collyer's Reports, Chancery, 2 vols., 1844—1846 ...	Eng.
Coll. Jurid. ...	Collectanea Juridica, 2 vols. ...	Eng.
Colles ...	Colles' Cases in Parliament, 1 vol., 1697—1713 ...	Eng.
Colt. ...	Coltman's Registration Cases, 1 vol., 1879—1885 ...	Eng.
Com. ...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740 ...	Eng.
Com. Cas. ...	Commercial Cases, 1895—(current) ...	Eng.
Com. Dig. ...	Comyns' Digest ...	Eng.
Comb. ...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1693	Eng.
Con. & Law. ...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843 ...	Ir.
Cong. Dig. ...	Congdon's Digest ...	Can.
Const ...	Const's edition of Bott's Poor Laws, 3 vols., 1807 ...	Eng.
Cooke & Al. ...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834 ...	Ir.
Cooke, Pr. Cas. ...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742 ...	Eng.
Coop. G. ...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815 ...	Eng.
Coop. Pr. Cas. ...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. temp. Brough.	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834 ...	Eng.
Coop. temp. Cott.	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases) ...	Eng.
Corb. & D. ...	Coryton's Reports ...	Ind.
Correspondances Jud.	Corbett and Daniell's Election Cases, 1 vol., 1819 ...	Eng.
Couper ...	Correspondances Judiciaires ...	Can.
	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ...	Scot.
Cout. Dig.	Coutlees' Unreported Cases ...	Can.
Cowp. ...	Coutlees' Digest ...	Can.
Cox & Atk.	Cowper's Reports, King's Bench, 2 vols., 1774—1778 ...	Eng.
	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	Eng.
	E. W. Cox's Criminal Law Cases, 1843—(current) ...	Eng.
Cox, Eq. Cas. ...	S. C. Cox's Equity Cases, 2 vols., 1745—1797 ...	Eng.
Cox, M. & H. ...	Cox, Macrae, and Hertalet's County Courts Cases and Appeals, 1 vol., 1846—1852 ...	Eng.
Cr. & J. ...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	Eng.
Cr. & M. ...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	Eng.
Cr. & Ph. ...	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ...	Eng.
Cr. App. Rep. ...	Cohen's Criminal Appeal Reports, 1908—(current) ...	Eng.
Cr. M. & R. ...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835 ...	Eng.
Craw. & D. ...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	Ir.
Craw. & D. Abr. C.	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	Ir.
Cress. Insolv. Cas.	Cresswell's Insolvency Cases, 1 vol., 1827—1829 ...	Eng.
Cripps' Church Cas.	Cripps' Church and Clergy Cases, 2 parts, 1847—1850 ...	
Cro. Car. ...	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641 ...	Eng.
Cro. Eliz. ...	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603 ...	Eng.
Cro. Jac. ...	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625 ...	Eng.
Cru. Dig. ...	Cruise's Digest of the Law of Real Property, 7 vols. ...	Eng.
Cunn. ...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	Eng.
Curt. ...	Curteis' Ecclesiastical Reports, 3 vols., 1834—1844 ...	
	Duxbury's Reports of the High Court of the South African Republic ...	S.
D. O. A. ...	Dorion's Queen's Bench Reports ...	Can.
D. L. R.	Dominion Law Reports ...	Can.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Dal. ...	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574 ..	Eng.
Dalr. ...	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol.	Scot.
Dan. ...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823 ...	Eng.
Dan. & Ll.	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829 ...	Eng.
Dav. & Mer.	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—	Eng.
Dav. Ir. ...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—	Ir.
	1611	Eng.
Dav. Pat. Cas.	Davies' Patent Cases, 1 vol., 1785—1816	Eng.
Day ...	Day's Election Cases, 1 vol., 1892—1893	Eng.
Dea. & Sw.	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	Eng.
Deac. ...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	Eng.
Deac. & Ch.	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	Eng.
Dears. & B.	Dearsly and Bell's Crown Cases Reserved, 1 vol., 1856—1858	Eng.
Dears. C. C.	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856	Eng.
Deas & And.	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	Scot.
De G. ...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	Eng.
De G. & J.	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm.	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J.	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1850—	Eng.
		Eng.
De G. J. & Sm.	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—	Eng.
	1865	Eng.
De G. M. & G. ...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols.,	Eng.
		Eng.
Delane	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dick.	Dickens' Reports, Chancery, 2 vols., 1559—1798	Eng.
Dirl.	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol.,	Scot.
	1665—1677	Eng.
Dods.	Dodson's Reports, Admiralty, 2 vols., 1811—1822	Eng.
Donnelly ...	Donnelly's Reports, Chancery, 1 vol., 1836—1837	Eng.
Doug. El. Cas. ...	Douglas' Election Cases, 4 vols., 1774—1776	Eng.
Doug. K. B. ...	Douglas' Reports, King's Bench, 4 vols., 1778—1785	Eng.
Dow	Dow's Reports, House of Lords, 6 vols., 1812—1818	Eng.
Dow & Cl. ...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	Eng.
Dow. & L. ...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	Eng.
Dow. & Ry. K. B.	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822	Eng.
	—1827	Eng.
Dow. & Ry. M. C.	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	Eng.
Dow. & Ry. N. P.	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	Eng.
Dowl.	Dowling's Practice Reports, 9 vols., 1830—1841	Eng.
Dowl. N. S. ...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	Eng.
Dr. & Wal. ...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—	Ir.
		Ir.
Dr. & War. ...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—	Can.
	1843	Eng.
Dra.	Draper's King's Bench Reports	Eng.
Drew.	Drewry's Reports, Chancery, 4 vols., 1852—1859	Eng.
Drew. & Sm. ...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater ...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap.	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—	Ir.
	1859	Ir.
Drury temp. Sug.	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841	Ir.
	—1844	Eng.
Dugd. Orig. ...	Dugdale's Origines Juridiciales	Scot.
Dunl. (Ot. of Sess.)	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols.,	Eng.
		Eng.
Dunning	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Scot.
Durie	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621	Eng.
		Scot.
Dyer	Dyer's Reports, King's Bench, 3 vols., 1513—1581	Eng.
		Can.
E. & A.	Upper Canada Error and Appeal	Eng.
E. & B.	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—	Eng.
	1858	Eng.
E. & E.	Ellis and Ellis's Reports, Queen's Bench, 8 vols., 1858—1861	Eng.
E. B. & E.	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol.,	Eng.
	1858—1860	S. Af.
E. D. C.	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L.	South African Law Reports, Eastern Districts Local Division	Can.
E. L. R.	Eastern Law Reporter	Can.
E. R. (or Eng. Rep.)	English Reports	Can.
E. R.	Ontario Election Reports	Can.
Eag. & Y.	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	

East	East's Reports, King's Bench, 16 vols., 1800—1812	Eng.
East, P. C.	East's Pleas of the Crown	Eng.
Ecc. & Ad.	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	Eng.
Eden	Eden's Reports, Chancery, 2 vols., 1757—1766	Eng.
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	Scot.
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812	Eng.
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	Scot.
Emden's B. C.	Emden's Building Contracts, Building Leases and Building Statutes	Eng.
Eng. Pr. Cas.	Roscoe's English Prize Cases, 2 vols., 1745—1858	Eng.
Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	Eng.
Eq. Rep.	Equity Reports, 3 vols., 1853—1855	Eng.
Esp.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	Eng.
Ex. D.	Law Reports, Exchequer Division, 5 vols., 1875—1880	Eng.
Exch.	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	Eng.
Exch. C. R.	Exchequer Court Reports	Can.
F. (Ct. of Sess.)	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	Scot.
F.	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	S. Af.
F. & F.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	Eng.
F. N. D.	Finnemore's Notes and Digest of Natal Cases, 1863—1867	S. Af.
Fac. Coll.	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	Scot.
Falc.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	Scot.
Falc. & Fitz.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	Eng.
Fenton	Fenton, Important Judgments	N.Z.
Ferg.	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz. Nat. Brev.	Fitzherbert's Natura Brevium	
Fitz-G.	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
Fl. & K.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol.,	Ir.
Fonbl.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	Eng.
For.	Forrest's Reports, Exchequer, 1 vol., 1800—1801	Eng.
Forb.	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	Scot.
Fort. De Laud.	Fortesque, De Laudibus Legum Angliæ	Eng.
Fortes. Rep.	Fortescue's Reports, fol., 1 vol., 1692—1736	Eng.
Fost.	Foster's Crown Cases, 1 vol., 1708—1760	Eng.
Fount.	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	Scot.
Fox & S. Ir.	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	Ir.
Fox & S. Reg.	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	Eng.
Fras.	Fraser (Simon), Election Cases, 2 vols., 1793	Eng.
Freem. Ch.	Freeman's Reports, Chancery, 1 vol., 1660—1706	Eng.
Freem. K. B.	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	Eng.
G.	Gregorowski's Reports of the High Court of the Orange Free State from 1883	S. Af.
G. & R.	Nova Scotia Reports (Geldert & Russell)	Can.
G. I. Dig.	General Index Digest	Can.
G. W. L.	South African Law Reports, Griqualand West Local Division	S. Af.
Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	Eng.
Gale	Gale's Reports, Exchequer, 2 vols., 1835—1836	Eng.
Gaz. L. R.	New Zealand Gazette Law Reports	N.Z.
Geld. Dig.	Geldert's Digest	Can.
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani	Eng.
Giff.	Giffard's Reports, Chancery, 5 vols., 1857—1865	Eng.
Gilb.	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	Eng.
Gilb. C. P.	Gilbert's History and Practice of the Court of Common Pleas	Eng.
Gilb. Ch.	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	Eng.
Gilm. & F.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	Scot.
Gl. & J.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
Glanv.	Glanville, De Legibus et Consuetudinibus Regni Angliæ	Eng.
Glanv. El. Cas.	Glanville's Election Cases, 1 vol., 1623—1624	Eng.
Glascok	Glascok's Reports (Ireland), 1 vol., 1831—1832	Ir.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. ...	Irish Law Reports, 13 vols., 1838—1851	Ir.
I. L. R. (Vol.) All.	Indian Law Reports, Allahabad ...	Ind.
I. L. R. (Vol.) Bom.	Indian Law Reports, Bombay ...	Ind.
I. L. R. (Vol.) Calc.	Indian Law Reports, Calcutta ...	Ind.
I. L. R. (Vol.) Lah.	Indian Law Reports, Lahore ...	Ind.
I. L. R. (Vol.) Mad.	Indian Law Reports, Madras ...	Ind.
I. L. R. (Vol.) Pat.	Indian Law Reports, Patna ...	Ind.
I. L. R. (Vol.) Ran.	Indian Law Reports, Rangoon ...	Ind.
I. L. T. ...	Irish Law Times, 1867—(current) ...	Ir.
I. L. T. Jo.	Irish Law Times Journal, 1867—(current) ...	Ir.
I. R. (preceded by date)	Irish Reports, since 1893 (<i>e.g.</i> , [1894] 1 I. R.)	Ir.
I. R. (Vol.) C. L.	Irish Reports, Common Law, 11 vols., 1866—1877 ...	Ir.
I. R. Eq.	Irish Reports, Equity, 11 vols., 1866—1877 ...	Ir.
I. R., R. & L.	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876 ...	Ir.
Ind. Awards	Industrial Awards Recommendations ...	N.Z.
Ind. Jur. N. S.	Indian Jurist, New Series ...	Ind.
Ind. Jur. O. S.	Indian Jurist, Old Series ...	Ind.
Ir. Cir. Rep.	Reports of Irish Circuit Cases, 1 vol., 1841—1843 ...	Ir.
Ir. Jur.	Irish Jurist, 18 vols., 1849—1866 ...	Ir.
Ir. L. Rec. 1st ser.	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831 ...	Ir.
Ir. L. Rec. N. S.	Law Recorder (Ireland), New Series, 6 vols., 1833—1838 ...	Ir.
Irv.	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867 ...	Scot.
J. Bridg.	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621 ...	Eng.
J. D. R.	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division ...	S. Af.
J. P.	Justice of the Peace, 1837—(current) ...	Eng.
J. P. Jo.	Justice of the Peace (Weekly Notes of Cases) ...	Eng.
J. R.	Jurist Reports ...	N.Z.
J. R. N. S.	Jurist Reports, New Series ...	N.Z.
J. Shaw, Just.	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852 ...	Scot.
Jac.	Jacob's Reports, Chancery, 1 vol., 1821—1823 ...	Eng.
Jac. & W.	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821 ...	Eng.
James	Nova Scotia Reports (James) ...	Can.
Jebb & B.	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842 ...	Ir.
Jebb & S.	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841 ...	Ir.
Jebb, C. C.	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840 ...	Ir.
Jebb, Cr. & Pr. Cas.	Jebb's Crown and Presentment Cases ...	Ir.
Jo. & Car.	Jenkins' Reports, 1 vol., 1220—1623 ...	Eng.
Jo. & Lat.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839 ...	Eng.
Jo. Ex. Ir.	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846 ...	Ir.
John.	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838 ...	Ir.
John. & H.	Johnson's Reports, Chancery, 1 vol., 1858—1860 ...	Eng.
Jur.	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862 ...	Eng.
Jur. N. S.	Jurist Reports, 18 vols., 1837—1854 ...	Eng.
K.	Jurist Reports, New Series, 12 vols., 1855—1867 ...	Eng.
K. & G.	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881 ...	S. Af.
K. & J.	Keane and Grant's Registration Cases, 1 vol., 1854—1862 ...	Eng.
K. B. (preceded by date)	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858 ...	Eng.
Kames, Dict. Dec.	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.) ...	Eng.
Kames, Rem. Dec.	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741 ...	Scot.
Kames, Sel. Dec.	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752 ...	Scot.
Kay	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768 ...	Scot.
Keb.	Kay's Reports, Chancery, 1 vol., 1853—1854 ...	Eng.
Keen	Keble's Reports, fol., 3 vols., 1661—1677 ...	Eng.
Keil.	Keen's Reports, Rolls Court, 2 vols., 1836—1838 ...	Eng.
Kel.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578 ...	Eng.
Kel. W.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707 ...	Eng.
Keny.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734 ...	Eng.
Keny. Ch.	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759 ...	Eng.
Kerr	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754 ...	Can.
	New Brunswick Reports (Kerr) ...	Can.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Kilkerran	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	
Kn. & Omb.	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	Scot.
	Knapp's Reports, Privy Council, 3 vols., 1829—1836	Eng.
	Knox's Reports	Eng.
Konst. & W. Rat. App.	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	Aus.
Konst. Rat. App.	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	Eng.
		Eng.
L. & G. temp. Plunk.	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	Ir.
L. & G. temp. Sugd.	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	Ir.
L. & Welsb.	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	
L. C. & M. Gaz.	Local Courts and Municipal Gazette	Eng.
L. C. J.	Lower Canada Jurist	Can.
L. C. L. J.	Lower Canada Law Journal	Can.
L. C. R.	Lower Canada Reports	Can.
L. G. R.	Local Government Reports, 1902—(current)	Eng.
L. J. Adm.	Law Journal, Admiralty, 1865—1875	Eng.
L. J. Bcy.	Law Journal, Bankruptcy, 1832—1880	Eng.
L. J. C. C.	Law Journal (County Courts Reporter), 1912—(current)	Eng.
L. J. C. P.	Law Journal, Common Pleas, 1831—1875	Eng.
L. J. Ch.	Law Journal, Chancery, 1831—(current)	Eng.
L. J. Eccl.	Law Journal, Ecclesiastical Cases, 1866—1875	Eng.
L. J. Ex.	Law Journal, Exchequer, 1831—1875	Eng.
L. J. Ex. Eq.	Law Journal, Exchequer in Equity, 1835—1841	Eng.
L. J. K. B. or Q.	Law Journal, King's Bench or Queen's Bench, 1831—(current)	Eng.
L. J. M. C.	Law Journal, Magistrates' Cases, 1831—1896	Eng.
L. J. N. C.	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	Eng.
L. J. O. S.	Law Journal, Old Series, 10 vols., 1822—1831	Eng.
L. J. P.	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	Eng.
L. J. P. & M.	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	Eng.
L. J. P. C.	Law Journal, Privy Council, 1865—(current)	Eng.
L. J. P. M. & A.	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	Eng.
L. Jo.	Law Journal Newspaper, 1866—(current)	Eng.
L. L. R.	Leader Law Reports	S. Af.
L. M. & P.	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	Eng.
L. N.		Can.
L. R. A. & E.	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865	Eng.
L. R. C. C. R.	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	Eng.
L. R. C. P.	Law Reports, Common Pleas, 10 vols., 1865—1875	Eng.
L. R. Eq.	Law Reports, Equity Cases, 20 vols., 1865—1875	Eng.
L. R. Exch.	Law Reports, Exchequer, 10 vols., 1865—1875	Eng.
L. R. H. L.	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	Eng.
L. R. Ind. App.	Law Reports, Indian Appeals, Privy Council, 1873—(current)	Eng.
L. R. Ind. App. Supp. Vol.	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	Eng.
L. R. Ir.	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	Ir.
L. R. P. & D.	Law Reports, Probate and Divorce, 3 vols., 1865—1875	Eng.
L. R. P. C.	Law Reports, Privy Council, 6 vols., 1865—1875	Eng.
L. R. Q. B.	Law Reports, Queen's Bench, 10 vols., 1865—1875	Eng.
L. R. Q. B.	Quebec Reports, Queen's Bench	Can.
L. R. Sc. & Div.	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	Eng.
L. T.	Law Times Reports, 1859—(current)	Eng.
L. T. Jo.	Law Times Newspaper, 1843—(current)	Eng.
L. T. O. S.	Law Times Reports, Old Series, 34 vols., 1843—1860	Eng.
L. Th.	La Themis	Can.
Lane	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	Eng.
Lat.	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	Eng.
Laws. Reg. Cas.	Lawson's Registration Cases, 1895—(current)	Eng.
Ld. Raym.	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	Eng.
Le. & Ca.	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	Eng.
Leach	Leach's Crown Cases, 2 vols., 1730—1814	Eng.
	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	Eng.
Lee temp. Hard.	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	Eng.

Leg. Rep.	Legal Reporter	Aus.
Legge ..	Legge's Reports	
	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	Eng.
Lev. ..	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	Eng.
Lew. C. C.	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	Eng.
	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	Eng.
Lib. Ass.	Liber Assisarum, Year Books, 1—51 Edw. III.... .. .	Eng.
Lilly	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	Eng.
	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Lloyd, L. R.	Lloyd's List Law Reports, 1919—(current)	Eng.
Lloyd, Pr. Cas.	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	Eng.
	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	Eng.
Long. & T. ..	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	Ir.
Lords Journals ..	Journals of the House of Lords	Eng.
Lud. E. C. ..	Luder's Election Cases, 3 vols., 1784—1787	Eng.
Lumley, P. L. C.	Lumley's Poor Law Cases, 2 vols., 1834—1842	Eng.
Li	Lushington's Reports, Admiralty, 1 vol., 1859—1862	Eng.
	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., —1704	Eng.
Lut. Reg. Cas.	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	Eng.
Lynd.	Lyndwood, Provinciale, fol., 1 vol.	Eng.
M.	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
M. & S.	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	Eng.
M. & W.	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	Eng.
M. C. R.	Montreal Condensed Reports	Can.
M. H. C. R.	Madras High Court Reports	Ind.
M. L. R. (Vol.) K. B. or	Montreal Law Reports, King's Bench or Queen's Bench	Can.
M. L. R. (Vol.) S. C.	Montreal Law Reports, Superior Court	Can.
M. M. Cas.	Martin's Reports of Mining Cases	Can.
	Macasseys' New Zealand Reports	N.Z.
Mac. & G.	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	Eng.
Mac. & H.	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	Eng.
M'Cle.	M'Clelland's Reports, Exchequer, 1 vol., 1824	Eng.
M'Cle. & Yo.	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	Eng.
Macfarlane	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	Scot.
Macl. & Rob.	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	Scot.
Macph. (Ct. of Sess.)	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	Scot.
	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	Scot.
Macr.	Macrory's Patent Cases, 2 parts, 1847—1856	Eng.
	Madras High Court Reports	Ind.
Madd.	Maddock's Reports, Chancery, 6 vols., 1815—1821	Eng.
Madd. & G.	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	Eng.
Madox	Madox's Formulæ Anglicanum	Eng.
Madox, Exch.	Madox's History and Antiquities of the Exchequer, 2 vols.	Eng.
	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	Eng.
Man. & G.	Manning and Granger's Reports, Common Pleas, 7 vols.,	Eng.
Man. & Ry. K. B.	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	Eng.
Man. & Ry. M. C.	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	Eng.
Man. L. J.	Manitoba Law Journal	Can.
Man. L. R.	Manitoba Law Reports	Can.
Man. R. temp. Wood	Manitoba Reports temp. Wood	Can.
Mans.	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	Eng.
Mar. L. C.	Maritime Law Reports (Crockford), 3 vols., 1860—1871	Eng.
March	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	Eng.
Marr.	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Marsh.	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	Eng.
Marsh.	Marshall's Reports	Ind.
Mayn.	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	Eng.
	Megone's Companies Acts Cases, 2 vols., 1889—1891	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Men.	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
Mer.	...	Merivale's Reports, Chancery, 3 vols., 1815—1817	...	Eng.
Milw.	...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	...	Ir.
Mod. Rep.	...	Modern Reports, 12 vols., 1669—1755	...	Eng.
Mol.	...	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	...	Ir.
Mont.	...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	Eng.
Mont. & A.	...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	...	Eng.
Mont. & B.	...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	...	Eng.
Mont. & Ch.	...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	...	Eng.
Mont. & M.	...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	...	Eng.
Mont. D. & De G	...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols.,	...	Eng.
Moo. & P.	...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	...	Eng.
Moo. & S.	...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	...	Eng.
Moo. Ind. App.	...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	...	Eng.
Moo. P. C. C.	...	Moore's Privy Council Cases, 15 vols., 1836—1863	...	Eng.
Moo. P. C. C. N. S.	...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	...	Eng.
Mood. & M.	...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	...	Eng.
Mood. & R.	...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	...	Eng.
Mood. C. C.	...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	...	Eng.
Moore, C. P.	...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	...	Eng.
Moore, K. B.	...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	...	Eng.
Mor. Dict.	...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	...	Scot.
Morr.	...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	...	Eng.
Mos.	...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	...	Eng.
Mun. Rep.	...	Municipal Reports	...	Can.
Murd. Epit.	...	Murdoch's Epitome	...	Can.
Murp. & H.	...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	...	Eng.
Murr.	...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	...	Scot.
My. & Cr.	...	Mylne and Craig's Reports, Chancery, 5 vols., 1835—1841	...	Eng.
My. & K.	...	Mylne and Keen's Reports, Chancery, 3 vols., 1832—1835	...	Eng.
N. (preceded by date)	...	Northern Ireland Law Reports, 1925—(current) (<i>c.g.</i> , [1925] N.)	...	Ir.
N. A. C.	...	Native Appeal Cases	...	S. Af.
N. & S.	...	Nichols and Stop's Reports (Tasmania)	...	Tasmania
N. B. Dig.	...	New Brunswick Digest (Stevens)	...	Can.
N. B. Eq. Rep.	...	New Brunswick Equity Reports	...	Can.
N. B. R.	...	New Brunswick Reports	...	Can.
N. B. R. (All.)	...	New Brunswick Reports (Allen)	...	Can.
N. B. R. (Ber.)	...	New Brunswick Reports (Berton)	...	Can.
N. B. R. (Carl.)	...	New Brunswick Reports (Carleton)	...	Can.
N. B. R. (Chip.)	...	New Brunswick Reports (Chipman)	...	Can.
N. B. R. (Han.)	...	New Brunswick Reports (Hannay)	...	Can.
N. B. R. (Kerr)	...	New Brunswick Reports (Kerr)	...	Can.
N. B. R. (P. & B.)	...	New Brunswick Reports (Pugsley and Burbidge)	...	Can.
N. B. R. (P. & T.)	...	New Brunswick Reports (Pugsley and Trueman)	...	Can.
N. B. R. (Pug.)	...	New Brunswick Reports (Pugsley)	...	Can.
N. B. R. (Tru.)	...	New Brunswick Reports (Trueman)	...	Can.
N. L. R.	...	Natal Law Reports	...	S. Af.
N. P. D.	...	South African Law Reports, Natal Provincial Division	...	S. Af.
N. S. R.	...	Nova Scotia Reports	...	Can.
N. S. R. (Coch.)	...	Nova Scotia Reports (Cochran)	...	Can.
N. S. R. (G. & O.)	...	Nova Scotia Reports (Geldert and Oxley)	...	Can.
N. S. R. (G. & R.)	...	Nova Scotia Reports (Geldert and Russell)	...	Can.
N. S. R. (James)	...	Nova Scotia Reports (James)	...	Can.
N. S. R. (Old.)	...	Nova Scotia Reports (Oldrights)	...	Can.
N. S. R. (R. & C.)	...	Nova Scotia Reports (Russell and Chesley)	...	Can.
N. S. R. (R. & G.)	...	Nova Scotia Reports (Russell and Geldert)	...	Can.
N. S. R. (Thom.)	...	Nova Scotia Reports (Thomson)	...	Can.
N. S. W. Adm. or Ad.	...	New South Wales Reports, Admiralty	...	Aus.
N. S. W. B.	...	New South Wales Reports, Bankruptcy	...	Aus.
N. S. W. Bkpty. Cas.	...	New South Wales Bankruptcy Cases	...	Aus.
N. S. W. Eq.	...	New South Wales Reports, Equity	...	Aus.
N. S. W. Ind. Arbtrn. Cas.	...	New South Wales Industrial Arbitration Cases	...	Aus.
N. S. W. L. R.	...	New South Wales Law Reports	...	Aus.
N. S. W. Land App. Cts.	...	New South Wales Land Appeal Courts	...	Aus.
N. S. W. S. C. R. (Eq.)	...	New South Wales Supreme Court Reports (Equity)	...	Aus.
N. S. W. S. C. R. (L.)	...	New South Wales Supreme Court Reports (Law)	...	Aus.
N. S. W. S. C. R. N. S.	...	New South Wales Supreme Court Reports, New Series	...	Aus.
N. W.	...	New South Wales Weekly Notes	...	Aus.
N. W. T. R.	...	North-Western Provinces High Court Reports	...	Ind.
N. Z. Jur.	...	North-West Territories Reports	...	Can.
N. Z. Jur. Mining Law	...	New Zealand Jurist	...	N.Z.
	...	New Zealand Jurist Mining Law	...	N.Z.

xxvi REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

N. Z. Jur. N. S..	New Zealand Jurist, New Series	N.Z.
N. Z. L. R.	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. O. A.	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels.	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B.	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C.	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B.	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C.	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837	Eng.
New Mag. Cas.	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	Eng.
New Pract. Cas.	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep.	New Reports, 6 vols., 1862—1865	Eng.
New Sess. Cas.	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R.	Newfoundland Reports	Nfld.
Nolan	Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
Notes of Cases	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
Noy	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649	Eng.
O. B. & F.	Ollivier Bell and Fitzgerald's Reports	N.Z.
O. B. S. P.	Old Bailey Session Papers	Eng.
O. Bridg.	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666	Eng.
O. F. S.	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R.	Ontario Law Reports	Can.
O'M. & H.	O'Malley and Hardcastle's Election Cases, 1869—(current)	Eng.
O. P. D.	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R.	Ontario Reports	Can.
O. R.	Official Reports of the South African Republic, 1894—1899	S. Af.
O. R. C.	Reports of the High Court of the Orange River Colony	S. Af.
O. S.	Upper Canada Queen's Bench, Old Series	Can.
O. W. N.	Ontario Weekly Notes	Can.
O. W. R.	Ontario Weekly Reporter	Can.
Old.	Nova Scotia Reports (Oldrights)	Can.
Ont. Dig.	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—	Eng.
P. (preceded by date)	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (<i>e.g.</i> , [1891] P.)	Eng.
P. & B.	New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T.	New Brunswick Law Reports (Pugsley and Trueman)	Can.
P. Ct	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
P. D.	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
P. E. I.	Prince Edward Island Reports	Can.
P. R.	Ontario Practice	Can.
P. Wms.	Peere Williams' Reports, Chancery and King's Bench, 3 vols.,	Eng.
Palm.	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	Eng.
Park.	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	Eng.
Pat. App.	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App.	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake, Add. Cas.	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	Eng.
	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham	Pelham (S. A.) Reports	Aus.
Per. & Dav.	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn.	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. C. S.	Perrault's Conseil Supérieur	Can.
Per. P.	Perrault's Prévosté de Quebec, 1726—1756	Can.
Ph.	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas.	Philipps' Election Cases, 1 vol., 1780	Eng.
Phillim.	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	Eng.
Phillim. Eccl. Jud.	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R.	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	Eng.
Pitc.	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	Scot.
Plowd.	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll.	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	Eng.
Poph.	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	Eng.
Pow. R. & D.	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Pratt	Pratt's Supplement to Bott's Poor Laws, 1833	...	Eng.
Prec. Ch.	Precedents in Chancery, fol., 1 vol., 1689—1722	...	Eng.
Price	Price's Reports, Exchequer, 13 vols., 1814—1824	...	Eng.
Price	Price's Mining Commissioners' Cases	...	Can.
Pug.	New Brunswick Reports (Pugsley)	...	Can.
Py. R.	Pykes' Lower Canada Reports	...	Can.
Q. B.	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	...	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 (<i>e.g.</i> , [1891] 1 Q. B.)	...	Eng.
Q. B. D.	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	...	Eng.
Q. J. P.	Queensland Justice of Peace Reports	...	Aus.
Q. L. J.	Queensland Law Journal and Reports, 11 vols., 1879—1901	...	Aus.
Q. L. R.	Quebec Law Reports	...	Can.
Q. L. R. (Beor)	Queensland Law Reports by Beor, 1876—1878	...	Aus.
Q. P. R.	Quebec Practice Reports	...	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	...	Can.
Q. R. (Vol.) S. C.	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	...	Can.
Q. S. C. R.	Queensland Supreme Court Reports, 5 vols., 1860—1881	...	Aus.
Q. S. R.	Queensland State Reports	...	Aus.
Q. W. N.	Weekly Notes, Queensland	...	Aus.
R.	The Reports, 15 vols., 1893—1895	...	Eng.
R. (Ct. of Sess.)	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	...	S. Af.
R. A. C.	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., Ramsay, Appeal Cases	...	Scot.
R. & C.	Nova Scotia Reports (Russell & Chesley)	...	Can.
R. & G.	Nova Scotia Reports (Russell and Geldert)	...	Can.
R. C.	La Revue Critique de Législation et de Jurisprudence de Canada	...	Can.
R. de J.	Revue de Jurisprudence	...	Can.
R. de L.	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	...	Can.
R. E. D.	New South Wales, Reserved and Equity Decisions	...	Aus.
R. E. D.	Ritchie's Equity Decisions (Russell)	...	Can.
R. J. R. Q.	Quebec Revised Reports	...	Can.
R. L. N. S.	Revue Légale, New Series, 1895—(current)	...	Can.
R. L. O. S.	Revue Légale, Old Series, 21 vols., 1869—1892	...	Can.
R. P. C.	Reports of Patent Cases, 1884—(current)	...	Eng.
R. R.	Revised Reports	...	Eng.
Rayn.	Rastell's Entries	...	Eng.
Real Prop. Cas.	Rayner's Tithe Cases, 3 vols., 1575—1782	...	Eng.
Rep. Ch.	Real Property Cases, 2 vols., 1843—1847	...	Eng.
Rep. in C. of A.	Reports in Chancery, fol., 3 vols., 1615—1710	...	Eng.
Res. & Eq. Jud.	Reports in Courts of Appeal	...	N.Z.
Reserv. Cas.	New South Wales Reserved and Equity Judgments	...	Aus.
Rick. & M.	Reserved Cases	...	Ir.
Rick. & S.	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	...	Eng.
Ridg. L. & S.	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	...	Eng.
Ridg. Parl. Rep	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	...	Ir.
Ridg. temp. H.	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	...	Ir.
Ritch. Eq. Rep.	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	...	Eng.
Rob. Eccl.	Ritchie's Equity Reports	...	Can.
Rob. L. & W.	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	...	Eng.
Robert. App.	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	...	Eng.
Robin. App.	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	...	Scot.
Roll. Abr.	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	...	Scot.
Roll. Rep.	Rolle's Abridgment of the Common Law, fol., 2 vols.	...	Eng.
Rom.	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	...	Eng.
Roscoe's B. C.	Romilly's Notes of Cases in Equity, 1 part, 1772—1787	...	Eng.
Rose	Roscoe, Digest of Building Cases	...	Eng.
Ross, L. C.	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	...	Eng.
Rowe	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	...	Eng.
Rul. Cas.	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	...	Eng.
Russ.	Campbell's Ruling Cases, 25 vols.	...	Eng.
Russ. & M.	Russell's Reports, Chancery, 5 vols., 1824—1829	...	Eng.
	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	...	Eng.

Russ. & Ry. ...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	En
Rus. E. R. ...	Russell's Election Reports ...	En
Ry. & Can. Cas. ...	Railway and Canal Cases, 7 vols., 1835—1854 ...	
Ry. & Can. Tr. Cas. ...	Railway and Canal Traffic Cases, 1855—(current) ...	
Ry. & M. ...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	En
Ryde & K. Rat. App. ...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ...	En
Ryde, Rat. App. ...	Ryde's Rating Appeals, 3 vols., 1871—1893 ...	En
	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. A.
S. A. L. J. ...	South African Law Journal ...	S. A.
S. A. L. R. ...	South Australian Law Reports ...	Au
S. A. L. R. ...	South African Law Reports ...	S. A.
S. A. R. ...	Reports of the High Court of the South African Republic, 1881—1892 ...	S. A.
S. A. S. R. ...	South Australian State Reports, since 1921 (<i>e.g.</i> , [1921] S. A. S. R.) ...	Au
S. C. ...	Reports of the Supreme Court of the Cape of Good Hope from 1880 ...	S. A.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 (<i>e.g.</i> , [1906] S. C. (H. L.))	Scot
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot
S. C. R. ...	Canada, Supreme Court Reports ...	Can
S. L. T. ...	Scots Law Times, 1893 (current) ...	Scot
	Queensland State Reports ...	Aus
	Reports of the High Court of Southern Rhodesia ...	S. Af
S. R. C. ...	Stuart's Lower Canada Reports ...	Can.
S. R. N. S. W. ...	New South Wales, State Reports ...	Aus.
S. R. Q. ...	Queensland Reports, Supreme Court ...	Aus.
S. V. A. R. ...	Stuart's Vice-Admiralty Reports ...	Can.
S. W. A. ...	South-West Africa Law Reports ...	S.-W. Af.
	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ...	Eng.
	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ...	Eng.
L. R.	Saskatchewan Law Reports ...	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840 ...	Ir.
Saund. ...	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ...	Eng.
Saund. & A. ...	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B. ...	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C. ...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M. ...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols.,	
Sav. ...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Say. ...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. Jur. ...	Scottish Jurist, 46 vols., 1829—1873 ...	Scot.
Sc. L. R. ...	Scottish Law Reporter, 1865—1924 ...	Scot.
Sc. R. R. ...	Scots Revised Reports ...	Scot.
Sch. & Lef. ...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ...	Ir.
Scott ...	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ...	Eng.
Scott, N. R. ...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm. ...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—	
Sel. Cas. Ch. ...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.) ...	Eng.
Selwyn's N. P. ...	Selwyn's Abridgement of the Law of Nisi Prius ...	Eng.
Sess. Cas. K. B. ...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem. ...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742 ...	Eng.
Sh. (Ct. of Sess.) ...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols.,	Scot.
Sh. & MacI. ...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838 ...	Scot.
Sh. Dig. ...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ...	Scot.
Sh. Just. ...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App. ...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct. ...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch. ...	Sheppard's Touchstone of Common Assurances ...	Eng.
Show. ...	Shower's Reports, King's Bench, 2 vols., 1678—1695 ...	Eng.
Show. Parl. Cas. ...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ...	Eng.
Sid. ...	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ...	Eng.

INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Sim.	..	Simons' Reports, Chancery, 17 vols., 1826—1852
Sim. & St.	..	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	Eng.
Sim. N. S.	..	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	...	...	Eng.
Skin.	...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	...	...	Eng.
Sm. & Bat.	..	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	...	...	Ir.
Sm. & G.	..	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	...	...	Eng.
Smith, K. B.	..	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	...	...	Eng.
Smith, L. C.	..	Smith's Leading Cases, 2 vols.	...	...	Eng.
Smith, Reg. Cas.	..	C. L. Smith's Registration Cases, 1895—(current)	...	...	Eng.
Smythe	...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	...	...	Ir.
Sol. Jo.	...	Solicitors' Journal, 1856—(current)	...	...	Eng.
Spence	...	Spence's Equitable Jurisdiction of the Court of Chancery	...	...	Eng.
Spinks	...	Spinks' Prize Court Cases, 2 parts, 1854—1856	...	...	Eng.
St. R. Qd. (preceded by		Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.)			Aus.
Stair Rep.		Stair's Decisions, Court of Session (Scotland), fol., 2 vols 1661—1681	...	...	Scot.
Stark.	...	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	...	...	Eng.
State Tr.		State Trials, 34 vols., 1163—1820	...	...	Eng.
State Tr. N. S.		State Trials, New Series, 8 vols., 1820—1858	...	...	Eng.
Stewart	...	Stewart's Nova Scotia Admiralty Reports, 1803—1813			Can.
Stockton	...	Stockton's Vice-Admiralty Report and Digest	...	...	Can.
Story	...	Story's Commentaries on Equity Jurisprudence	...	...	Eng.
Stu. M. & P.	...	Strange's Reports, 2 vols., 1716—1747	...	...	Eng.
Stuart	...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—			Scot.
Stuart, Adm.	...	Sessions Cases (Stuart)	...	...	Scot.
Stuart, Adm. N. S.	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856	...	...	Can.
Stuart, K. B.	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	...	...	Can.
Sw.	...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	...	...	Can.
Sw. & Tr.	...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655	...	...	Eng.
Swan.	...	Swabey's Report, Admiralty, 1 vol., 1855—1859	...	...	Eng.
Swin.	...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols.,			Eng.
Syme	...	Swanston's Reports, Chancery, 3 vols., 1818—1821	...	...	Eng.
T. &		Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841	...	...	Scot.
T. H.		Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829	...	...	Scot.
T. Jo.	...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851			Eng.
T. L.	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	...	...	S. Af.
T. L. R.	...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	...	...	Eng.
T. P.	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	...	...	S. Af.
T. P. D.	...	The Times Law Reports, 1884—(current)	...	...	Eng.
T. Raym.	...	Reports of the Supreme Court of the Transvaal, 1910—(current)	...	...	S. Af.
T. S.	...	South African Law Reports, Transvaal Provincial Division	...	...	S. Af.
Taml.	...	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	...	...	Eng.
Tas. L. R.	...	Reports of the Supreme Court of the Transvaal, 1902—1909	...	...	S. Af.
Taunt.	...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	...	...	Eng.
Tax Cas.	...	Tasmanian Law Reports	...	...	Aus.
Tay.	...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819	...	...	Eng.
Temp. Wood	...	Tax Cases, 1875—(current)	...	...	Eng.
Term Rep.	...	Taylor's King's Bench Reports	...	...	Can.
Terr. L. R.	...	Manitoba Reports <i>temp.</i> Wood	...	...	Can.
Thom.	...	Term Reports (Durnford and East), fol., 8 vols., 1785—1800	...	...	Eng.
Toth.	...	Territories Law Reports	...	...	Can.
Town St. Tr.	...	Nova Scotia Reports (Thomson)	...	...	Can.
Trem. P. C.	...	Tothill's Transactions in Chancery, 1 vol., 1559—1646	...	...	Eng.
Trist.	...	Townsend, Modern State Trials	...	...	Eng.
Tru.	...	Tremaine Pleas of the Crown, 1 vol., 1667	...	...	Eng.
Tudor, L. C. Merc. Law.	...	Tristram's Consistory Judgments, 1 vol., 1872—1890	...	...	Eng.
Tudor, L. C. Real Prop.	...	New Brunswick Reports (Trueman)	...	...	Can.
Turn. & R.	...	Tudor's Leading Cases on Mercantile and Maritime Law	...	...	Eng.
Tyr.	...	Tudor's Leading Cases on Real Property	...	...	Eng.
Tyr. & Gr.	...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825	...	...	Eng.
U. C. Jur.	...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	...	...	Eng.
U. C. L. J. N. S.	...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	...	...	Eng.
		Upper Canada Jurist	...	...	Can.
		Canada Law Journal, New Series, 1865—(current)	...	...	Can.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, see pp. xv.—xxxi., *ante.*)

A.-G.	for Attorney-General.
Act.	„ Actiengesellschaft.
Admlty.	„ Admiralty.
Affd.	„ Affirmed.
Affg.	„ Affirming.
Akt.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	„ Anonymous.
Apld.	„ Applied.
Appct.	„ Applicant.
Appln.	„ Application.
Appln.	„ Application to Register a Trade Mark.
App't.	„ Appellant.
Apprvd	„ Approved.
Arbn. .	„ Arbitration.
Archbp.	„ Archbishop.
Art. .	„ Article.
Ass. Tax	„ Assessed Tax Case.
Assce. .	„ Assurance.
Assocn.	„ Association.
B. C. .	„ Borough Council.
Bkpcy. .	„ Bankruptcy.
Bkpt. .	„ Bankrupt.
Bldg. Soc.	„ Building Society.
Bp. .	„ Bishop.
C. A.	„ Court of Appeal.
C. & S. L. Ry. Co.	„ City & South London Railway Co.
C. C. A.	„ Court of Criminal Appeal.
C. C. R.	„ County Court Rules.
C. C. R.	„ Court of Crown Cases Reserved.
C. L. P. Act.	„ Common Law Procedure Act.
C. L. Ry. Co.	„ Central London Railway Co.
C. O. R.	„ Crown Office Rules.
C. S. U. C.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	„ <i>Capias ad satisfaciendum.</i>
Cale. Ry. Co.	„ Caledonian Railway Co.
Ch.	„ Chancery.
Ch. Div.	„ Chancery Division.
Co.	„ Company.
Co-op. Assocn.	„ Co-operative Supply Association.
Comrs.	„ Commissioners.
Consd.	„ Considered.
Corpn.	„ Corporation.
Ct.	„ Court.
Ct. of Ch.	„ Court of Chancery.
Ct. of Eq.	„ Court of Equity.
Ct. of R.	„ Court of Review.
D. C.	„ Divisional Court.
Dbtd.	„ Doubted.
Deft.	„ Defendant.

Distd. .	.	for Distinguished.
Div. Ct. .	.	„ Divisional Court.
Eccl. Comrs.		„ Ecclesiastical Commissioners.
Eccl. Ct.		„ Ecclesiastical Court.
Ex. Ch.		„ Exchequer Chamber.
<i>Ex p.</i> .		„ <i>Ex parte</i> .
Exch. .		„ Exchequer.
Exor. .		„ Executor.
Exorship.		„ Executorship.
Expld. .		„ Explained.
Extd. .		„ Extended.
Extrix. .		„ Executrix.
<i>Fi. fa.</i> .		„ <i>Fieri facias</i> .
Folld. .		„ Followed.
G. & S. W. Ry. Co. . . .		„ Glasgow & South Western Railway Co.
G. C. Ry. Co.		„ Great Central Railway Co.
G. E. Ry. Co.		„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co. .		„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.		„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.		„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland		„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.		„ Great Western Railway Co.
Govt.		Government.
Grdns.		Guardians or Guardians of the Poor.
H. C. of A.		„ High Court of Australia.
H. L. .		„ House of Lords.
I. R. Comrs.		„ Inland Revenue Commissioners.
Insce. .		„ Insurance.
JJ. .		„ Justices.
Jud. Act		„ Judicature Act.
K. B. Div.		„ King's Bench Division.
L. & B. Ry. Co. .		London & Brighton Railway Co.
L. & N. E. Ry. Co.		London & North Eastern Railway Co.
L. & N. W. Ry. Co.		London & North Western Railway Co.
L. & S. W. Ry. Co.		London & South Western Railway Co.
L. & Y. Ry. Co. .		Lancashire & Yorkshire Railway Co.
L. B. .		Local Board.
L. B. & S. C. Ry. Co.		London, Brighton & South Coast Railway Co.
L. C. .		Lord Chancellor.
L. C. & D. Ry. Co. .		London, Chatham & Dover Railway Co.
L. C. C. .		London County Council.
L. Elec. Ry. Co.		London Electric Railway Co.
L. G. Board .		Local Government Board.
L.J. .		„ Lord Justice.
L.JJ. .		„ Lords Justices.
L. M. & S. Ry. Co.		„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co. .		„ London, Tilbury & Southend Railway Co.
M. S. Act		„ Merchant Shipping Act.
M. S. & L. Ry. Co.		„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.		Magistrates.
Mentd.		Mentioned.
Met. Dist. Ry. Co. .		Metropolitan District Railway Co.
Met. Ry. Co. . . .		Metropolitan Railway Co.
Mid. G. W. Ry. Co.		„ Midland Great Western Railway Co.
Mid. Ry. Co. . . .		„ Midland Railway Co.
Mtge.		„ Mortgage.
Mtgee.		„ Mortgagee.
Mtgor.		„ Mortgagor.
N. B. Ry. Co. . . .		„ North British Railway Co.
N. E. Ry. Co. . . .		„ North Eastern Railway Co.
N. F.		„ Not Followed.
N. P.		„ Nisi Prius.
Ord.		„ Order.
Overd.		„ Overruled.

ABBREVIATIONS.

XXXV

P. .	for Privy Council.
Pe .	„ Petition or Election Petition.
Pltf. .	„ Plaintiff.
Q. B. Div.	„ Queen's Bench Division.
Qu. .	„ <i>Quære</i> .
R. C. .	Rural Council.
R. D. C.	Rural District Council.
R. S. A.	Rural Sanitary Authority.
R. S. C.	Revised Statutes of Canada.
R. S. C.	Rules of the Supreme Court, 1883.
Refd. .	Referred.
Regn. of Trade Mk.	Registration of Trade Mark.
Regr. of Trade Mks.	„ Registrar of Trade Marks.
Resp. .	„ Respondent.
Restg. .	„ Restoring.
Revsd. .	„ Reversed.
Revsg. .	„ Reversing.
Ry. Co.	Rail. Co. or Railway Co.
S. C.	„ Same Case.
S. C. (name of colony following)	„ Supreme Court of a Colony.
S. E.	„ Settled Estates.
S. E. & C. Ry. Co.	„ South Eastern & Chatham Railway Co
S. E. Ry. Co.	„ South Eastern Railway Co.
S. P.	„ Same Point.
S.S.	„ Steamship.
Sched.	„ Schedule.
<i>Sci. fa.</i>	„ <i>Scire facias</i> .
Sect.	„ Section.
Set. Land Act	„ Settled Land Act.
Settlmt. .	„ Settlement.
Soc. .	„ Society.
Soc. Anon.	„ Société Anonyme, etc.
Solr. .	„ Solicitor.
Trade Mk.	„ Trade Mark.
Tram. Co.	„ Tramways Company.
U. C.	„ Urban Council.
U. D. C.	„ Urban District Council.
U. S. A.	„ United States of America.
Union Assmt. Com.	„ Union Assessment Committee.
Urban S. A.	„ Urban Sanitary Authority.
V.-C.	„ Vice-Chancellor.
Workmen's Comp. Act	.. Workmen's Compensation Act.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

TABLE OF CASES.

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<i>Corporation Profits Tax</i> See REVENUE. <i>Crown, Revenue of</i> „ CONSTITUTIONAL LAW. <i>Excess Profits Duty</i> „ REVENUE.	<i>Practice on the Revenue</i> <i>Side of the King's</i> <i>Bench Division</i> . See CROWN PRACTICE. <i>Revenue Authorities</i> „ REVENUE.	
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INCOME TAX.

NOTE.—The Act now in force in England is *Income Tax Act, 1918* (c. 40), as amended by the annual Finance Acts. These Acts are given the collective short title "*the Income Tax Acts*" (*Finance Act, 1919* (c. 32), s. 28), & are referred to in this Title by their respective years. References to Schedules A–E are to the Schedules of the 1918 Act, as amended by subsequent Acts.

Part I.—Administration.

SECT. 1.—OFFICIALS AND THEIR DUTIES.

SUB-SECT. 1.—GENERAL, ADDITIONAL, EX-OFFICIO AND SPECIAL COMMISSIONERS.

See 1918 Act, ss. 57–74.

1. **Commissioners—Jurisdiction to decide questions of fact — English company carrying on business partly abroad.**—An English co., incorporated under the cos. Acts, had its registered office in the district of Clerkenwell, & there carried on a business, in respect of the profits of which they were chargeable to income tax under Schedule D. by the comrs. for that district. For the purpose of the assessment of the co. in respect of their profits, the comrs. drew the inference of fact that, having regard to the relations existing between the co. & an American co. trading at Rochester in the United States, the bulk of the shares in which was held by the English co., the business & profits of the American co. were technically the business & profits of the English co., that the head, seat, & directing power of the co. were at the registered office in London, & that, if the profits of the business carried on at Rochester were technically the profits of the American co., that co. was for all purposes the agent of the English co. The English co. applied for a writ of prohibition to the comrs. to prohibit them from assessing that co. in respect of the profits of the American co., on the ground that the business of the American co. was not in truth the business of the English co., & that the comrs. therefore had not, & could not by an erroneous decision on the facts give themselves, jurisdiction to assess the English co. in respect of the profits of that business:—*Held*: the comrs. having jurisdiction under *Income Tax Act, 1842* (c. 35), s. 106, to assess the English co. to income tax in respect of profits of a business, carried on either wholly or in part only in Great Britain, they had for the purposes of that assessment jurisdiction to decide all questions of fact necessary for ascertaining the amount of those profits, & therefore prohibition would not lie, the proper remedy, if the decision of the comrs. were wrong in point of law, being by appeal upon a case stated.—*R. v. CLERKENWELL GENERAL COMRS. OF TAXES*, [1901] 2 K. B. 879; 85 L. T. 503; 65 J. P. 724; 17 T. L. R. 744; *sub nom. R. v. INCOME TAX COMRS.*, 70 L. J. K. B. 1010, C. A.

Annotations:—*Consd. R. v. Kensington Income Tax Comrs.*, [1914] 3 K. B. 429; *R. v. Bloomsbury Income Tax Comrs.*, [1915] 3 K. B. 768; *R. v. Swansea Income Tax Comrs., Ex p. English Crown Spelter Co.*, [1925] 2 K. B. 250. *Mentd. R. v. Electricity Comrs., Ex p. London Electricity Joint-Committee Co. (1920), Ltd.*, [1924] 1 K. B. 171.

SUB-SECT. 2.—CLERKS, ASSESSORS, COLLECTORS, INSPECTORS AND SURVEYORS.

See 1918 Act, ss. 76–89.

2. Collector—Liability of surety—No return of

defaulters.]—If, in an action on a bond given by the sureties of a collector of taxes, there be breaches assigned, that the collector did not pay over money received, & that he did not duly demand & enforce payment of the taxes, it is not necessary, on the part of pltf., to prove exactly what money he received; for if it be proved that he was to collect a certain sum, & that he paid over a smaller sum, & did not take proper steps to exonerate himself from the residue, pltf. will be entitled to recover.

No return is made of any list of defaulters, which should have been done to discharge the collector; & by not returning such a list, persons are enabled to run away, who would otherwise have been obliged to pay their taxes; & therefore the collector is liable for those taxes (*LORD TENTERDEN, C.J.*).—*LOVELAND v. KNIGHT* (1828), 3 C. & P. 106, N. P.; *subsequent proceedings*, 1 Man. & Ry. K. B. 597.

3. **Invalid appointment.**—Sureties in a bond given by a collector of property & income tax, under *Income Tax Act, 1842* (c. 35), conditioned for the due collection & payment of the sums assessed under the Act, are not liable in respect of moneys collected by him without legal authority, i.e. before he is furnished with the duplicate assessment & warrant to collect, as mentioned in sect. 172 of the Act.

The condition recited that A. "had been duly nominated & appointed a collector for the year ending," etc.; & that duplicates of the assessments had been delivered & given in charge to him, with a warrant or warrants for collecting the same. In an action against the sureties, for A.'s default:—*Held*: they were not estopped by these recitals from showing that there had been no complete appointment of A. as collector, & the duplicate assessments & warrant to collect had not been delivered to him.—*KEPP v. WIGGETT* (1850), 10 C. B. 35; 20 L. J. C. P. 49; 16 L. T. O. S. 172; 14 Jur. 1137; 138 E. R. 15.

Annotation:—*Mentd. Durham Corpn. v. Fowler* (1889), 22 Q. B. D. 394.

4. **Increase of risk—Tax increased since bond given.**—The condition of a bond, after reciting that "A. had been appointed a collector of the property, income & assessed taxes, which had been or thereafter should be charged or assessed within the parish of D., under & by virtue of the several Acts relating to the said duties," provided, in the usual terms, that the bond should be void if A. should properly discharge the duties of his office. By a subsequent Act the income tax was raised 2d. in the pound:—*Held*: this alteration in the law increased the risk of the sureties & avoided the bond.—*BADGER v. FINCH* (1857), 29 L. T. O. S. 88.

See, generally, *GUARANTEE*, Vol. XXVI., pp. 62 *et seq.*

PART I. SECT. 1, SUB-SECT. 2.

a. **Assessors — Land valuation — Appointment of surveyor of taxes.**—Where the surveyor of taxes is not appointed assessor under *Lands Valua-*

tion (Scotland) Acts the valuation is not binding with respect to income (1877), 1 Tax Cas, 148.—*SCOT.*

b. **Appointment for district—**

When invalid.—It is incompetent for general comrs. of income tax for a district to appoint an assessor of income tax for the whole district when it includes a burgh for which an

PART I.—ADMINISTRATION.

5. **Appointment for several parishes.]** Under 43 Geo. 3, c. 99, assessors & collectors of assessed taxes may be appointed for districts consisting of several parishes; & it is not incumbent upon the comrs. to appoint separate assessors or collectors for each parish.—CLARK v. LEDGER (1850), 16 L. T. O. S. 124; 14 J. P. Jo. 686.

See 1918 Act, s. 80 (1).

6. — **Security — Increase during term of office.]**—Taxes Management Act, 1880 (c. 19), s. 74, which provides that the Board of Inland Revenue may call for security from a collector of taxes whenever it thinks fit, entitles the Board at any time during a collector's term of office to demand increased security if the Board thinks it desirable to do so.—MAXWELL v. NATHAN (1915), 31 T. L. R. 288.

See 1918 Act, s. 81.

7. **Assessors — Appointed for several parishes.]**—CLARK v. LEDGER, No. 5, *ante*.
See 1918 Act, ss. 76, 77.

8. **Surveyor — Undertaking to surrender appointment on termination of service—Dismissal—Enforcement of undertaking.]**—If a surveyor of taxes, who on his appointment undertakes that on the termination of his service he will on request surrender the document by which he was formally appointed, is justifiably dismissed, the undertaking can be enforced by an order of the ct.—FISHER v. STEWARD (1920), 36 T. L. R. 395.

Exemption from serving certain offices—Collectors & commissioners.]—See 1918 Act, ss. 231, 232.

9. — **Persons employed by the Inland Revenue in the collection tax—What constitutes employment.]**—A member of a firm of foreign bankers, which carries on business in London & is employed by the Inland Revenue Comrs. in the collection of income tax on foreign dividends & is paid by poundage, is not employed by the Inland Revenue Comrs. within Juries Act, 1870 (c. 77), s. 9, & the Schedule to that Act, & is not

officer of income tax has already been appointed assessor under Valuation Acts.—LORD ADVOCATE v. CUNINGHAM DIVISION OF Ayrshire Income Tax General Comrs. (1895), 22 R. (Ct. of Sess.) 986; 32 Sc. L. R. 709; 3 S. L. T. 72.—SCOT.

PART I. SECT. 2, SUB-SECT. 1.

a. **Assessment of underwriters—List to be prepared for assessor.]**—A firm of underwriters are bound to deliver to the assessor of income tax a list of the persons for whom they conduct the business of underwriting with the names & addresses of such persons, & to include in such list the amount of profit effecting to each person.—LORD ADVOCATE v. GIBB (1906), 8 F. (Ct. of Sess.) 887.—SCOT.

d. **Validity of regulations requiring returns.]**—HOUSE v. PETERSEN (1899), 25 V. L. R. 240.—AUS.

e. **Compulsory return of income—Assessment by commissioners in default of return.]**—By the combined effect of Land & Income Tax Assessment & of Income Tax Acts, 1895, a tax is imposed on all incomes exceeding £200, *incomes* below that amount not being to income tax. The comrs.

were to give notice requiring all persons liable to taxation to "furnish returns for the purpose of assessment of Land & Income Tax." By a regulation having the force of law "every person in receipt of income within the meaning of the said Acts" is required to make a return. If any person makes default in furnishing such return the comrs. may make an assessment "of the amount on which, in their judgment, tax ought to be charged":—*Held*: a return must be made of income whether or not it exceeded £200, & in the absence of such return the comrs. were entitled to make a default assessment.—TAXATION COMRS. v. MOONEY, [1907] A. C. 342; 76 L. J. P. C. 64.—AUS.

PART I. SECT. 2, SUB-SECT. 2.

1. **Where demand not received by person to whom addressed.]**—Proof of mailing under Income War Tax Act, 1917, s. 8 (1), of a registered letter requiring a return to be made, is only *prima facie* evidence of receipt of the letter, & even if it appears the letter was delivered by the postmaster to the one who on other occasions had received mail to the person addressed, it is open to the person addressed to show

on that ground exempt from jury service.—*Ex p.* VAN DRUTEN (1913), 30 T. L. R. 198.

SECT. 2.—PROCEEDINGS BEFORE ASSESSMENT.

SUB-SECT. 1.—IN GENERAL.

See 1918 Act, ss. 98–131.

SUB-SECT. 2.—NOTICE TO PERSON TO BE CHARGED.

10. **Necessity for notice — Additional assessment.]**—Pltf. was the manager of a limited co. the registered office of which was in the city of London. The co. did no business & pltf. only attended at the co.'s office on rare occasions. The Comrs. of Income Tax for the city of London made an additional assessment under Schedule E. of the Income Tax Acts upon pltf. in respect of the salary paid to him as manager of the co. Notice of the assessment & a written demand for payment were left at the co.'s office, but were not received by, & did not come to the knowledge of, pltf. Pltf. not having paid the tax, a distress was levied in respect thereof at his dwelling-house:—*Held*: under Income Tax Act, 1842 (c. 35), & Taxes Management Act, 1880 (c. 19), notice of an additional assessment & a demand for payment must be given to the person sought to be charged; the co.'s office was not pltf.'s "usual or last known place of abode" within sect. 16 (e) of the latter Act, & therefore, no valid assessment had been made upon pltf. & the distress was wrongful.—BERRY v. FARROW, [1914] 1 K. B. 632; 83 L. J. K. B. 487; 110 L. T. 104; 30 T. L. R. 129.

Annotation:—*Refd.* G. W. Ry. v. BATER, [1922] 2 A. C. 1.

11. **Where service must be made — Place of abode—Service at company's office—Official of company.]**—BERRY v. FARROW, No. 10, *ante*.

See 1918 Act, s. 220.

that he did not receive it, & on this being shown he should not be convicted for non-compliance therewith.—ROBINS v. FORBES, [1921] 1 W. W. R. 438; 56 D. L. R. 496; 14 Sask. L. R. 142; 34 Can. Crim. Cas. 135.—CAN.

g. — **]**—A notice was sent by registered mail to the proper office address of a person requiring him to make a return. He never received the notice, which was delivered to one who occupied his office in his absence & received his mail, although not authorised in writing to receive registered mail:—*Held*: liable for disregard of the notice; where the registered letter is posted & should not be unexpected by the addressee the act of registering & mailing is sufficient; being in default, the addressee should have expected the notice & provided for its being received & dealt with; postal regulations directing that the postman shall not deliver a registered parcel to a person other than the addressee unless the person receiving it is authorised by the addressee in writing are regulative only, & cannot be invoked by the addressee in such case.—R. v. MEEHAN, [1924] 2 W. W. R. 1231; [1924] 3 W. W. R. 305.—CAN.

Part II.—Schedule A.

SECT. 1.—APPLICATION OF SCHEDULE.

See 1918 Act, sched. A.

As to property in London, see Valuation (Metropolis) Act, 1869 (c. 67).

12. Mines—Effect of Revenue Act, 1866 (c. 36), s. 8.]—A colliery co. bought freehold & leasehold coal mines, & raised some of the coal & sold it. At the end of the first years' working the mines, by reason of the coal gotten during the year, were worth £10,424 less than the price for which they were bought. The co., being assessed to the income tax under Schedule D. in respect of the profits of their business as colliery proprietors for that year, claimed to deduct £10,424 for exhausted capital:—*Held*: (1) by virtue of above sect. the mines were assessable under Schedule D. of Income Tax Act, 1842 (c. 35), s. 100, & not under Schedule A.; (2) in estimating "the full amount of the balance of the profits or gains" of the business under Schedule D., Case I., r. 1, the deduction ought to be made, & it was not one of the deductions forbidden by Schedule D, Case I., r. 3, or by Income Tax Act, 1842 (c. 35), s. 159.—*KNOWLES v. MCADAM* (1877), 3 Ex. D. 23; 47 L. J. Q. B. 139; 37 L. T. 795; 26 W. R. 114; 1 Tax Cas. 161.

Annotations:—As to (1) *Overd.* Coltness Iron Co. v. Black (1881), 6 App. Cas. 315. *Refd.* Allanza Co. v. Bell, [1905] 1 K. B. 184. As to (2) *Distd.* Watney v. Musgrave (1880), 5 Ex. D. 241. *Consd.* Allanza Co. v. Bell, [1905] 1 K. B. 184. *Refd.* Broughton Coal Co. v. Kirkpatrick (1884), 14 Q. B. D. 491.

A tenant of minerals, though he may be under a constant vanishing expense in sinking new pits as the old ones become exhausted, is not entitled, in computing the profits for assessment of income tax, to deduct from the gross profits a sum estimated as representing the amount of capital expended in making bores & sinking pits, which have been exhausted by the year's working.

Can a mine owner write off & deduct from the gross earnings of his mine in a particular year, a sum to represent that year's depreciation of all the pits in the mines whenever sunk? I am clearly of opinion that this cannot be done. It may be proper for a trader, or for a trading co., to perform in his or their books an operation of this kind every year, in order to judge of the sum that can in that year be safely taken out of the trade & spent as trade profits. But I am clearly of opinion that the owner of a mine cannot *quid* owner thus manipulate his accounts when the question is, under sect. 60 of the principle Act [Income Tax Act, 1842 (c. 35)] what is the "amount of profits received" from the mine in each of the five years upon which the average is to be taken? (LORD CAIRNS).

A pit sunk to approach the mineral underground is not unlike a road made above ground, from the pit's mouth to the highway, as means of transporting the mineral to the market. If a man were possessed of such a mine & such a road, it would be true that as the mineral was gradually worked out, the road & the capital sunk in making

it, equally with the pit, & the capital involved in making it, would gradually be exhausted & lost; but the decaying character of the property would not make it the less subject to be taxed, according to its annual value or the profit obtained by using it, as long as the mineral lasted (LORD PENZANCE).

(2) I am not prepared to say that, under the words Income Tax Act, 1842 (c. 35), a mine-owner might not in some cases be entitled to an allowance in respect to the cost of sinking a pit, by means of which pit the minerals are gotten which are the source of profit for the year in which the pit was sunk (LORD CAIRNS).

I do not wish to lay down any general proposition, either that money expended in sinking pits can never be in the nature of expenses incurred within the five years in working the coal so as to be properly taken into account in estimating the profits made in that period, or to say what, if any, the circumstances are under which it may be done (LORD BLACKBURN).

(3) The effect of Revenue Act, 1866 (c. 36), s. 8, is not to transfer mines for the purposes of income tax from Schedule A. of Income Tax Act, 1842 (c. 35), s. 100, to Schedule D. but only to cause the duties to be assessed according to the provisions laid down as to secrecy, etc., in Schedule D. so far as not inconsistent with the rules of Schedule A.—*COLTNESS IRON CO. v. BLACK* (1881), 6 App. Cas. 315; 51 L. J. Q. B. 626; 45 L. T. 145; 46 J. P. 20; 29 W. R. 717; 1 Tax Cas. 287, H. L.

Annotations:—As to (1) *Folld.* Broughton Coal Co. v. Kirkpatrick (1884), 14 Q. B. D. 491. *Consd.* Edinburgh Southern Cemetery Co. v. Kinmont (1889), 2 Tax Cas. 516; *Allanza Co. v. Bell*, [1905] 1 K. B. 184. *Appld.* Kauri Timber Co. v. Taxes Comr., [1913] A. C. 771. *Refd.* Gillatt & Watts v. Colquhoun (1884), 33 W. R. 258; Burnley S.S. Co. v. Aiken (1894), 3 Tax Cas. 275; London Cemetery Co. v. Barnes, [1917] 2 K. B. 496. As to (2) *Consd.* Morant v. Wheal Grenville Mining Co. (1894), 71 L. T. 758; Bonner v. Basset Mines (1913), 108 L. T. 764. As to (3) *Consd.* Wakefield R. C. v. Hall, [1912] 2 K. B. 265. *Generally, Refd.* Mersey Docks & Harbour Board v. Lucas (1881), 46 J. P. 388; Colquhoun v. Brooks (1889), 14 App. Cas. 493; Reid's Brewery Co. v. Male (1891), 64 L. T. 294; Gresham Life Assce. Soc. v. Styles, [1892] A. C. 309. *Mentd.* Lambert v. Neuchatel Asphalt Co. (1882), 51 L. J. Ch. 882; Grainger v. Gough, [1896] A. C. 325.

14. Building society mortgage.]—A benefit building society lent money to borrowing members at a fixed rate of interest, & took from them a security on their property. The repayment of the loans was by weekly payments of a fixed sum, in respect of principal & interest, the proportion of interest to principal in each payment decreasing as time went on, & the principal remaining due decreased. No deduction was allowed to be made by the borrower in respect of income tax. The society were assessed to income tax under Schedule D. on the interest they received, as being interest of money within Income Tax Act, 1853 (c. 34), s. 2. On a case stated:—*Held*: the expression "interest of money" in the sect. is not restricted to annual interest, & the interest received by the society was not in respect of a loan on land, but of a contract relating to interest

PART II. SECT. 1.

—Applt. was the public officer of owners of land upon which they carried on coal mining operations, & their income during 1906 & 1907 was derived from the working of their coal mines & from the sale of the coal:

applt.'s income was derived from the ownership or use of land.—*ADAMS v. TAXATION COMRS., TAXATION COMRS. v. ADAMS* (1909), 10 C. L. R. 1.—AUS.

for removal of colliery
—Payments for dross removed

—Whether assessable as "annual value."—A landed proprietor, on whose estate blings of colliery dross had lain for many years, entered into agreements for their removal. The contractor undertook to make monthly payments at a tonnage rate as the weight of the material was ascertained on

PART II.—SCHEDULE A.

of money lent, & was therefore assessable in their hands to the income tax.

In my view we have nothing to do with Schedule A., for this is not a case of money lent in respect of land, but of money lent to those who wish to borrow it (LORD ESHER, M.R.).—LEEDS BENEFIT BUILDING SOCIETY v. MALLANDAINE, [1897] 2 Q. B. 402; 66 L. J. Q. B. 813; 77 L. T. 122; 61 J. P. 675; 13 T. L. R. 535; 3 Tax Cas. 577, C. A.

Annotations:—*Reid*. Lord Advocate v. Edinburgh Corpn. (1903), 4 Tax Cas. 627; East Indian Ry. v. Secretary of State in Council of India (1905), 92 L. T. 495; Schulze v. Bensted (1915), 7 Tax Cas. 30; Sweet v. Macdiarmid (or Henderson) (1920), 7 Tax Cas. 640. *Mentd.* I. R. Comrs. v. Hay (1924), 8 Tax Cas. 636.

15. Property yielding no profits—Capable of occupation—Public sewer—Contributions by other authorities.]—(1) A sewer was made, controlled by, & vested in a local authority in pursuance of statutory powers. It was rated to the poor rate. The local authority made no profit or gain out of it. The cost of making & maintaining it was paid for by a public loan repayable by annual instalments. The moneys for the repayment were found partly by contributions levied from neighbouring district councils whose sewage went through the sewer & partly from rates; & this was the only income. Upon an assessment to income tax as to a portion of the sewer:—*Held*: the local authority was chargeable to income tax in respect of the annual value of that portion of the sewer as a hereditament capable of actual occupation under Income Tax Act, 1842 (c. 35), s. 60, Sched. A., No. I.

(2) Schedule A., No. III., applies to the properties therein specified when such properties are used as trading concerns for the purpose of earning profits, but when such properties are not used as trading concerns they are assessable under No. I. & not under No. III.

(3) The word “drains” in No. III. is not applicable to a public sewer but must be construed on the *ejusdem generis* principle by the context in which it occurs.—YSTRADYFODWG & PONTYPRIDD MAIN SEWERAGE BOARD v. BENSTED, [1907] A. C. 264; 76 L. J. K. B. 876; 97 L. T. 141; 71 J. P. 425; 23 T. L. R. 621; 51 Sol. Jo. 588; 5 L. G. R. 865; 5 Tax Cas. 230, H. L.

Annotations:—*As to* (1) *Reid*. Hill v. Gregory, [1912] 2 K. B. 61. *As to* (2) *Consd.* Shaw v. Lichfield Conduit Lands Trustees (1920), 7 Tax Cas. 597. *Reid*. Harris v. Edinburgh Corpn. (1907), 5 Tax Cas. 271.

16. ——— Waterworks belonging to trustees of charity—Bulk of expenses met by endowment fund.]—The trustees of a charity owned a reservoir & certain land connected therewith, which, under a deed of trust of 1563, was used to provide a water supply to the inhabitants of the city of L. The water supply was confined to the limits of the city, no charge being made by the trustees for water

supplied for public purposes & a nominal charge only for water supplied for domestic & trade purposes. Three-quarters of the expenses of the undertaking were met out of the endowment income of the trust & one-quarter only was obtained from the persons to whom water was supplied:—*Held*: the waterworks were not a concern chargeable under Schedule A., No. III., but were a hereditament chargeable under Schedule A., No. I.—SHAW v. LICHFIELD CONDUIT LANDS TRUSTEES (1920), 7 Tax Cas. 597.

SECT. 2.—METHOD OF ASSESSMENT.

SUB-SECT. 1.—IN GENERAL.

17. Applicability of rules of Schedule D—Effect of Revenue Act, 1866 (c. 36), s. 8.]—KNOWLES v. MCADAM, No. 12, *ante*.

18. ———.]—COLTNESS IRON CO. v. BLACK, No. 13, *ante*.

19. ——— Separate concerns carried on by one person.]—WAKEFIELD RURAL COUNCIL HALL, No. 279, *post*.

20. “Rent”—Purchase price of term of years in mine—Payable by variable instalments—Fixed annual minimum.]—TAYLOR v. EVANS, No. 335, *post*.

21. Incorporation of partnership—Accounts for last five years—Liability of company.]—RYHOPE COAL CO. v. FOYER, No. 208, *post*.

22. Not controlled by poor rate assessment.]—Premises having been assessed to income tax, Schedule A., on annual value in excess of the gross annual value in the poor rate, it was contended that the comrs. were bound to observe the latter value as the maximum annual value:—*Held*: they were not so bound.—WALKER v. BRISLEY (1900), 4 Tax Cas. 254, D. C.

23. ———.]—GUNDRY v. DUNHAM, No. 586, *post*.

24. Property capable of actual occupation—Whether included under No. I. or No. III.]—YSTRADYFODWG & PONTYPRIDD MAIN SEWERAGE BOARD v. BENSTED, No. 15, *ante*.

25. Annual value for preceding year—As value for current year—Whether conclusive.]—(1) The lessee of a theatre under an agreement which provided that the lessor should insure the premises claimed to deduct the amount of the fire insurance premium so paid by the lessor in arriving at the annual value for assessment made upon him under Schedule A. of the Income Tax Acts & for inhabited-house duty for the year ending Apr. 1905. The annual value of the premises adopted for Schedule A. & inhabited-house duty during the year ending Apr. 1904, was £1,500:—*Held*: the

removal. The proprietor did not carry on a business of selling colliery dross:—*Held*: the payments were not assessable to income tax as the annual value of land under Schedule A. Rule 1, in respect that the agreement was not a lease.—ROBERTS (INSPECTOR OF TAXES) v. BELHAVEN & STENTON'S (LORD) EXECUTORS, [1925] S. C. 635.—SCOT.

PART II. SECT. 2, SUB-SECT. 1.

1. Rent reserved by lease—Inclusive rent for realty & personally—Apportionment.]—Where a lease is granted of heritable & movable subjects at an inclusive rent for the whole, the assessments must be limited to so much of the rent as is payable according to a fair valuation for the assessable subjects.—CAMPBELL

v. INLAND REVENUE (1879), 1 Tax Cas. 234.—SCOT.

m. ——— *Not conclusive of annual value.]*—A mother granted to her son a lease of a public-house at a rent of £19 10s., such lease, dated May 2, 1898, being in continuation of one dated July, 1889. The comrs. for general purposes considered that they were not bound to accept either lease in the circumstances as conclusive evidence of the annual value of the premises, & fixed such value at £40. The Ct. affirmed the determination of the comrs.—STOCKS v. SULLEY (1899), 4 Tax Cas. 98.—SCOT.

24 i. Property capable of actual occupation—Whether included under No. I. or No. III.]—The premises are assessable on their annual value under 5 & 6 Vict. c. 35, Sched. A., No. I., &

the case does not fall within sect. 60, Sched. A., No. III., as modified by 29 & 30 Vict. c. 36, s. 8.—HARRIS (SURVEYOR OF TAXES) v. EDINBURGH CORPN. (1907), 5 Tax Cas. 271.—SCOT.

25 i. Annual value for preceding year—As value for current year—Whether conclusive.]—By New South Wales Land & Income Tax Assessment Act, 1895, s. 27 (1), the amount of taxable income for the year preceding the year of assessment should be taken as the basis of calculating the income tax payable, & by sub-sect. 6 that in all other cases, i.e. not specified in preceding sub-sects. the taxable amount should be the total amount of income from all sources less authorised deductions:—*Held*: sub-sect. 6 applied to resp.'s case, whose income

Sect. 2.—Method of assessment: Sub-sects. 1, 2, 3, 4, 5, 6. Sect. 3.]

words "shall be taken" of Finance Act, 1904 (c. 7), s. 7 (3), were conclusive, & precluded any appeal as to the annual value of the premises in the next subsequent year.

(2) *Semble*: the amount of the fire insurance premiums covenanted to be paid by the lessor ought not to be deducted from the annual rent paid by the lessee in arriving at the annual value of the premises for assessment under Schedule A. of the Income Tax Acts & for inhabited-house duty.—*TURNER v. CARLTON*, [1909] 1 K. B. 932; 78 L. J. K. B. 378; 100 L. T. 400; 5 Tax Cas. 395.

See, now, 1923 Act, s. 26 (1).

26. Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 2 (1) (d)—Increase in respect of repairs—Increase in rent for purpose of assessment.]—Where, in the case of a dwelling-house to which above Act applies, the landlord increases the standard rent, under sect. 2 (1) (d) of the Act, by an amount in respect of repairs, that increased amount is part of the rent for the purposes of assessment to income tax under Schedule A., & is not a mere indemnity for the increased cost of repairs.—*BIDDLE v. MORRIS*, [1924] 2 K. B. 490; 93 L. J. K. B. 907; 132 L. T. 492; 40 T. L. R. 791; 9 Tax Cas. 87.

SUB-SECT. 2.—FINES ON RENEWAL OF LEASES.

See Schedule A., No. II., r. 6.

27. "Applied as productive capital"—Temporary deposit at bank.]—*MOSTYN (LORD) v. LONDON SURVEYOR OF TAXES*, No. 48, *post*.

SUB-SECT. 3.—PROFITS ARISING FROM LANDS NOT IN OCCUPATION OF THE PERSON TO BE CHARGED.

See Schedule A., No. II., r. 7; 1922 Act, s. 26.

28. Rent of minerals—Lessee not in occupation—Assessment on lessor.]—Appl't. granted to a co. a lease for a term of years of all the coal & other minerals under land of which he was the owner at a "footage rent or royalty" to be computed yearly & at a "minimum yearly rent" of £60. The co. also owned the minerals under adjoining lands, which it intended to work together with the demised minerals as one colliery undertaking. The co. had bored for coal under the adjoining lands, but no borings or workings had taken place with regard to the demised coal; & the co. had not yet produced any coal or minerals. The co. paid the minimum yearly rent of £60 to the lessor, deducting income tax; but it did not pay over the amount of the tax to the Crown. No assessment had been made in respect of the demised coal. The lessor, having been assessed to income tax

from the use of land was first assessable in 1907 & must be assessed as derived in that year. The other sub-sects. mentioned above apply only where the taxpayer has been in actual receipt of taxable income in the year preceding the year of assessment, & not otherwise.—*NEW SOUTH WALES TAXATION COMRS. v. ADAMS*, [1912] A. C. 384; 81 L. J. P. O. 185; 106 L. T. 307; 28 T. L. R. 263.—*AUS.*

PART II. SECT. 2, SUB-SECT. 3.

n. Company worked by principal company—Proportion of profits payable

*to subsidiary company—Principal company not assessable in respect of.]—*CALEDONIAN RY. CO. v. INLAND REVENUE*, [1919] S. C. 557.—*SCOT.**

PART II. SECT. 2, SUB-SECT. 5.

*o. Estimate of life of mine—Latest estimate to be considered.]—*NEW PRIMROSE GOLD MINING CO. v. UNION GOVERNMENT (MINISTER OF FINANCE)* (1916), App. D. 282.—*S. AF.**

PART II. SECT. 2, SUB-SECT. 6.

p. Public services—Surplus income of water commissioners—Applied to re-

under Schedule A. in respect of the sum of £60, appealed against the assessment:—*Held*: the co. was not in occupation of the demised coal & was not entitled to deduct the tax from the payment made to the lessor; & the lessor was properly assessed in respect of the minimum yearly rent paid to him as "profits arising from lands tenements & hereditaments not in the actual possession or occupation of the party to be charged," within Income Tax Act, 1842 (c. 35), s. 60, Sched. A., No. II., r. 6.—*HILL v. GREGORY*, [1912] 2 K. B. 61; 81 L. J. K. B. 730; 106 L. T. 603; 6 Tax

B.

303. *Reid. Howe v. I. L.* (Back v. Daniels, [1925] 1 K. 526.

SUB-SECT. 4.—QUARRIES.

See Schedule A., No. III., r. 1; 1919 Act, s. 18 (2).

29. "Mine" or "quarry"—Underground slate workings.]—Slate was obtained from the side of a hill by underground workings carried on through levels:—*Held*: the works were to be assessed as a quarry under Income Tax Act, 1842 (c. 35), s. 60, Sched. A., No. III., r. 1, & not as a mine under rule 2 of the enactment.—*JONES v. CWMORTHEN SLATE CO.* (1879), 5 Ex. D. 93; 49 L. J. Q. B. 110; 41 L. T. 575; 44 J. P. 168; 28 W. R. 237; 1 Tax Cas. 267, C. A.

Annotation:—Mentd. Glasgow, Lord Provost & Mags. v. Farle (1888), 13 App. Cas. 657.

SUB-SECT. 5.—MINES.

See Schedule A., No. III., r. 2; 1919 Act, s. 18 (2).

30. "Mine" or "quarry"—Underground slate workings.]—*JONES v. CWMORTHEN SLATE CO.*, No. 29, *ante*.

31. Duty on coal worked—Used for public purposes—Local Improvement Act.]—*A.-G. v. BLACK*, No. 100, *post*.

32. Lease of minerals—Purchase price payable by instalments—Fixed minimum annual payment.]—*TAYLOR v. EVANS*, No. 335, *post*.

33. — Lessee not in occupation.]—*HILL v. GREGORY*. No. 28, *ante*.

SUB-SECT. 6.—VARIOUS WORKS AND OTHER CONCERNS HAVING PROFITS.

See Schedule A., No. III., r. 3; 1919 Act, s. 18 (2).

34. Dues tolls, etc.—Market tolls—Purpose to which applied immaterial.]—The Corp'n. of the City of London derived a large annual income from renewal fines, profits of markets, corn & fruit metages, brokers' rents, & Mayor's ct. &

*duce rates—Not assessable.]—*GLASGOW WATER COMRS. v. INLAND REVENUE* (1875), 12 Sc. L. R. 466; 2 R. (Ct. of Sess.) 708.—*SCOT.**

*g. — Time for assessment—Four months after end of year.]—*MAUGHAN v. EDINBURGH & DISTRICT WATER TRUST* (1886), 13 R. (Ct. of Sess.) 1046.—*SCOT.**

*r. Cemetery company.]—*Held*: the proceeds of sales of the right of sepulture during the year were assessable for income tax without deduction of any part thereof in respect of its being a realisation or conversion of*

other fees. The receipts from these several sources, after deducting the cost of collection, were carried to a general account, from which was deducted the whole expenditure of the Corpn. for the civil government of the city, including the maintenance of the police, etc., & the balance was returned by deft., the proper officer of the Corpn., as the profits of the Corpn. chargeable under Schedule D. It was admitted at the trial that the renewal fines were chargeable in the ordinary manner under Income Tax Act, 1842 (c. 35), Sched. A., No. II., r. 5, but, with this exception, it was contended that deft.'s return was correct:—*Held*: the profits of the Corpn. derived from market tolls, corn & fruit metages, brokers' rents, Mayor's ct. fees, etc. are liable to income tax under Schedule D., without reference to the purposes to which they are applied; & the proper principle upon which the assessment should be made is to take each item or head of income separately, & to assess the income tax upon the net produce of such item, after deducting from the gross receipts the expenses incurred in earning & collecting the same.—*A.-G. v. SCOTT* (1873), 28 L. T. 302; 21 W. R. 265; 1 Tax Cas. 55.

Annotation:—*Folld. Glasgow Corpn. Water Comrs. v. Miller* (1806), 50 J. P. 503.

35. — Court fees.]—*A.-G. v. SCOTT*, No. 34, *ante*.

36. — Dues levied on ships—Applied in reimbursement of cost of works.]—The Corpn. of King's Lynn contributed £60,000 towards the making of a cut from the Wash to King's Lynn, & to enable the corpn. to repay the money borrowed for the purpose the harbour moorings comrs. were empowered by Act of Parliament to levy dues for the use of the corpn. on all ships using the cut:—*Held*: the dues were profits assessable to the income tax.—*SOWREY v. KINGS LYNN HARBOUR MOORINGS COMRS.* (1887), 3 T. L. R. 516; 2 Tax Cas. 201.

Annotation:—*Mentd. Bowers v. Harding* (1891), 3 Tax Cas. 22.

37. Statutory contributions to conservancy board—From railway & canal companies.] The Humber Conservancy Board were the lessees of certain foreshores & the bed of the river Humber, but they possessed no docks or wharves. They exercised under their statute the ordinary conservancy duties, their receipts consisting of shipping & registration dues & certain statutory contributions amounting in the aggregate to £4,300 *per annum* payable to them by four railway cos. & a canal co. The board admitted that all their income other than the contributions from those five bodies fell to be included in the income tax computation of their profits:—*Held*: the contributions in question were also liable to income tax as being either profits from "an inland navigation" within Income Tax Act, 1842 (c. 35), s. 60, Sched. A., No. III., r. 3, or as being "annual profits & gains" within Income Tax Act, 1853 (c. 34), s. 2, Sched. D.—*HUMBER CONSERVANCY BOARD v. BATER*, [1914]

capital, & being income derived from a trade carried on by the use of land they fell to be assessed under Income Tax Act, 1842, Sched. A., No. III., r. 3.—*EDINBURGH SOUTHERN CEMETERY CO. v. INLAND REVENUE* (1889), 17 R. (Ct. of Sess.) 154.—*SCOT*.

t. —.]—A cemetery co. received from purchasers of lairs, in lieu of annual payment, a lump sum for keeping the lairs in order:—*Held*: the sums so received were assessable to income tax under Income Tax Act, Sched. A., No. III., r. 3.—*CEMETERY CO. v. INLAND*

REVENUE (1898), 25 R. (Ct. of Sess.) 1080.—*SCOT*.

a. *Burgh council burial ground.*]—A burgh council is required by Act of Parliament to provide a burial ground:—*Held*: income tax is chargeable on the profits, after deducting only the working expenses.—*PORTOBELLO TOWN COUNCIL v. SULLEY* (SURVEYOR OF TAXES) (1890), 55 J. P. 9; 2 Tax Cas. 647.—*SCOT*.

b. "Gasworks" — Profits assessed according to previous year.]—Income Tax Act, 1918, Sched. A., No. III., r. 3, a special rule dealing with special

3 K. B. 449; 83 L. J. K. B. 1745; 111 L. T. 856; 6 Tax Cas. 555.

Annotation:—*Refd. Severn Fishery Board v. O'May*, [1919] 2 K. B. 484.

38. Public services—Surplus income of burial board—Applied in aid of poor rate.]—*PADDINGTON BURIAL BOARD v. INLAND REVENUE COMRS.*, No. 105, *post*.

39. — Corporation gas works—Lighting public streets—Private customers also supplied.]—*DILLON v. HAVERFORDWEST CORPN.*, No. 219, *post*.

40. — Public sewer—Distinguished from drain.]—*YSTRADYFODWG & PONTYPRIDD MAIN SEWERAGE BOARD v. BENSTED*, No. 15, *ante*.

See, now, 1921 Act, s. 34.

41. — Reservoir owned by charity trustees—Bulk of expenses met by endowment—Not a "concern" within No. III.]—*SHAW v. LICHFIELD CONDUIT LANDS TRUSTEES*, No. 16, *ante*.

42. Royalty or brick rent from brickfield.]—By indenture, a piece of land was demised with power to the lessee to get from the land, clay, brick earth & other materials for making bricks, & to make the same into bricks upon the premises, for a term of fourteen years, paying to the lessor the yearly rent of £17 10s. for surface rent, by quarterly payments, also paying to the lessor, for royalty or brick rent, the yearly sum of £100, by four equal quarterly payments on the same days, & also paying in respect of every thousand bricks over & above the first million which should be made on the premises in any one year, an additional royalty or brick rent of 2s., to be paid on the last day of every year:—*Held*: both the royalties or brick rents were chargeable with income tax, & it was payable in the first instance by the lessee, who was entitled to deduct it from the amount due to the lessor.—*EDMONDS v. EASTWOOD* (1858), 2 H. & N. 811; 27 L. J. Ex. 209; 22 J. P. 275; 157 E. R. 334; *sub nom.* *EDMONDS v. EASTWOOD*, 30 L. T. O. S. 304; *sub nom.* *EDWARDS v. EASTWOOD*, 6 W. R. 331.

Annotation:—*Refd. Foley v. Fletcher* (1858), 3 H. & N. 769.

43. "Gasworks"—Gasworks abroad not included.]—*IMPERIAL CONTINENTAL GAS ASSOCN. v. NICHOLSON*, No. 145, *post*.

SECT. 3.—DEDUCTIONS AND ALLOWANCES.

See Schedule A., No. V.; 1919 Act, s. 19; 1920 Act, s. 29; 1922 Act, s. 25; 1923 Act, s. 28; 1924 Act, s. 25.

44. Expenses of collection—Dues, tolls, etc.]—*A.-G. v. SCOTT*, No. 34, *ante*.

45. — Tithe rentcharge.]—In estimating the "annual value" of tithe commutation rentcharge for the purpose of charging the owner thereof with property tax under Income Tax Act, 1853 (c. 34), s. 32, the amount necessarily expended by him in collection of the title rentcharge must be deducted.—*STEVENS v. BISHOP* (1888), 20

heritages including "ironworks, gasworks," etc., provides that their annual value is to be taken at the profits of the preceding year.—*LARGO & LUNDIN LINKS GAS CO., LTD. v. SMITH* (INSPECTOR OF TAXES), [1922] S. C. 616.—*SCOT*.

PART II. SECT. 3.

c. *Casualty to superior.*]—A successor to lands in Scotland has to pay to his superior on entry a casualty of a year's rent. No allowance in respect of such payment can be paid from the Schedule A. assessment on

Sect. 3.—Deductions and allowances. Sect. 4: Sub-sects. 1 & 2.]

Q. B. D. 442; 57 L. J. Q. B. 283; 58 L. T. 669; 52 J. P. 548; 36 W. R. 421; 4 T. L. R. 325; 2 Tax Cas. 249, C. A.

Annotation:—Consd. Norfolk v. Lamarque (1890), 24 Q. B. D. 485.

46. — Manorial dues — Whether expenses necessary.]—In estimating the annual value of the "profits" of a manor for assessment to the income tax under Income Tax Act, 1842 (c. 35), s. 60, Sched. A., No. II., no deduction can be made in respect of expenses incurred by the lord of the manor in collecting the manorial dues, at any rate where it does not appear that such expenses must necessarily be incurred before the dues can be obtained.—*NORFOLK (DUKE) v. LAMARQUE (1890)*, 24 Q. B. D. 485; 59 L. J. Q. B. 119; 62 L. T. 153; 54 J. P. 327; 38 W. R. 382; 2 Tax Cas. 579, D. C.

47. Expense of constructing sea wall or embankment—Increasing value of land—Not protective merely.]—Applt. was assessed to the income tax under Income Tax Act, 1853 (c. 34), s. 37, Sched. A., in respect of the annual value of certain lands. The lands had prior to 1880 been salt marshes adjoining a tidal river, which were liable to be flooded at every tide, & had a small yearly value as pasturage. Applt. began in 1880 to construct an embankment for the purpose of excluding the water from these lands, which was completed in 1885, & the lands were by the construction of such embankment, converted into valuable enclosed lands, of much greater value than in their previous state as salt marshes:—*Held*: applt. was not entitled to any deduction under Income Tax Act, 1853 (c. 34), s. 37, on the ground that the embankment constructed by him was not "necessary for the preservation or protection of such lands against the encroachment or overflowing of the sea or any tidal river," within the sect., inasmuch as the sect. did not apply to embankments made for the improvement of the land by altering its condition, but only to embankments made for its protection or preservation in its existing state.—*HESKETH v. BRAY (1888)*, 21 Q. B. D. 444; 57 L. J. Q. B. 633; 53 J. P. 133; 37 W. R. 22; 4 T. L. R. 761; 2 Tax Cas. 380, C. A.

See Schedule A., No. V., r. 1 (g).

48. Fines on renewal of leases — Temporarily deposited at bank—Not applied as productive capital.]—Money, which had been received by applt. for fines on the renewal of leases, had been placed at a bank, on deposit at interest, in the names of the trustees of a will, under which applt. was tenant for life. By the will fines on renewals of leases were to be invested in the purchase of freehold, copyhold, or leasehold property. The money was placed at the bank temporarily until required for permanent investment, & interest was received on it by applt., who paid income tax

on such interest. Applt. claimed exemption from income tax on the money so placed on deposit, on the ground that such money had been applied as productive capital, on which a profit had arisen otherwise chargeable for the year in which the assessment was made, within the meaning of rule 5 in s. 60, Schedule (A), No. II., of Income Tax Act, 1842 (c. 35), so as to be exempt under the proviso contained in that rule:—*Held*: the money on which exemption was claimed, having been temporarily placed on deposit, had not been "applied as productive capital," within the meaning of the rule, & applt. was not entitled to exemption.—*MOSTYN (LORD) v. LONDON SURVEYOR OF TAXES*, [1895] 1 Q. B. 170; 64 L. J. Q. B. 106; 71 L. T. 760; 59 J. P. 390; 43 W. R. 330; 11 T. L. R. 68; 39 Sol. Jo. 82; 15 R. 49; 3 Tax Cas. 294, D. C.

See Schedule A., No. II., r. 6.

49. Fire insurance premium—Payable by landlord under lease.]—*TURNER v. CARLTON*, No. 25, *ante*.

50. Allowance in respect of repairs—Effect of increase of rent under Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 2 (1) (d).]—*BIDDLE v. MORRIS*, No. 26, *ante*.

SECT. 4.—PROPERTY EXEMPT FROM TAX.

SUB-SECT. 1.—PROPERTY VESTED IN TRUSTEES FOR CHARITABLE PURPOSES, OR OCCUPIED BY CHARITIES.

See 1918 Act, s. 37 (1) (a); 1921 Act, s. 30.

51. General rule—Construction of charitable purposes—Not restricted to relief from poverty.]—(1) In a case where an allowance which ought to be granted under Income Tax Act, 1842 (c. 35), s. 61, Sched. A., No. VI., is refused, *mandamus* lies to the comrs. commanding them to grant the allowance & to give a certificate of the allowance with an order for the payment thereof.

(2) Lands in England were conveyed by deed in 1813 to trustees upon trust after payment of costs & outgoings to apply two-fourths of the rents & profits for the general purposes of maintaining, supporting & advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, commonly known as the Moravian Church; & to apply the remaining two-fourths for purposes which were admitted in argument in this House on behalf of the Crown to be charitable within the Act. On a claim for the allowance in respect of the whole trust:—*Held*: the words "charitable purposes" in Income Tax Act, 1842 (c. 35), s. 61, Sched. A., No. VI., were not restricted to the meaning of relief from poverty, but must be construed according to the legal & technical meaning given to those words by English law & by legislation applicable to Scotland &

the lands.—*MCGREGOR v. MACFARLAN (SURVEYOR OF TAXES) (1889)*, 2 Tax Cas. 435.—*SCOT*.

d. Cemetery — Estimated cost of grave space.]—A deduction cannot be allowed in respect of the estimated cost price of the grave spaces.—*EDINBURGH SOUTHERN CEMETERY CO. v. KINMONT (SURVEYOR OF TAXES) (1889)*, 2 Tax Cas. 516.—*SCOT*.

e. Contract for annual payments—Capital expenditure—Not "annual payments."]—The magistrates of a burgh constructed a sewer through the lands of a proprietor, under an agreement by which the proprietor undertook that, until the assessable rental from

the district served by the sewer should yield, in respect of the sewer rate, a return equal to 5 per cent. on the cost of the sewer, he would annually make up the deficiency.

The payments in question, being either capital expenditure for the development of the estate or a supplement to rates, were not annual payments within the meaning of Income Tax Acts, & accordingly were not subject to deduction of income tax.—*OSWALD v. KIRKCALDY MAGISTRATES*, [1919] S. C. 147.—*SCOT*.

f. Gasworks—One-sixth annual value—Governed by Schedule A., No. I.]—*LARGO & LUNDIN LINKS GAS CO., LTD.*

v. SMITH (INSPECTOR OF TAXES) (1922), 8 Tax Cas. 296.—*SCOT*.

PART II. SECT. 4, SUB-SECT. 1.

g. General rule—Construction of charitable purposes—Whether restricted to relief of poverty.]—The words "charitable purposes" as used in the exempting clauses of Income Tax Act, 1842, are to be interpreted in the ordinary & popular signification as meaning the relief of poverty & do not cover purposes of general benevolence & of public utility.

By trust deed a trustee provided a fund for the promotion of religion "among the poor & working population

Ireland as well as England, & the allowance ought to be granted.—**INCOME TAX SPECIAL PURPOSES COMRS. v. PEMSEL**, [1891] A. C. 531; 61 L. J. Q. B. 265; 65 L. T. 621; 55 J. P. 805; 7 T. L. R. 657; 3 Tax Cas. 53, H. L.; *affg.* S. C. *sub nom.* **R. v. INCOME TAX COMRS.** (1888), 22 Q. B. D. 296, C. A.

Annotations:—*As to* (1) *Refd.* **R. v. Income Tax Special Purposes Comrs.**, *Ex p.* Dr. Barnardo's Homes National Incorporated Assocn., [1920] 1 K. B. 26. *As to* (2) *Apld.* **R. v. Income Tax Special Comrs.**, *Ex p.* University College of North Wales (1909), 78 L. J. K. B. 576; **R. v. Income Tax Special Comrs.**, *Ex p.* Headmasters' Conference, *Same v. Same*, *Ex p.* Incorporated Assocn. of Preparatory Schools (1925), 41 T. L. R. 651. *Consd.* **Chesterman v. Federal Taxation Comr.** (1925), 42 T. L. R. 121. *Distd.* **Brighton College v. Marriott**, [1925] 1 K. B. 312. *Refd.* **I. R. Comrs. v. Scott**, *Re* Bootham Ward Strays, York, [1892] 2 Q. B. 152; **Southwell v. Royal Holloway College**, Egham, [1895] 2 Q. B. 487; **R. v. Income Tax Special Purposes Comrs.**, *Ex p.* Essex Hall (1911), 5 Tax Cas. 636; **Rotunda Hospital, Dublin v. Coman** (1920), 7 Tax Cas. 517; **R. v. Income Tax Special Comrs.**, *Ex p.* Rank's Trustees (1922), 91 L. J. K. B. 311; **Jackson v. Voss**, [1923] 2 K. B. 357. *Generally, Mentd.* **Charterhouse School v. Lamarque** (1890), 25 Q. B. D. 121; **Maughan v. Free Church of Scotland** (1893), 3 Tax Cas. 207; *Re* Foveaux, **Cross v. London Anti-Vivisection Soc.**, [1895] 2 Ch. 501; *Re* Nottage, **Jones v. Palmer**, [1895] 2 Ch. 649; *Re* Buck, **Bruty v. Mackey**, [1896] 2 Ch. 727; **Cunnack v. Edwards**, [1896] 2 Ch. 679; *Re* Macduff, **Macduff v. Macduff**, [1896] 2 Ch. 451; *Re* Perry Almshouses, *Re* Ross' Charity, [1899] 1 Ch. 21; **Blair v. Duncan**, [1902] A. C. 37; **L. O. C. v. South Metropolitan Gas Co.**, [1903] 2 Ch. 532; *Re* Church Patronage Trust, **Laurie v. A.-G.**, [1904] 2 Ch. 643; *Re* Good, **Harington v. Watts**, [1905] 2 Ch. 60; **Grimond v. Grimond**, [1905] A. C. 603; **Lord Advocate v. Moray**, [1905] A. C. 531; *Re* Manser, **A.-G. v. Lucas**, [1905] 1 Ch. 68; *Re* Sidney, **Hingston v. Sidney** (1908), 98 L. T. 625; *Re* Wedgwood, **Allen v. Wedgwood**, [1915] 1 Ch. 113; *Re* Werrall, **National Trust for Places of Historic Interest or Natural Beauty v. A.-G.**, [1916] 1 Ch. 100; **G. W. Ry. & Mid. Ry. v. Bristol Corpn.** (1918), 87 L. J. Ch. 414; **Houston v. Burns**, [1918] A. C. 337; **Bourne v. Keane**, [1919] A. C. 815; *Re* Bennett, **Gibson v. A.-G.**, [1920] 1 Ch. 305; **Barber v. Chudley** (1922), 92 L. J. K. B. 711; *Re* Hummeltenberg, **Beatty v. London Spiritualistic Alliance**, [1923] 1 Ch. 237; *Re* Ludlow, **Bence-Jones v. A.-G.** (1923), 93 L. J. Ch. 30; *Re* Shakespeare Memorial Trust, **Lytton v. A.-G.**, [1923] 2 Ch. 398; **A.-G. v. National Provincial Bank**, [1924] A. C. 262; **Verge v. Somerville**, [1924] A. C. 496; *Re* Gray, **Todd v. Taylor**, [1925] Ch. 362.

What are charitable purposes, *see, generally*, **CHARITIES**, Vol. VIII., pp. 241 *et seq.*

52. Foreign missionary establishment.—**INCOME TAX SPECIAL PURPOSES COMRS. v. PEMSEL**, No. 51, *ante*.

53. Trust for advancement of education—Various sources of income.—The University College of North Wales was incorporated in 1885 with the object of giving instruction in all branches of a liberal education except theology, & to promote higher education generally. The sources of income were voluntary donations, devises & bequests, a Govt. grant of £4,000 *per annum*, & payment by pupils:—*Held*: the property of the college was “vested in trustees for charitable purposes” & exempted from income tax as well under Schedule A. as under Schedules C. & D. of Income Tax Act, 1842 (c. 35).—**R. v.**

INCOME TAX SPECIAL COMRS., *Ex p.* UNIVERSITY COLLEGE OF NORTH WALES (1909), 78 L. J. K. B. 576; 100 L. T. 585; 25 T. L. R. 368; 53 Sol. Jo. 320; 5 Tax Cas. 408, C. A.

Annotations:—*Distd.* **Brighton College v. Marriott**, [1925] 1 K. B. 312. *Refd.* **Rotunda Hospital, Dublin v. Coman** (1920), 7 Tax Cas. 517. *Mentd.* **Northumberland v. I. R. Comrs.**, [1911] 2 K. B. 343.

54. Lands in occupation of trustees for charitable purposes—Not producing rents.—(1) Trustees for charitable purposes, or a charitable corpn., not being a college or hall, hospital, public school or almshouse, are not entitled to the allowances for income tax under Income Tax Act, 1842 (c. 35), s. 61, Sched. A., No. VI., in respect of lands, tenements, hereditaments or heritages in their own occupation not producing rents.

(2) Sums received by the trustees for the use of the property & wholly expended in its upkeep are not “rents & profits” within the sect.—**R. v. INCOME TAX SPECIAL COMRS.**, *Ex p.* **ESSEX HALL**, [1911] 2 K. B. 434; 80 L. J. K. B. 1035; 104 L. T. 764; 27 T. L. R. 466; 5 Tax Cas. 636, C. A.

Annotations:—*As to* (1) *Consd.* **Coman v. Rotunda Hospital, Dublin**, [1921] 1 A. C. 1. *Refd.* **College of Preceptors v. Jenkins** (1919), 89 L. J. K. B. 27.

SUB-SECT. 2.—COLLEGES, HOSPITALS, PUBLIC SCHOOLS, ALMSHOUSES AND LITERARY AND SCIENTIFIC INSTITUTIONS.

See 1918 Act, s. 37 (1) (a); Sched. A., No. VI., r. 1 (a)–(e).

55. “College or hall in any university”—College of Preceptors.—The College of Preceptors was incorporated by Royal Charter “for the purpose of promoting sound learning & of advancing the interests of education, more especially among the middle classes, by affording facilities to the teacher for the acquiring of a sound knowledge of his profession & by providing for the periodical session of a competent board of examiners, to ascertain & give certificates of the acquirements & fitness for their office of persons engaged or desiring to be engaged in the education of youth.” The college had sustained a loss on its working for the year but received interest on sums deposited with its bankers. The college claimed that the interest allowed by the bankers was not interest in respect of which the college was chargeable with income tax under Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Case III., & that, alternatively, if the bank interest was assessable, the college was entitled to apply under Customs & Inland Revenue Act, 1890 (c. 8), s. 23, for an adjustment of the liability to income tax by reference to the loss on its working & to the aggregate amount of its income for the year of assessment. The college further claimed exemption under Income Tax

of Scotland.” The income of the fund was principally applied towards the building & endowment of churches:—not exempt from the payment of income tax.—**BAIRD'S TRUSTEES v. ADVOCATE** (1888), 15 R. (Ct. of Sess.) 682; 25 Sc. L. R. 533.—**SCOT.**

in occupation of trustees purposes—Not producing General Trustees of the of Scotland having been income tax on the annual their Assembly Hall claimed The Assembly Hall was oh purposes & was unlet rents or profits:—*Held*: Act, 1842, Sched. A.,

r. v. had no application to the case, the Assembly Hall yielded no rents

or profits.—**SURVEYOR OF TAXES v. FREE CHURCH OF SCOTLAND GENERAL TRUSTEES** (1893), 20 R. (Ct. of Sess.) 759; 30 Sc. L. R. 666; 1 S. L. T. 40.—**SCOT.**

h. Trust fund for two purposes—One charitable—Surplus in respect of other—Not exempt.—Testatrix by her will, after directing the payment of annuities to two persons after their deaths the payment of legacies to two other persons, directed her trustees, after & subject to the two legacies, to hold her real & personal estate & all income thereof upon trust for certain charitable institutions. While the annuitants were alive the trustees had set aside sufficient of the corpus to pay the two legacies, & in a particular

year the income of the estate was much more than sufficient to pay the two annuities:—*Held*: this surplus was not exempt from income tax.—**TRUSTEES, EXECUTORS & AGENCY CO., LTD. v. ACTING FEDERAL COMR. OF TAXATION** (1917), 23 C. L. R. 576.—**AUS.**

PART II. SECT. 4, SUB-SECT. 2.

k. Public school—College for Divinity.—The Free Church of Scotland is a Divinity hall, & is primarily intended for the training of candidates for the ministry of that church after they have completed their undergraduate course at a university:—*Held*: the college is

Property exempt from tax: Sub-sect. 2.]

Act, 1842 (c. 35), s. 61, Sched. A., No. VI., from the tax charged under Schedule A in respect of the college buildings:—*Held*: the interest on deposit received from the bankers was rightly charged to income tax in the hands of the college, & the college was neither a college in any of the universities of Great Britain, nor itself a university so as to be entitled to the allowance granted under Schedule A., No. VI.—*COLLEGE OF PRECEPTORS v. JENKINS* (1919), 89 L. J. K. B. 27; 121 L. T. 121; 35 T. L. R. 447; 7 Tax Cas. 162.

56. Hospital—Lunatic asylum—Wholly self-supporting.]—*NEEDHAM v. BOWERS*, No. 469, *post*.

57. ——— Self-supporting for one year.]—An institution for the reception of insane persons was founded by charitable contributions; it was partly & substantially supported by funds derived from charitable sources, having an endowment fund, & a small portion of its income being derived from subscription. It was vested in trustees & managed gratuitously by a committee. During the year previous to that for which the assessment was made the income derived from the payments made by patients & from the sale of produce on a farm belonging to the institution, without taking into account the income arising from the endowment fund & the annual subscriptions, exceeded the total expenditure:—*Held*: the institution was not wholly self-supporting merely because the income derived from the payments of patients & the sale of produce had in a particular year exceeded the expenditure, but was a hospital maintained in part by charity, & was therefore exempt from landlord's property tax & inhabited house duty, as being a "hospital" within Income Tax Act, 1842 (c. 35), s. 61, r. 6, & House Tax Act, 1808 (c. 55), Sched. B., Case IV.—*CAWSE v. NOTTINGHAM LUNATIC HOSPITAL*, [1891] 1 Q. B. 585; 60 L. J. Q. B. 485; 65 L. T. 155; 55 J. P. 582; 39 W. R. 461; 3 Tax Cas. 39, D. C.

Annotations:—*Consd.* *Mary Clark Home, Trustees v. Anderson*, [1904] 2 K. B. 645. *Refd.* *Musgrave v. Dundee Royal Lunatic Asylum* (1895), 59 J. P. 758; *Southwell v. Royal Holloway College, Egham*, [1895] 2 Q. B. 487; *Rotunda Hospital, Dublin v. Coman* (1920), 7 Tax Cas. 517.

58. ——— Occupation by officers—Salaries over £150.]—(1) The justices of a county were assessed to the income tax under Income Tax Act, 1842 (c. 35), sched. A., in respect of such parts of a county lunatic asylum established under Lunatic Asylums Act, 1853 (c. 97), as were occupied by officers having an income of more than £150 *per annum*. On a case stated:—*Held*: the premises assessed were not in the occupation of the Crown or of persons using them exclusively in & for the service of the Crown, & were therefore not exempt from assessment to the income tax.

(2) The only question argued before the comrs. & raised by the case stated by them, having been whether the premises could be assessed, the Ct. of Appeal declined to decide who were the proper parties to be assessed.—*BRAY v. LANCASHIRE JJ.* (1889), 22 Q. B. D. 484; 58 L. J. M. C. 54; 53 J. P. 499; 37 W. R. 392; 5 T. L. R. 244; 2 Tax Cas. 426, C. A.

not a public school within the exemption.—*BAIN (SURVEYOR OF TAXES) v. FREE CHURCH OF SCOTLAND* (1897), 61 J. P. 742; 3 Tax Cas. 537.—*SCOT.*

1. *Proprietors receiving rent.]*

—The proprietors of a voluntary school had transferred the school on lease to an Education Authority, & the school was occupied & carried on by the Authority as a public school:—*Held*: the proprietors were liable to

59. Public school—Necessity for charitable foundation.]—*Ackworth School* was established in 1779 by subscriptions collected from members of the Society of Friends, for the education of children who were members of the society in Great Britain whose parents were not in affluence. The rules of the school provided that when the school was not full there should be eligible for admission at the discretion of the controlling committee, children from beyond the limits of Great Britain being members of the society, failing whom, children closely connected with the society, or failing whom, children not in the membership of the society. The object of the school was to train up the children in the principles & practices of the Christian religion as professed by the Society of Friends, & to impart to them a sound English education. The school was supported by substantial fees paid by the parents of the children, by the income arising from its invested property, by annual subscriptions & other donations & legacies, & was under the direction of a general meeting appointed by the society. To assist those members of the society who were unable to provide the whole of the fees, bursaries were granted in some cases. Bursaries were restricted to members of the society, excepting that the committee might grant certain bursaries to children closely connected with the society. The religious views of the society were taught, but no effort was made to bring into the society the children of parents who were not members of the society. At the end of 1910 the school was full on both sides, there being one hundred & eighty-one boys, & one hundred & twenty-two girls, three hundred & three in all. £12,000 out of rather less than £14,000, the income received by the school during 1910, was derived from fees. The school was recognised as an efficient secondary school by the Board of Education, but never received any grants therefrom:—*Held*: the school was not a "public school" within Income Tax Act, 1842 (c. 35), s. 61, Sched. A., No. VI., & as such exempt from payment of income tax; & it was not a "charity school" within Case IV. of the exemptions to Schedule B. of House Tax Act, 1808 (c. 55).

Although, for a school to be a "public school," there must be an element of public foundation & charitable foundation among its resources, it need not be purely an eleemosynary institution. It is to be in the same rank as a college or hall. I certainly think that enough of the resources of this school are derived from endowment to satisfy that requirement, but that does not decide the question I have to determine. I do not think this school is a public school, having regard to its nature & management. It seems to me that the persons who founded this school wished to avoid an overwhelming public element in its constitution. They wanted a school which they could keep under their own control, in which they could teach the religious views held by members of the Society of Friends & exercise a supervision over the admission of pupils (*ROWLATT, J.*).—*ACKWORTH SCHOOL v. BETTS* (1915), 84 L. J. K. B. 2112; 113 L. T. 855; 6 Tax Cas. 642.

Annotation:—*Expld. & Distd.* *Cardinal Vaughan Memorial School, Trustees v. Ryall* (1920), 7 Tax Cas. 611.

60. ——— Partly maintained by fees—Partly by endowment.]—A school founded & carried on by

assessment to income tax under Schedule A., as they received a rent from the occupiers they were excluded from the exemption.—*BRYAN v. ROMAN CATHOLIC ARCHDIOCESE OF GLASGOW TRUSTEES*, [1922] S. C. 252.—*SCOT.*

the corpn. of London under the provisions of an Act of Parliament, not for purposes of profit, but for the benefit of a large portion of the public, & maintained partly by a charitable endowment, is a "public school" within Income Tax Act, 1842 (c. 35), s. 61, Sched. A., No. VI., notwithstanding the fact that the school is partly maintained by fees charged for instruction.—**BLAKE v. LONDON CORPN.** (1887), 19 Q. B. D. 79; 56 L. J. Q. B. 424; 35 W. R. 791; 3 T. L. R. 646; 2 Tax Cas. 209, C. A.

Annotations.—**Consd.** *Needham v. Bowers* (1888), 21 Q. B. D. 436. **Distd.** *Ackworth School General Committee v. Betts* (1915), 113 L. T. 855. **Apld.** *Cardinal Vaughan Memorial School, Trustees v. Ryall* (1920), 36 T. L. R. 694. **Refd.** *R. v. Income Tax Comrs.* (1888), 22 Q. B. D. 296; *Charterhouse School v. Lamarque* (1890), 25 Q. B. D. 121; *Cawse v. Nottingham Lunatic Hospital*, [1891] 1 Q. B. 585; *Rotunda Hospital, Dublin v. Coman* (1920), 7 Tax Cas. 517.

61. ————.]—**ACKWORTH SCHOOL v. BETTS**, No. 59, *ante*.

62. ————.]—The Cardinal Vaughan Memorial School is a Roman Catholic secondary day school, affording accommodation for over one hundred & fifty boys, administered under a trust deed which provides, *inter alia*, that the control & management shall be vested in *bona fide* members of the Roman Catholic Church & that the religious doctrines & practices to be observed in the school shall accord with the principles & be subject to the regulations & discipline of that church. In no case had admission to the school been refused on the ground that appct. was not a Roman Catholic, although, in fact, only one boy out of a total number of sixty-seven boys at the school between Sept. 1914, & Sept. 1915, was not of that faith. Out of a total income of £1,414 15s. 1d. for the period from Sept. 1914, to Dec. 1915, £1,041 16s. 6d. was derived from "fees of students":—**Held**: the school was exempt from income tax (Schedule A.) as a public school within Income Tax Act, 1842 (c. 35), s. 61, Sched. A., No. VI.—**CARDINAL VAUGHAN MEMORIAL SCHOOL, TRUSTEES v. RYALL** (1920), 36 T. L. R. 694; 7 Tax Cas. 611.

63. **Alms-house—Home for ladies in reduced circumstances—Private endowment.**]—A home for ladies in reduced circumstances was founded & endowed by a lady, who conveyed it to trustees in fee simple on trust to appropriate & use it for that purpose. The inmates were to be ladies of fifty years old or upwards, possessed or in the actual enjoyment of a fixed yearly income of not less than £25 & not more than £55. Each inmate was entitled to the use of the common room, & to the exclusive use of an unfurnished bedroom & sitting-room, & to be supplied with coals, gas, & attendance free of cost; the inmates provided their own furniture, food, clothing, washing, & medical attendance; the food was cooked & served by the staff. The income of the endowment fund was applied to the payment of salaries, servants, wages & board, repairs, upkeep of fabric & of household & cooking utensils, & in providing gas & coals for the inmates & staff. There were no subscriptions to the home from the public:

—**Held**: the institution was exempt from landlord's property tax & inhabited house duty, as being an "almshouse" within Income Tax Act, 1842 (c. 35), s. 61, Sched. A., No. VI., & a "house provided for the reception or relief of poor persons" within House Tax Act, 1808 (c. 55), Sched. B., Case IV.—**MARY CLARK HOME, TRUSTEES v. ANDERSON**, [1904] 2 K. B. 645; 73 L. J. K. B. 806; 91 L. T. 457; 20 T. L. R. 626; 5 Tax Cas. 48.

Annotations.—**Refd.** *Rotunda Hospital, Dublin v. Coman* (1920), 7 Tax Cas. 517. **Mentd.** *Re Gardom, Le Page v. A.-G.*, [1914] 1 Ch. 662; *Shaw v. Halifax Corpn.* (1915), 79 J. P. 257; *Re Clarke, Bracey v. Royal National Lifeboat Institution*, [1923] 2 Ch. 407.

64. **Buildings partly occupied by master & officers—Under charitable scheme—Salaries over £150.**]—The governors of Sutton's Hospital in Charterhouse, a public charity established by charter in 1611 & now administered under schemes approved by the Charity Comrs., are the owners & occupiers of certain premises, known as the Charterhouse, in respect of which for the years ended Apr. 5, 1917, 1918, & 1919, they had been assessed to income tax under Schedule A., in the gross sum of £2,896 less the statutory deduction of £482 14s. for repairs, & an allowance of £2,055 1s. under No. VI. of Schedule A. The balance, viz. £358 5s., charged with tax under the said assessments represented the annual value of the premises occupied rent free by the master, registrar, preacher, medical officer & manciple, each of whom was an officer of the hospital with an income exceeding £150 *per annum*. The governors contended that, inasmuch as these officials inhabited the said apartments in compliance with the schemes under which the charity was administered & as part of their respective duties, they did not "occupy" their respective residences within Schedule A., No. VI. & No. IX.; that, as the assessment in respect of the premises as a whole had been made upon the governors, it was inconsistent to claim that the premises assigned to those officials were so occupied; & that the premises as a whole were exempt as a hospital or almshouse under No. VI. of Schedule A. Alternatively they contended that, if the premises were so occupied by the said officers, the assessment on the governors was void & should be discharged:—**Held**: the governors were the occupiers of the premises as a whole within Income Tax Act, 1842 (c. 35), s. 63, Sched. A., No. IX., r. 2, & the apartments occupied by the officials were not within the exemption granted to the hospital by No. VI. of Schedule A.—**SUTTON'S HOSPITAL IN CHARTERHOUSE (GOVERNORS) v. ELLIOTT**, [1922] 2 K. B. 1; 91 L. J. K. B. 547; 127 L. T. 214; 38 T. L. R. 129; 8 Tax Cas. 155.

65. **Literary or scientific institution—Municipal free library.**]—A building used for the purposes of a free library, maintained by a municipal corpn. under Public Libraries Act, 1855 (c. 70), is not within the exemption from income tax granted to literary & scientific institutions by Income Tax Act, 1842 (c. 35), s. 61, Sched. A., No. VI.—**ANDREWS v. BRISTOL CORPN.** (1892),

Literary or scientific institution
municipal free library.]—A building
to the Magistrates & Town
Dundee is used mainly as a
— but in one of the rooms
led for the
a Subscription
building is not
exemption in favour of
for the purpose
institution.—
OF TAXES) v.

DUNDEE TOWN COUNCIL & MAGISTRATES (1897), 3 Tax Cas. 552.—**SCOT.**

m. ————. *Society of Writers to the Signet—Library.*]—A building belonging to & occupied as a library by the Society of Writers to the Signet did not fall within the exemption.—**SOCIETY OF WRITERS TO THE SIGNET v. INLAND REVENUE COMRS.** (1886), 14 R. (Ct. of Sess.) 34.—**SCOT.**

n. ————.]—A society which

is mainly a professional institution & only incidentally an institution for the promotion of science & literature is not exempt.—**FARMER v. JURIDICAL SOCIETY OF EDINBURGH** (1914), 6 Tax Cas. 467.—**SCOT.**

o. ————. *Professional institution.*]—The objects of this college being mainly professional, the Royal College of Surgeons is not a scientific institution & is therefore not entitled to

Sect. 4.—Property exempt from tax: Sub-sects. 2**3. Sects. 5 & 6. Part III.]**

61 L. J. Q. B. 715; 67 L. T. 618; 56 J. P. 615; 8 T. L. R. 661; 5 R. 7; 3 Tax Cas. 236, D. C.

Annotation:—Reid. Manchester Corpn. v. McAdam, [1896] A. C. 500.

66. ———.]—The exemption from income tax granted by Income Tax Act, 1842 (c. 35), s. 61, Sched. A., No. VI., to any building "the property of any literary institution" includes buildings appropriated to free public libraries & used solely for the purposes of the libraries, whoever may be the owners of the buildings, & whether they are or are not supported by rates.—**MANCHESTER CORPN. v. McADAM, [1896] A. C. 500;** 65 L. J. Q. B. 672; 75 L. T. 229; 61 J. P. 100; 12 T. L. R. 606; 3 Tax Cas. 491, H. L.

Annotations:—Consd. Musgrave v. Dundee Mags. & Town Council (1897), 3 Tax Cas. 552. Reid. Rotunda Hospital, Dublin v. Coman (1920), 7 Tax Cas. 517.

67. Effect of partial occupation by officers—Salaries over £150.]—BRAY v. LANCASHIRE JJ., No. 58, ante.

68. ———.]—**SUTTON'S HOSPITAL IN CHARTERHOUSE (GOVERNORS) v. ELLIOTT, No. 64, ante.**

SUB-SECT. 3.—OTHER CASES.

69. Property in occupation of Crown—Assize court & police station—Vested in clerk of the peace.]

—The justices of a county in the due exercise of statutory powers erected assize cts. with the usual rooms & offices, & a county police station with the usual offices & accommodation for constables living there, & for prisoners. The land on which they were built was conveyed under 21 & 22 Vict. c. 92, to the clerk of the peace to hold to him & his successors for ever upon trust for the construction of a police station, & otherwise for such uses as the county justices should from time to time order. The buildings formed one block, & were used for the administration of justice & for police purposes. Parts of the buildings were also used for holding county & committee meetings, & various other occasional purposes, but no rent or profit was received or made in respect of the buildings or any part of them:—*Held*: income tax was not payable in respect of the buildings under Schedules A. & B. of Income Tax Acts, 1842 (c. 35), 1853 (c. 34).—**COOMBER v. BERKS JJ. (1883), 9 App. Cas. 61; 53 L. J. Q. B. 239; 50 L. T. 405; 48 J. P. 421; 32 W. R. 525; 2 Tax Cas. 1, H. L.**

Annotations:—Consd. Bray v. Lancashire JJ. (1889), 22 Q. B. D. 484. Reid. Nicholson v. Holborn Assmt. Com. (1886), 18 Q. B. D. 161; Tunnicliffe v. Birkdale Overseers (1888), 20 Q. B. D. 450; Middlesex County Council v. St. George's Union Assmt. Com., [1897] 1 Q. B. 64; Wixon v. Thomas, Lambert v. Thomas, Burrows v.

exemption for buildings belonging to it used as a library, museum, etc., for the purposes of the College.—SULLEY v. ROYAL COLLEGE OF SURGEONS, EDINBURGH (1892), 3 Tax Cas. 173.—SCOT.

PART II. SECT. 4, SUB-SECT. 3.

p. Property in occupation of Crown.]

—A burgh ct. in Scotland is exempt from income tax as being a public ct. of justice occupied for Crown purposes.—**ADAM (EDINBURGH CITY CHAMBERLAIN) v. MAUGHAN (SURVEYOR OF TAXES) (1889), 2 Tax Cas. 541.—**

q. Municipal purposes.]—Neither municipal offices nor corporation baths can be exempted on the ground that they yield no profit & can be used

only for public purposes.—**ADAM (EDINBURGH CITY CHAMBERLAIN) v. MAUGHAN (SURVEYOR OF TAXES) (1889), 2 Tax Cas. 541.—SCOT.**

r. ———.]—The parts of the premises occupied for municipal purposes & as private offices are liable to assessment under Schedule A., & the occasional use of a county hall as a Ct. of Justice gives no title to relief.—**BROWN (SURVEYOR OF TAXES) v. SMITH (1901), 4 Tax Cas. 435.—SCOT.**

t. ———.]—The public sewerage system constructed & maintained by a local authority comprised sewers, consisting solely of pipes for the conveyance of sewage, & sewage works, consisting of tanks, channels, filters, etc., through which the sewage passes for purification on its way to the out-

falls. The sewage works were not a source of profit:—*Held*: works for the disposal or treatment of sewage are not within the definition of "sewer" in Finance Act, 1921, s. 34 (2) & that the exemption granted to the local authority by that sect. in respect of sewers maintained by it did not extend to sewage purification works.—**SUMMERS (INSPECTOR OF TAXES) v. RENFREW UPPER DISTRICT COUNTY COUNCIL (1924), 9 Tax Cas. 216.—SCOT.**

70. Capital.]—**SECRETARY OF STATE IN COUNCIL OF INDIA v. SCOBLE, No. 337, post.**

Fines on renewal of leases applied as productive capital—Money deposited at bank.]—See No. 48, ante.

SECT. 5.—PERSONS DIRECTLY CHARGEABLE.

See 1918 Act, s. 164; Schedule A., No. VII.

71. Occupier—Superintendent of police—House within boundary of police station.]—Applt., a superintendent of police, lived with his family in a house within the boundary of a police station which included other buildings used for the purposes of the police district. There was a yard to the house, & a wall which divided applt.'s premises from the remainder of the police station, to which a door in the wall afforded access. The front entrance of the house faced the street. Applt. kept the keys of the house, which he had himself furnished, & for the use of which a deduction was made from his salary. He was compelled to live in the house, as that was necessary for the discharge of his official duties; the house was liable to be used for such purposes connected with the police force as the chief constable might direct; & applt. was liable to be removed from station to station at any time:—*Held*: applt. had not such an occupation of the house as to render him liable to pay income tax or inhabited house duty in respect of it.—**BENT v. ROBERTS (1877), 3 Ex. D. 66; 47 L. J. Q. B. 112; 37 L. T. 673; 26 W. R. 128; 1 Tax Cas. 199.**

Annotations:—Consd. Sutton's Hospital in Charterhouse v. Elliott, [1922] 2 K. B. 1. Reid. Coomber v. Berks JJ. (1882), 9 Q. B. D. 17; Bradford Grammar School v. Northwood (1905), 5 Tax Cas. 124.

72. ——— Assize court & police station—Vested in clerk of the peace.]—COOMBER v. BERKS JJ., No. 69, ante.

73. Arrears accrued before occupation—While premises unoccupied.]—On Apr. 22, 1897, a lease was granted to pltf. of premises, beginning Dec. 25, 1896, for sixty years at £65 a year rent. The rent was to be paid quarterly, the first payment being payable on Sept. 29, 1897. He did not take possession, until Apr. 1897, & for several years before he entered, the premises had been unoccupied. An assessment for income tax of £9 3s. 4d. was made for the year Apr. 1896 to Apr. 1897. In Aug. & again in Sept. 1897 demands were made for payment, & as pltf. refused to pay, on Nov. 17 a distraint was put in. The present action was then commenced against deft., a duly appointed collector for the purpose of the Income

PART II. SECT. 5.

a. Income Tax Act, 1842 (c. 35), s. 163—Inapplicable to an association.]—**CURTIS v. OLD MONKLAND CONSERVATIVE ASSOCN. (1905), 8 F. (Ct. of Sess.) 9; 43 Sc. L. R. 119; 13 S. L. T. 649 H. L.—SCOT.**

Tax Acts, for wrongful distress:—*Held*:—this was a lawful entry, & no action would lie, as it was covered by Income Tax Act, 1842 (c. 35), s. 70.—*READING v. CHEW* (1898), 78 L. T. 681; 14 T. L. R. 468; 42 Sol. Jo. 593; 3 Tax Cas. 625.

74. — Land farmed for part of year.]—Resps. who were wholesale potato merchants & potato salesmen carrying on business in London, owned land on which they grew potatoes, & also hired land under ordinary tenancy agreements for the same purposes. They also grew potatoes on land in Lincolnshire which they hired from neighbouring farmers under special agreements, the land so hired being changed each season. Under those special agreements, by which the land was purported to be let to resps., resps. had possession of the land until the potatoes were fully ripe, which in some cases was more than a year from the date of the agreement & in others was less than a year. The landlord under the agreement had to plough the land, do all the carting & provide all the horse labour that was necessary. Resps. supplied all the seed, artificial manure, & the manual labour necessary to drill the manure, plant the seed, take up & pit the potatoes & afterwards prepare them for market. The landlord was paid £3 per acre as rent for the land, & £15 per acre for supplying all horse labour, etc., which sum also included all rates & taxes. The landlord, was & the resps. were not, assessed to income tax under Schedule B. in respect of those lands. Resps. sold the potatoes, which they had grown in the course of their business as potato salesmen. They were assessed in London to income tax under Schedule D. on the profits of their business as potato merchants & salesmen, & the profits they made from the sale of potatoes grown on the

lands under those special agreements were included in that assessment:—*Held*: (1) resps. had the use of the lands on which they grew potatoes under the special agreements in a full sense of the term, with full power to maintain their rights, & must therefore be deemed to be occupiers within Rules applicable to Schedule A., No. VII., r. 2; (2) the fact that the “landlord” had been assessed & charged to income tax under Schedule B. in respect of the occupation of the lands did not conclude the matter against resps., as there might under Schedule B. be two persons who were chargeable as occupiers in respect of the same lands; (3) resps. were assessable in respect of the profits arising from the occupation of the lands in question under Schedule B. & not under Schedule D.

Where there is a separate & distinct operation unconnected with the occupation of the land, such as a cheese factory dealing with the milk of a dairy farm, or a butcher's shop dealing with the beasts of a cattle farm, there may be a separate assessment of that operation; but the fact that the farmer sells his produce either on the farm or at a local market, or at Mark Lane, or even that he sells it in a shop, does not justify an assessment under Schedule D. as well as or in substitution for Schedule B.—*BACK v. DANIELS*, [1925] 1 K. B. 526; 94 L. J. K. B. 304; 132 L. T. 455; 41 T. L. R. 162; 69 Sol. Jo. 160; 9 Tax Cas. 183, C. A.

SECT. 6.—RIGHT OF PERSONS PAYING TAX TO RECOUPMENT.

Tax paid by tenant.]—*See* LANDLORD & TENANT.
Tax paid by mortgagor.]—*See* MORTGAGE.

Part III.—Schedule B.

75. Premises liable—Premises in occupation of Crown—Assize courts & police station.]—*COOMBER v. BERKS JJ.*, No. 69, *ante*.

“Assessable value.”—*See* 1922 Act, s. 23.

Exemptions—Lands occupied by charity.]—*See* 1921 Act, s. 30.

76. Profits liable—Farm profits—Stallion's fees.]—*MALCOLM v. LOCKHART*, No. 118, *post*.

77. — Poultry farm.]—Where poultry are kept for the purpose of the production & the sale of eggs, & where the poultry derive sustenance to a material extent from the produce of the ground & from the insects & materials therein, the profits are to be treated as the profits of husbandry & the poultry farmer is entitled to be assessed to income tax under Schedule B. instead of Schedule D.—*JONES v. NUTTALL* (1926), 1 T. L. R. 384.

78. “Occupier” — A question of fact.]—

Applt., who had been assessed to income tax under Schedule B. for the year ended Apr. 5, 1921, as the occupier of a certain farm, appealed against the assessment on the ground that he was not the sole occupier of the farm, but occupied it jointly with his three sons & daughter, & that the assessment should have been made in their joint names. On appeal before the general comrs. applt. stated that, prior to the tenancy of the present farm, he had occupied another farm in partnership with two of his sons, & that those sons were named in the agreement relating to that tenancy (the agreement was not produced in evidence); stated that he alone was the rated occupier of the present farm; produced the agreement of tenancy of the present farm, which had been entered into between the landlord & applt. alone, & stated that the sons were not mentioned therein owing to their absence on military service;

PART II. SECT. 6.

b. Maintenance—Exceeding statutory allowance—Limited to estate concerned.]—

—A property-owner claimed relief in respect of the excess cost of maintenance, etc., of one of his estates on

a years' average over the fixed allowances for repairs made

Schedule A. assessments on the He claimed that he was to repayment of tax on the by which the excess of maintenance, exceeded the net annual the estate:—*Held*: the relief

of No. V., Schedule A., was limited to

repayment of the amount of income tax paid by him under Schedule A. assessments on the estate concerned.—*CROMPTON (INSPECTOR OF TAXES) v. CAMPBELL* (1924), 9 Tax Cas. 224; [1925] S. C. 124.—*SCOT*.

PART III.

c. Profits liable—Farm profits.]—A person who carried on business as a seedsman & occupied a farm in connection with that business for producing seeds, claimed, under s. 6 & 6 Viot. c. 35, s. 101, to set his losses on the farm against his profits on the seedsman's business, & to be assessed

for income tax on the balance only:—*Held*: he was not entitled to do so, the assessment on the farm being, according to the rules of Schedule B., on the rent, while the assessment on the profits of his business was regulated by Schedule D.—*BROWN v. WATT* (1886), 13 R. (Ct. of Sess.) 598; 23 Sc. L. R. 403.—*SCOT*.

d. — — —.]—A tenant of a farm under a grazing lease is also the lessee under another lease, applicable to the same period, of the landlord's shooting rights over such farm:—*Held*: as occupier under both leases he is assessable under Schedule B. upon

produced an agreement dated Dec. 1920, purporting to be an agreement of partnership in the farming business between applt., his three sons & daughter; & insurance policy dated Dec. 1920, which all the parties named in the deed dated Dec. 1920, were named as principals. The general conclusion of opinion that no partnership in fact existed during the year of assessment; that the terms of the deed dated Dec. 1920, were inconsistent with the existence of an actual partnership; & that applt. was the sole occupier of the farm & that the assessment had been correctly made in his name; & they accordingly confirmed the assessment:—*Held*: the determination of the comrs. was a conclusion of fact, & as there was evidence upon which they could properly reach that conclusion, the ct. was not entitled to review that determination.—*HAWKER v. COMPTON* (1922), 8 Tax Cas. 306.

79. — Construction of agreement.]—*BACK v. DANIELS*, No. 74, *ante*.

Allowances—For wear & tear.]—See 1925 Act, s. 16.

80. Right of appeal—Owner of tithe rentcharge.—Annual value reduced below two-thirds of tithe rentcharge.]—Tithe Act, 1891 (c. 8), s. 8 (3), which gives the owner of tithe rentcharge the same right of appeal as the owner of lands, gives a right of appeal to the owner of the tithe rentcharge where the assessment on land made by the surveyor for the purpose of Income Tax Act, 1853 (c. 34), Sched. B., has been reduced by the comrs., on appeal by the occupier of the land, to such an extent that the tithe rentcharge exceeds two thirds of the annual value of the land, as ascertained by the assessment, in consequence of which so much of the tithe rentcharge as is equal to the excess is liable to be remitted under sub-sect. 1. —*R. v. BARSTAPLE DIVISION OF ESSEX TAXES COMRS.*, [1895] 2 Q. B. 123; 64 L. J. Q. B. 759; 72 L. T. 800; 59 J. P. 470; 43 W. R. 666; 11 T. L. R. 427; *sub nom.* *R. v. BARSTABLE DIVISION OF ESSEX TAXES COMRS.*, *Ex p. GIBSON*, 15 R. 471, D. C.

81. — From decision of commissioners on question of fact.]—*HAWKER v. COMPTON*, No. 78, *ante*.

82. Effect of election to be assessed under Schedule D.—Application for certificate of annual value under Tithe Act, 1891 (c. 8)—Right of commissioners to assess under Schedule B.]—An owner-occupier of agricultural land had exercised the option given by Customs & Inland Revenue

Act, 1887 (c. 15), s. 18, to be assessed for & income tax purposes under Schedule D. of Schedule B. He subsequently applied Tithe Act, 1891 (c. 8), s. 8 (5), for a certificate of the district comrs. of taxes of the annual value of his land. The comrs. declined to give certificate unless applt. first consented to his land assessed for the purposes of Schedule under sub-sect. 4 of the last-mentioned Act

to be granted under Act, 1887 (c. 15), s. 18, only applied to of land that sect., & that sect. referred to assessments ascertained & entered under Schedule B. or, if not already so entered, to assessments ascertained for the purposes of the said Schedule under sub-sect. 4; & no assessment under Schedule D. was made applicable for the purpose of remission of tithe rentcharge under this section.—*R. v. PETERSFIELD DIVISION OF HANTS T COMRS.*, *Ex p. WOODS* (1893), 63 L. J. Q. B. 3 D. C.

See Customs & Inland Revenue Act, 1887 (c. 15), s. 18; Tithe Act, 1891 (c. 8), s. 8 (5), Schedule r. 5.

83. Claim to relief — As joint tenants Limited to partners.]—A farm was let to a father & his four sons as joint tenants. The father was assessed to income tax under Schedule B. in respect of the farm as the occupier, & the deductions & reliefs to which he was personally entitled were duly allowed against the assessment. The tax under the assessment was paid by the father & the four sons by five several & equal payments. The father appealed against the assessment on the ground that there was a partnership between himself & his four sons & that the five of them should be assessed as joint occupiers, but the General Comrs. dismissed the appeal. One of the sons then contended that, notwithstanding that there might be no partnership, he was as a joint tenant of the farm entitled to treat one-fifth share of the Schedule B. assessment as his income & to claim relief in respect of his personal allowance by way of repayment of the tax paid on that share. The General Comrs. decided that the matter was concluded by their decision on the father's appeal, & that the son had no title to payment:—*Held*: although the son was a joint tenant of the property, he was not entitled under 1918 Act, s. 20, to any repayment in respect of the tax paid thereon under Schedule B., inasmuch as he was not a partner in joint occupation of the land.—*McKIE v. LUCK* (1925), 9 Tax Cas. 511.

the aggregate of the two rents reserved.—*REVELL (SURVEYOR OF TAXES) v. SCOTT* (1895), 3 Tax Cas. 403.—*SCOT*.

e. — — —.]—Lands occupied for grazing sheep are occupied for purposes of husbandry within Finance Act, 1918, s. 21, & accordingly the occupier is in respect of his occupation assessable to income tax under Schedule B. on twice the annual value of the lands.—*KEIR v. GILLESPIE*, [1920] S. C. 67; [1920] 2 S. L. T. 256; 57 Sc. L. R. 73.—*SCOT*.

f. "Occupier" — Lessor of sporting rights.]—A. having been assessed for income tax under Schedule B. as occupier of the farms & grazings claimed that the assessments should be reduced by the amount of the rent which he received from letting the shootings & fishings:—*Held*: A. had not divested himself of the position

of occupier of the lands & shootings under the lease, & was not entitled to the reduction.—*INLAND REVENUE v. ANDERSON*, [1922] S. C. 284; 59 Sc. L. R. 262; [1922] S. L. T. 267.—*SCOT*.

g. Basis of assessment.]—The basis of the assessment under Schedule B. on a deer forest is the value chargeable under Schedule A.—*Re MIDDLETON* (1876), 1 Tax Cas. 109.—*SCOT*.

h. Effect of election to be assessed under Schedule D.]—An industrial society is entitled to elect to be assessed under Schedule D. in lieu of under Schedule B., & the effect of this election is not to confer upon the society exemption from the charge to tax, but to make them assessable as under Schedule D. in respect of the profits derived from the occupation of

the lands.—*TRANENT CO-OPERATIVE SOCIETY, LTD. v. BROWN* (1921), Tax Cas. 1.—*SCOT*.

k. Claim to relief — Income Act, 1918, Schedules A. & B.]—agreement between the Minister of Munitions & a gas co. provided that if the Govt. leased from the gas co. site at a nominal rent, the Govt. would pay or indemnify the gas co. against all taxes payable in respect of the plant:—*Held*: the Govt. was bound to indemnify the co. against income tax paid by the co. on interest received by them from Govt. in respect that the expression "in respect of the said plant" was inappropriate to income tax which is a tax upon persons & not upon property.—*EDINBURGH MAGISTRATE LORD ADVOCATE*, [1923] S. C. 11 *SCOT*.

Part IV.—Schedule C.

84. Annuity—Payments partly capital & partly income.]—*SECRETARY OF STATE IN COUNCIL OF INDIA v. SCOBLE*, No. 337, *post*.

85. ———.]—*EAST INDIAN RY. CO. v. SECRETARY OF STATE IN COUNCIL OF INDIA*, No. 338, *post*.

86. Deduction of tax after resolution of House

of Commons—Before Finance Act for the year passed.]—*BOWLES v. BANK OF ENGLAND*, No. 578, *post*.

Savings bank.]—See 1918 Act, s. 39 (3) (a).

Securities vested in custodian or administrator of enemy property.]—See 1925 Act, s. 20.

Part V.—Schedule D.

SECT. 1.—APPLICATION OF SCHEDULE—PROFITS OR GAINS.

SUB-SECT. 1.—IN GENERAL.

87. Annual value of house—Occupied by virtue of employment.]—Applt. was agent at M. for the Bank of Scotland & had an income in money, from all sources, of £374. He occupied rent free a house forming part of the bank buildings, which was of annual value of £50. It was part of his duty as agent to occupy the house, & he could not let it, or vacate it even for a time, without the consent of the directors. Upon ceasing to hold the appointment of the agent he would have been obliged to give up the house at once. The house was suitable for a residence, & if it had not been provided he would have required another house of the same value. He claimed an abatement of income tax under Customs & Inland Revenue Act, 1876 (c. 16), s. 8, on the ground that his income from all sources was under £400:—*Held*: the annual value of the house was not “profits & gains” within Income Tax Act, 1842 (c. 35), Sched. D., nor “perquisites, profits, or emoluments” within Sched. E. & could not be reckoned as part of his income, & he was entitled to the abatement claimed.

A person is chargeable for income tax under Schedule D., as well as under Schedule E., not on what saves his pocket, but on what goes into his pocket (*LORD MACNAGHTEN*).—*TENNANT v. SMITH*, [1892] A. C. 150; 61 L. J. P. C. 11; 66 L. T. 327; 56 J. P. 596; 8 T. L. R. 434; 3 Tax Cas. 158, H. L.

Annotations:—*Consd.* *M'Dougall v. Sutherland* (1894), 3 Tax Cas. 261. *Distd.* *Hartland v. Diggins*, [1924] 2 K. B. 168. *Consd.* *Cordy v. Gordon*, [1925] 2 K. B. 276. *Refd.* *A.-G. v. Beech*, [1898] 2 Q. B. 147; *Herbert v. McQuade*, [1901] 2 K. B. 761; *Carlisle & Silloth Golf Club v. Smith*, [1913] 3 K. B. 75; *I. R. Comrs. v. Blott*, *Same v. Greenwood*, [1920] 2 K. B. 657; *G. W. Ry. v. Bator*, [1922] 2 A. C. 1; *Pool v. Guardian Investment Trust Co.*, [1922] 1 K. B. 347; *Colville v. I. R. Comrs.* (1923), 8 Tax Cas. 442; *I. R. Comrs. v. Wemyss* (1924), 8 Tax Cas. 551. *Mentd.* *A.-G. v. Eastbourne Corpn.*, [1902] 1 K. B. 403; *A.-G. v. Selborne*, [1902] 1 K. B. 388; *Northumberland v. I. R. Comrs.*, [1911] 2 K. B. 343.

88. Profits made by trustee for creditors—Though applicable in payment of creditors.]—By an indenture of sub-lease a firm of worsted spinners demised a part of their business premises together with steam power to be generated by them. They subsequently executed a deed of

assignment for the benefit of their creditors empowering the trustee, with the consent of the committee of inspection, to carry on the business. The trustee continued to occupy the portion of the premises which the debtors had occupied for the purpose of winding up their business & continued to supply motive power to the sub-lessee in accordance with the sub-lease & a fresh sub-lease afterwards granted & the amount received by the trustee in respect of the power exceeded the cost of supplying it:—*Held*: the difference between the cost of supplying the power & the payment received for it, was a profit assessable under Income Tax Act, 1842 (c. 35), s. 100, sched. D., although the money was to be applied in payment of the creditors under the deed of assignment.—*ARMITAGE v. MOORE*, [1900] 2 Q. B. 363; 69 L. J. Q. B. 614; 82 L. T. 618; 44 Sol. Jo. 468; 4 Tax Cas. 199, D. C.

89. Surplus on investments—Money sent abroad for investment—Excess over original sum remitted to United Kingdom.]—*SCOTTISH PROVIDENT INSTITUTION v. ALLAN*, No. 426, *post*.

90. Green fees taken by golf club—From non-members.]—(1) Appls., an ordinary members' golf club, acquired land under a lease from a railway co. & laid out a golf course & erected a club house thereon. In addition to the members of the club, who were entitled on payment of an annual subscription to play on the links & to other privileges for the current year, a considerable number of visitors were permitted to use the club premises & to play on the links in accordance with a provision contained in the lease which required the club to allow such visitors to play on payment of certain green fees. The total annual expenditure incurred by the club in maintaining the links in a proper condition for play exceeded the total amount of fees received from visitors:—*Held*: appls. were carrying on an enterprise which was beyond the scope of the ordinary functions of the club, & as to which separate accounts might be kept so as to ascertain whether there were any profits, & any profits derived from the visitors' green fees were therefore taxable under Income Tax Act, 1842 (c. 35), Sched. D.

The adventure of maintaining golf links & charging for the use of them is an “adventure or concern in the nature of trade.” If other conditions therefore are satisfied, the club are, I think,

PART IV.

the allocation of, representing the the sale of five per cent. was made by the Revenue for the pay-

ment of income tax accrued in respect of the income of the fund:—*Held*: the deduction of income tax before distribution of the fund amongst the persons entitled would be a contravention of the terms upon which the five per cent. War Loan was issued, & the

proper procedure was to distribute the entire balance without deduction in respect of income tax, leaving it to the Comrs. of Inland Revenue to recover the tax, if any, payable by the persons entitled to the fund.—*COX v. MURRAY*, [1919] 1 I. R. 358.—*IR*.

Sect. 1.—Application of schedule—Profits or gains:
Sub-sect. 1.]

assessable under the first rule of Schedule D. But, as I have already said, it is, I think, unnecessary to determine whether that is so or not, for if it were not a "concern in the nature of trade" yet other things being satisfied the club would be assessable under the sixth rule (BUCKLEY, L.J.)

The . . . club is not in a position to assert that its receipts from visitors, not being members of the club, cannot constitute annual "profits & gains" in respect of which income tax is assessable (KENNEDY, L.J.).

(2) The comrs. for the general purposes of the income tax had decided that the club was liable to assessment in respect of visitors' green fees, less such proportion of the annual outlay in maintaining & keeping up the links & club-house as the visitors' contributions bore to the entire annual income of the club or fund available for the maintenance & upkeep:—*Held*: the method of arriving at the amount of the taxable profits adopted by the comrs. was wrong, & in default of agreement the case must go back to them to ascertain the amount of taxable income received by the club.—CARLISLE & SILLOTH GOLF CLUB v. SMITH, [1913] 3 K. B. 75; 82 L. J. K. B. 837; 108 L. T. 785; 29 T. L. R. 508; 57 Sol. Jo. 532; 11 L. G. R. 710; 6 Tax Cas. 198, C. A.

Annotations:—As to (1) Apprvd. Coman v. Rotunda Hospital, Dublin, [1921] 1 A. C. 1. Refd. Malcolm v. Lockhart (1919), 7 Tax Cas. 99; McLaughlin v. Bailey (1920), 7 Tax Cas. 508; Brighton College v. Marriott, [1925] 1 K. B. 312.

91. Trade association—Providing accommodation for members & subscribing non-members—Profits made from members.]—A trade assocn. which provided a market, newsroom, & other facilities for its members, & for non-members who were subscribers, was held to be carrying on a business & to be liable to assessment under Schedule D., Case I., on the profits of what its members paid to it.—LIVERPOOL CORN TRADE ASSOCN., LTD. v. MONKS (1926), 42 T. L. R. 393.

92. Profit on speculation—Isolated transaction—Whether in operation of company's business.]—A co. carrying on business as coal merchants, ship

& insurance brokers, & as sole selling agent for various colliery cos., in which latter capacity it is part of its duty to purchase wagons on behalf of its clients, makes a purchase of wagons on its own account as a speculation & subsequently disposes of them at a profit. It was contended that, this transaction being an isolated one, the profit was in the nature of a capital profit on the sale of an investment & should be excluded in computing the liability of the co. to income tax:—*Held*: the profit realised on this transaction was made in the operation of the co.'s business & was properly included in the computation of the co.'s profits for assessment under Schedule D.—BEYNON & Co., LTD. v. OGG (1918), 7 Tax Cas. 125.

93. ———.]—A co., which was incorporated on Feb. 24, 1917, with a capital of £30,000, purchased certain patents under an agreement, dated Mar. 6, 1917, & was assessed to income tax in respect of sums received by way of purchase price under various agreements by which the co. had sold the rights of working the patent to companies in America, France & Japan. The objects for which the co. in its memorandum of assocn. was stated to be formed did not include the carrying on the business of the buying & selling of patents & patent rights. The co. appealed against the assessments on the ground that the patents acquired were capital assets & that the result of the sale of the patents was to replace one set of capital assets by other capital assets, & that the sums received in respect of the sale of the patents were realisations of capital & were not profits or gains of its trade or business. The Crown contended that the co. had carried on the trade of acquiring, disposing of, & otherwise turning to account inventions, patents, & the like under the powers contained in its memorandum of assocn. & that the sums received for the patents were consequently profits or gains of the co.'s trade or business:—*Held*:—there was ample evidence for the findings of the comrs., which amounted in fact to a conclusion that the trade or business in question was not carried on but that the co. was formed to acquire these patents as its one capital asset.—COLLINS v. FIRTH BREARLEY STAINLESS STEEL SYNDICATE, LTD

PART V. SECT. 1, SUB-SECT. 1.

92 i. Profit on speculation—Isolated transaction—Whether in operation of company's business.]—Where the owner of an investment realises it, & obtains a higher price than he originally gave for it, the enhanced price is not "profit" within Income Tax Acts (Victoria); but where a co. was formed to hold & nurse the assets of certain banks which were in liquidation, & to sell the securities at a profit when an occasion presented itself:—*Held*: such co. was a trading co., & the surplus realised by it from selling the assets at enhanced prices was taxable as profit.—TAXES COMR. v. MELBOURNE TRUSTS, LTD. (1914), 84 L. J. P. C. 21.—AUS.

92 ii. ———.]—C. co. with a capital of £28,000 expended £24,000 in the purchase of a mining property & £4,000 in its development. Thereafter it sold the property for £300,000 to F. co., the price to be payable wholly by F. co. transferring 300,000 of its 400,000 £1 shares fully paid to C. co. C. co. having been assessed for income tax under Schedule D. on profit arising from the transaction, C. co. appealed contending that the co. had had no income & that the sale was truly a transaction by which the co. substituted for its capital in the form of land a capital in the form of shares:—*Held*: having regard to the various

branches of business for which C. co. was formed the transaction was a sale in the line of the co.'s business, resulting in a profit liable to income tax under Schedule D., & not a mere change in the mode of investment of C. co.'s capital.—CALIFORNIAN COPPER SYNDICATE, LTD. & REDUCED v. INLAND REVENUE (1904), 6 F. (Ct. of Sess.) 894.—SCOT.

m. ——— Outside ordinary course of business.]—A merchant & shipowner undertook as a venture outside the ordinary course of his business certain salvage operations which resulted in a profit:—*Held*: this profit constituted not receipts or accruals of a capital nature, but revenue derived from capital productively employed, & therefore, income liable to normal tax & super tax.—STEPHAN v. INLAND REVENUE COMRS. (1919), W. L. D. 1.—S. AF.

n. ——— Insurance co. in the course of its business derived profits from the realisation of investments at a larger price than was paid for them:—Held: the profits were chargeable with income tax.—NORTHERN ASSURANCE Co. v. RUSSELL (SURVEYOR OF TAXES) (1889), 2 Tax Cas. 551.—SCOT.

o. ———.]—Where a gain is made by a co. by realising an investment at a larger price than was paid for it the difference is to be reckoned among the

profits & games of the co.—SCOTTISH UNION & NATIONAL INSURANCE Co. v. INLAND REVENUE (1889), 16 R. (Ct. of Sess.) 461; 26 Sc. L. R. 330.—SCOT.

p. ———.]—An investment trust co. took powers in its memorandum of assocn. to vary its investments generally to sell or exchange any of its assets:—*Held*: the net gain by realising investments at larger price than were paid for them constitute profit chargeable with income tax.—SCOTTISH INVESTMENT TRUST Co. v. FORBES (1893), 3 Tax Cas. 231.—SCOT.

q. ———.]—A co., formed of several contributories of a banking co. which was in liquidation, acquired from the liquidator the outstanding assets of the bank, including sums expected to be recovered from estates of contributories, paying therefore sum sufficient to enable the liquidator to discharge the liabilities of the bank. From time to time the co. sold portions of these assets at prices exceeding the values at which they were "estimated" in the books of the liquidators:—*Held*: the above facts did not show that profits realised were "profits" within Income Tax Acts, liable to assessment.—ASSETS Co., LTD. v. FORBES (SURVEYOR OF TAXES) (1896), 61 J. P. 616; 3 Tax Cas. 542.—SCOT.

r. ———.]—Co. formed with 1

(1925), 133 L. T. 616; 69 Sol. Jo. 695; 9 Tax Cas. 520, O. A.

Compare Nos. 113, 114, *post*, & Part XI., Sect. 3, sub-sect. 2, B., *post*.

94. Loans to governing director of "one man" company.]—INLAND REVENUE COMRS. *v.* SANSOM, No. 612, *post*.

95. Bonus dividend—Whether capital or income.]—Resp. co. held shares in the Union Pacific Railroad Co., an American co., which in 1914 declared out of its accumulated profits an extra dividend upon its common capital stock, this dividend consisting partly of cash & partly of shares of the Baltimore & Ohio Railroad Co., in which co. part of its reserves were invested. Resps. duly received their proportion of this dividend in cash & shares, & in July, 1915, sold the shares for £1,086 19s. 9d., that amount being credited in their books to capital account. Having been assessed to income tax in respect of the amount realised by the shares, resps. appealed to the general comrs. who discharged the assessment, holding that the distribution of the assets in question was a distribution by the Union Pacific Co. of capital & not income:—*Held*: the distribution was not of capital but of profits or gains, & consequently the sum in question was liable to income tax.—POOL *v.* GUARDIAN INVESTMENT TRUST CO., [1922] 1 K. B. 347; 91 L. J. K. B. 242; 126 L. T. 540; 38 T. L. R. 177; 8 Tax Cas. 167.

—.]—*Compare* Part XI., Sect. 3, sub-sect. 2, B., *post*; & *see, generally*, COMPANIES, Vol. IX., pp. 596, 597.

96. Annual payment in respect of patents—Distinguished from purchase-money payable by instalments.]—Applt. co. had been incorporated under the name of L. & co. under which name it had acquired certain patents & knowledge of certain secret processes. In Nov. 1916, L. & co. entered into an agreement with an American co. by which each co. undertook to communicate to the other all such information as they then possessed or controlled in connection with the manufacture of dyes & certain other products. The agreement provided that L. & co. should have exclusive rights for the use, manufacture, & sale under its own & the American co.'s patented

inventions & secret processes throughout Great Britain, Ireland, India, & certain countries in Europe, & in all British possessions except Canada, & non-exclusive rights in Canada & all countries except those for which the American co. was to have exclusive rights; while the American co. was to have exclusive rights for the use, manufacture, & sale under its own & L. & co.'s patented inventions & secret processes throughout America & non-exclusive rights throughout all other countries except those for which L. & co. were to have exclusive rights. It was a term of this agreement that the American co. should pay, subject to certain conditions, to L. & co. £25,000 in each of the ten years from July 1, 1917, to July 1, 1927.

In arriving at the profits of applt. co. for excess profits duty purposes, the several sums of £25,000 falling due in the periods covered by the assessments, were included. Applt. co. contended before the Special Comrs. that on the true construction of the agreement the transaction was a sale by the co. to the American co. of one of its principal capital assets, viz. its special knowledge of secret processes & the right to use these processes & applt. co.'s patents in the territory allotted to the American co. for the sum of £250,000 payable by annual instalments; & that the sums received were the purchase price of a capital asset of applt. co., & not a trading receipt. The Special Comrs. held that the payments were income or business receipts, & were properly included in the assessments. Upon a case stated for the opinion of the ct.:—*Held*: the payments made by the American co. were of the nature of income, & were properly included in the assessments.—BRITISH DYESTUFFS CORPN. (BLACKLEY), LTD. *v.* INLAND REVENUE COMRS. (1923), 129 L. T. 538.

97. Lump-sum compensation for user of patented invention.]—The ct. held that income tax was deductible from a sum awarded by the Royal Commission on Awards to Inventors, it appearing that the sum in question was in fact the aggregate of royalties for the user by the Crown of a patented invention & not a capitalised sum in lieu of royalties.—CONSTANTINESCO *v.* R. (1926), 42 T. L. R. 383.

98. Compensation for loss of office.]—Resps.,

object of acquiring estates in the Malay Peninsula & developing them by planting & cultivating rubber trees. Power was taken in the memorandum of Assocn. to sell the property & such a sale was contemplated in the prospectus of the co. The original capital being insufficient to develop the estates purchased, the whole of the undertaking was sold to a second co. for a consideration in excess of the capital expended:—*Held*: the profit on the sale was not a profit assessable to income tax, but was an appreciation of capital.—TEBRAU (JOHORE) RUBBER SYNDICATE, LTD. *v.* FARMER (SUR-YOR OF TAXES) (1910), 5 Tax Cas. 1.—SCOT.

t. —.]—Resps. were a co. formed to acquire mining claims, to purchase or lease other mining property, plant, or mining facilities, & to carry on mining operations for gold & other minerals. Resps. sold all their mining property & went into voluntary liquidation:—*Held*: the profit realised by resps. on the sale of their assets was not taxable as resps.' income.—TAXES COMR. *v.* BOOYENS ESTATES, LTD., [1918] App. D. 576.—S. AF.

accumulated directors of a co. which declare & pay dividends of profits, reserved or un-

reserved, & to hold land as part of the capital of the co., declared dividends out of an accumulated reserve fund, & out of a sum representing profits on the sale of a piece of land which had been held by the co.:—*Held*: both dividends were liable to be assessed for income tax.—INCOME TAX COMR. (QUEENSLAND) *v.* BRISBANE GAS CO. (1907), 5 C. L. R. 96.—AUS.

b. Not confined to trading companies.]—The use of the word "profits" in Income Tax Act, 1903 (No. 1819), s. 9 (1), does not confine the payment of income tax to trading cos. only. *Qu.*: whether the "profits" referred to in the sect. are those from which dividends might legally be declared.—*Re* INCOME TAX ACTS (No. 1 OF 1907), [1907] V. L. R. 185.—AUS.

c. Premiums on shares issued by banking company.]—Premiums received by a banking co. on shares issued by it are not "profits" within Income Tax Act, 1902 (Qd.), s. 31, as amended by Income Tax Amendment Act, 1904, s. 11.—QUEENSLAND INCOME TAX COMR. *v.* BANK OF NEW SOUTH WALES (1913), 16 C. L. R. 504.—AUS.

d. Purchase-money of live stock—On sale of pastoral business.]—A person who carried on business as a pastoralist sold his property, including live stock

& plant, as a going concern. The comr. of taxation made an apportionment of the purchase-money in respect of the live stock, & assessed the vendor on that amount as income derived from carrying on a business:—*Held*: as the transaction was not in the course of carrying on the business or for the purpose of carrying on the business, but was for the purpose of putting an end to the business, neither the purchase money, nor any part of it was taxable.—TAXATION COMR. (WESTERN AUSTRALIA) *v.* NEWMAN (1921), 29 C. L. R. 484.—AUS.

e. Interest earned by society from loans by members.]—Where the capital of a mutual benefit society was made up solely of periodical investments by its members & the income of the society was mainly derived from interest earned on loans given solely by its members, every one of whom was by the rules eligible to take loans:—*Held*: such interest earned by the society from its own members was not taxable profits.—BOARD OF REVENUE *v.* MYLAPORE HINDU PERMANENT FUND, LTD. (1923), 1 L. R. 47 Mad. 1.—IND.

f. Rents of heritable properties.]—In estimating on a profits basis the income of an investment co., whose main revenue was derived from the

Sect. 1.—Application of schedule—Profits or gains:
Sub-sects. 1, 2 & 3.]

a firm of ship managers, were employed in that capacity by a certain steamship co., their remuneration consisting in part of a percentage of the co.'s annual net profits, including interest on its investments, which were considerable.

The co. went into voluntary liquidation in 1918, & in general meeting authorised the liquidator to distribute some £800,000 worth of its investments among the shareholders, & to transfer £50,000 of 5 per cent. National War Bonds to resps. "as compensation for loss of office," the arts of assocn. having been specifically amended to enable this to be done. The said bonds were duly transferred to resps. in Oct. 1918. Subsequently, in pursuance of arrangements already made, the undertaking of the old co., including two ships & its remaining assets, was transferred to a new co. of the same name consisting of the same shareholders. The arts of assocn. of the new co. provided that its first managers should be resp. firm, though there had been no bargain to that effect, & that their remuneration should be on similar lines to that formerly received by them from the old co. In computing resp. firm's liability to income tax & excess profits duty, the said sum of £50,000 was treated as part of the profits arising from their business as ship managers, but, on appeal to the General Comrs., they contended (*inter alia*) that the sum in question was a voluntary payment made to them as compensation for the loss of the profits of their employment under the old co. which had terminated, & that it was not chargeable to income tax or excess profits duty. The General Comrs. decided that it was not a profit liable to income tax or excess profits duty:—*Held*: on the findings of the Comrs. as to the nature of the payment, which there was evidence to support, the said sum of £50,000 was not a profit liable to income tax or excess profits duty.—**CHIBBETT v. ROBINSON (J.) & SONS (1924), 132 L. T. 26; sub nom. CHIBBETT v. ROBINSON (J.) & SONS, INLAND REVENUE COMRS. v. ROBINSON (J.) & SONS, 9 Tax Cas. 48.**

99. Stud fees—Stallions kept primarily for racing establishment.]—A person who keeps a racing & breeding establishment as a hobby, & who also lets out to others the services of his stallions, is liable to pay income tax on the fees received for such services.—**DERBY (EARL) v. BASSOM (1926), 42 T. L. R. 380.**

—.]—*See, also, No. 119, post.*

rents of heritable properties which had been charged to income tax under Schedule A.:—*Held*: the rents of the heritable properties would have fallen to be included in ascertaining the profits chargeable under Schedule D., & accordingly they fell to be included in the estimate.—**ROSYTH BUILDING & ESTATE CO., LTD. v. INLAND REVENUE, [1921] S. C. 372; 58 Sc. L. R. 363.—SCOT.**

g. Profits from seasonal grazings.]—A farmer rented the seasonal grazings of certain grass parks, which he used as an accessory to the farm. He was assessed under Schedule D. in respect of the profits from the grass parks. He appealed against the assessment:—*Held*: he had rightly been assessed under Schedule D., & the comrs., in the absence of any return by him of his profits, were justified in estimating these profits on the basis of the rental of the parks for the year preceding the year of assessment.—**DONALD v. THOMSON, [1922] S. C. 237.**

h. Market value of debentures—Allotted in lieu of unpaid interest in old bonds.]—A trading co. defaulted in payment of coupons representing two years' interest on its 5 per cent. first mtge. bonds. The co. was reconstructed under a scheme which provided for holders of the bonds surrendering them with the coupons attached, & receiving 5 per cent. first mtge. bonds of the same face value in the reconstructed co., together with debentures equal in amount to 10 per cent. of the face value of the surrendered bonds. In the assessment to income tax of an investment co., which had received mtge. bonds & debentures of the reconstructed co. in exchange for its holding of the original bonds & the unpaid coupons, a sum representing 75 per cent. of the face value of the debentures was included in the co.'s profits. In an appeal by the investment co.:—*Held*: the comrs. were entitled to find that the debentures represented the two years' interest on the original bonds, & if the debentures were marketable, a sum

SUB-SECT. 2.—PROFITS OF MUNICIPAL CORPORATIONS AND STATUTORY BODIES.

See Schedule D., 1 (a) ii., Case I.; Rules applicable to Cases I. & II., r. 1.

100. Local coal dues—Surplus income appropriated by statute—To public purposes.]—Under a local Act, improvement comrs. for the town of Brighton were empowered to levy a duty of 6d. upon every chaldron of coal, culm, etc., landed on the beach, or brought into, & consumed within, the town, for the purpose of erecting & maintaining groynes & other works against the encroachments of the sea. By a subsequent Act the duty was continued & increased; & subsequently, by Brighton Town Improvement Act, it was, together with market tolls, & other rates, duties, & assessments, which the said comrs. were empowered to levy, consolidated into a common fund for the general purposes of the Act, which included, in addition to the maintenance of the groynes, etc., the paving, lighting, watching, cleaning, & otherwise improving the town. By Brighton Comrs. Transfer Act, 1855 the said comrs. ceased to act as such, & the corpn. & their successors were appointed comrs. in their stead:—*Held*: the coal duty was a property in respect of which the corpn., who had succeeded to the rights of the comrs., were liable & bound to pay income tax, either as a "hereditament" under schedule A., or as "property or profits" under sched. D. of Income Tax Act, 1842 (c. 33).

Not every kind of income derived by a corpn., in whatever way it may come to them would be included in it [Income Tax Act, 1842 (c. 35), s. 100, sched. D.]. They would not be liable except in respect of something of the same nature & kind as what had been previously mentioned; not, for instance, in respect of a borough rate, a poor rate or a highway rate, because these are not within the analogy of the "property or profit" previously described (**BLACKBURN, J.**).—**A.-G. v. BLACK (1871), L. R. 6 Exch. 308; 40 L. J. Ex. 194; 25 L. T. 207; 19 W. R. 1114; 1 Tax Cas. 54, Ex. Ch.**

Annotations:—**Consd.** **A.-G. v. Scott (1873), 28 L. T. 302; Mersey Docks & Harbour Board v. Lucas (1883), 8 App. Cas. 891; Glasgow Corpn. Water Comrs. v. Miller (1886), 50 J. P. 503; Dublin Corpn. v. M'Adam (1887), 2 Tax Cas. 387. **Appld.** **Sowrey v. King's Lynn Harbour Mooring Comrs. (1887), 2 Tax Cas. 201. **Distd.** **Severn Fishery Board v. O'May, [1919] 2 K. B. 484. **Refd.** **Port of London Authority v. I. R. Comrs. (1919), 121 L. T. 607.********

101. Renewal fines.]—A.-G. v. SCOTT, No. 34, ante.

representing their market value fell to be included in the account of the co.'s profits.—**SCOTTISH & CANADIAN GENERAL INVESTMENT CO. v. EASSON, [1922] S. C. 242.—SCOT.**

k. Repaid excess profits duty.]—A co. which had paid excess profits duty sold its business & ceased to trade. In each of the two succeeding income tax years it received a repayment of a portion of the duty in respect of losses in trading made during its last accounting period. For each of these two years the co. was assessed to income tax on the sum received:—*Held*: the assessments were correct, in respect that the co. was liable to assessment, notwithstanding that it had ceased to trade, & that the sums repaid were to be taken as taxable & ascertained profits for the years in which they were received, & not merely as components of the profits to be ascertained for these years by the ordinary method of average.—**EGGLINTON SILICA BRICK CO., LTD. v. INLAND REVENUE, [1924] S. C. 946.—SCOT.**

102. Market dues, etc.]—A.-G. v. SCOTT, No. 34, *ante*.

103. Court fees.]—A.-G. v. SCOTT, No. 34, *ante*.

104. Dock dues—Surplus income appropriated by statute—To sinking fund.]—A corpn. was constituted for the management of the Mersey Dock Estate by an Act which provided that moneys to be received by them from their dock dues & other sources of revenue should be applied in payment of expenses, interest upon debts, construction of works & management of the estate, & that the surplus should be applied to a sinking fund for the extinguishment of the principal of the debts; & that after such extinguishment the rates should be reduced; & that except as aforesaid the moneys should not be applied for any other purpose whatsoever; & that nothing should affect their liability to parochial or local rates:—*Held*: under the Income Tax Acts the corpn. was liable to income tax in respect of the surplus though applicable to the above purposes only.—MERSEY DOCKS & HARBOUR BOARD v. LUCAS (1883), 8 App. Cas. 891; 53 L. J. Q. B. 4; 49 L. T. 781; 48 J. P. 212; 32 W. R. 34; 2 Tax Cas. 25, H. L.

Annotations:—*Appld.* Paddington Burial Board v. I. R. Comrs. (1884), 13 Q. B. D. 9. *Consd.* Glasgow Corpn. Water Comrs. v. Miller (1886), 50 J. P. 503; Dublin Corpn. v. M'Adam (1887), 2 Tax Cas. 387. *Appld.* Sowrey v. King's Lynn Harbour Mooring Comrs. (1887), 2 Tax Cas. 201. *Consd.* City of Dublin Steam Packet Co. v. O'Brien (1912), 6 Tax Cas. 101. Severn Fishery Board v. O'May, [1919] 2 K. B. 484. *Folld.* Port of London Authority v. I. R. Comrs., [1920] 2 K. B. 612. *Consd.* Coman v. Rotunda Hospital, Dublin, [1921] 1 A. C. 1; Rowntree v. Curtis, [1925] 1 K. B. 328. *Refd.* Last v. London Assce. Corpn. (1885), 10 App. Cas. 438; Clerical, Medical & General Life Assce. Soc. v. Carter (1888), 57 L. J. Q. B. 614; New York Life Insce. v. Styles (1889), 14 App. Cas. 381; Portobello Town Council v. Sulley

(1890), 55 J. P. 9; Dillon v. Haverfordwest Corpn., [1891] 1 Q. B. 575; Harris v. Irvine Corpn. (1900), 65 J. P. 663; Smyth v. Stretton (1904), 90 L. T. 756; Farmer v. Scottish North-American Trust, [1912] A. C. 118; Bruce v. Hatton, [1922] 2 K. B. 206; Brighton College v. Marriott (1925), 42 T. L. R. 228. *Mentd.* A.-G. v. De Préville, [1900] 1 Q. B. 223; Massy v. I. R. Comrs. (1915), [1919] 2 K. B. 354, n.

105. Fees of burial board—Surplus income applied in aid of poor rate.]—A burial board was constituted under Burial Act, 1852 (c. 85), & in pursuance of the Act a burial ground was provided with money charged upon the poor rate of the parish, & the surplus over expenditure of the income derived from the fees charged by the board was regularly applied in aid of the poor rate:—*Held*: the board were liable to be assessed to the income tax in respect of such surplus, inasmuch as the provision requiring it to be applied in aid of the poor rate did not prevent it from being a "profit" within Income Tax Act, 1842 (c. 35).—PADDINGTON BURIAL BOARD v. INLAND REVENUE COMRS. (1884), 13 Q. B. D. 9; 53 L. J. Q. B. 224; 50 L. T. 211; 48 J. P. 311; 32 W. R. 551; 2 Tax Cas. 46, D. C.

Annotations:—*Refd.* Portobello Town Council v. Sulley (1890), 55 J. P. 9; Rotunda Hospital, Dublin v. Coman (1920), 7 Tax Cas. 517.

106. Licenses & fines imposed by fishery board.]—SEVERN FISHERY BOARD v. O'MAY, No. 112, *post*.

107. Rural district council—Supplying water.]—WAKEFIELD RURAL COUNCIL v. HALL, No. 279, *post*.

SUB-SECT. 3.—RESIDENCE.

See Sect. 2, sub-sects. 2 & 3, *post*.

PART V. SECT. 1, SUB SECT. 2.

1071. Rural district council supplying water.]—A rural district council is bound by Act of Parliament to supply water to any ratepayers within its rural district who may make application therefor, & is empowered to collect a special rate from consumers of water so supplied:—*Held*: the profit made by the district council is a profit within Income Tax Acts, & as such is liable to tax.—MULLINGAR RURAL DISTRICT COUNCIL v. ROWLES (1912), 6 Tax Cas. 85.—IR.

l. Supply of water—Beyond area of compulsory supply—Surplus revenue.]—A city corpn. was empowered by its Waterworks Act to supply water beyond the city boundaries. Any income thus arising was to be paid into a consolidated fund available for all the purposes of the Act:—*Held*: the excess of receipts over expenditure in respect of the extra-municipal supply constituted profit chargeable with income tax.—DUBLIN CORPN. v. M'ADAM (SURVEYOR OF TAXES) (1887), 2 Tax Cas. 387.—IR.

m. ———.]—A municipal corpn. was empowered by its Water Acts to supply water beyond the municipal boundaries, & to sell water by contract for trade & other purposes within the area of compulsory supply:—*Held*: the surplus revenue derived from these sources constituted profit assessable to income tax.—GLASGOW WATER COMRS. v. MILLER (SURVEYOR OF TAXES) (1886), 2 Tax Cas. 131.—SCOT.

n. ———.]—The produce a rate or tax for a public purpose is not, in the hands of the local authority by which it is levied, to be by them administered for the benefit of the ratepayer within their administrative area, in the nature of "profits"

for the purposes of the income tax. But where a local authority sells water to authorities outside its own area, the produce or surplus arising from such sale is "profit" for the purposes of the tax. The corporation of I., owning waterworks, entered, pursuant to statutory authority, into agreements with two authorities outside their area for the supply of water to those authorities at a price based on gross rental. The local authorities raised the sums to pay the fixed price by a compulsory rate. The sums so received by the corporation of I. were in part applied to a sinking fund:—*Held*: (1) the surplus of receipts from the local authorities were profits earned by the corporation assessable to income tax; (2) the part applied to the sinking fund was also assessable to the tax.—HARRIS v. IRVINE CORPN. (1900), 65 J. P. 663.—SCOT.

o. ———Money appropriated to sinking fund—Surplus carried forward for reduction of rate.]—The G. Corpn. Water Comrs. were empowered to levy rates to be applied in defraying the current expenses of the water supply & in keeping up the undertaking; in payment of annuities & of interest on borrowed moneys; in providing a sinking fund; & any surplus was to be carried to the next year's account & applied in the reduction of the domestic water rate:—*Held*: neither the money appropriated to the sinking fund nor the surplus carried forward for the reduction of next year's rate was assessable profit.—Re GLASGOW CORPN. WATERWORKS (1875), 1 Tax Cas. 28.—SCOT.

p. ———Within area of compulsory supply.]—Waterworks are liable for profits derived by selling water by meter to barracks within the area of compulsory supply.—ALLAN (SUR-

VEYOR OF TAXES) v. HAMILTON WATERWORKS COMRS. (1887), 51 J. P. 727.—SCOT.

q. Supply of gas—Surplus income—Including sum set apart for sinking fund.]—The G. Corpn. Gas Comrs. were empowered to supply gas to the city & its suburbs. The receipts are to be applied in payment of incidental expenses; in payment of expenses of management & maintenance; in payment of annuities & interest on borrowed moneys; in providing a sinking fund & carrying out extensions; & any surplus might be carried to the credit of the corpn. for general purposes:—*Held*: the surplus, including the sum set apart for sinking fund, was assessable profit.—Re GLASGOW GAS COMRS. (1876), 1 Tax Cas. 122.—SCOT.

r. Profits forming part of the common good of the burgh.]—A corpn. received annual profits forming part of the common good of the burgh. The corpn. contended before the comrs. that these profits did not form a subject for taxation, being applicable to the public purposes of the burgh; & if they were assessable, that the whole expenditure incurred in connection with the common good should be deducted:—*Held*: the assessment must be upheld.—WEBBER v. GLASGOW CORPN. (1893), 3 Tax Cas. 202.—SCOT.

t. Interest on county fund of county council.]—The county fund of a county council was banked in the name of the county treasurer, who was appointed by the council. Interest was allowed on any money from time to time lying to the credit of the fund:—*Held*: the interest was chargeable with income tax & the council was liable to assessment in respect of it.—MATTHEWS (SURVEYOR OF TAXES) v. CORK COUNTY COUNCIL (1910), 5 Tax Cas. 545.—IR.

SECT. 2.—CASE I.—TRADES.

SUB-SECT. 1.—TRADE, MANUFACTURE, ADVENTURE OR CONCERN IN NATURE OF TRADE.

A. In General.

See 1918 Act, s. 237, Sched. D., Case I.

108. Ownership of trading vessel.]—The ownership of trading vessels let to freight is a trade or concern in the nature of trade, within Income Tax Act, 1806 (c. 65). The part owners of such ships are special partners. The ship's husband or managing part owner is bound to make a joint return of the aggregate profits of the concern to the property tax.—*A.-G. v. BORRODAILE* (1814), 1 Price, 148; 145 E. R. 1359.

Annotation :—*Apld. Farrell v. Sunderland S.S. Co.* (1903), 88 L. T. 741.

109. Purchase of coal mine by company from partnership.]—*RYHOPE COAL CO. v. FOYER*, No. 208, *post*.

110. Golf club—Charging visitors for use of links.]—*CARLISLE & SILLOTH GOLF CLUB v. SMITH*, No. 90, *ante*.

111. Trade association—Providing accommodation for members & non-member subscribers.]—*LIVERPOOL CORN TRADE ASSOCN., LTD. v. MONKS*, No. 91, *ante*.

112. Fishery board—Income from licences exceeding cost of administration.]—A fishery board acting under the provisions of Salmon & Freshwater Fisheries Acts, 1861 to 1892, does not carry on a business analogous to a trade, & any balance of the moneys received by it for fishing licences or for penalties recovered from offenders over & above the expenses of maintaining the fishery does not constitute a profit which is assessable to income tax.

The general sweeping up words in Case VI. of Schedule D., wide as they are, must not be treated as including every kind of income from whatever source derived, but must be read as limited to profits analogous to the other taxed forms of income (*ROWLATT, J.*).—*SEVERN FISHERY BOARD v. O'MAY*, [1919] 2 K. B. 484; 89 L. J. K. B. 9; 121 L. T. 371; 7 Tax Cas. 194.

113. Speculation—Contracts for future delivery of cotton.]—A person who speculates in contracts for future delivery of cotton is liable to income tax, Schedule D., Case VI.

It appears that he did engage in trade in the sense in which that is to be understood, & therefore these profits fall to be assessed under Case I. of Schedule D. (*POLLOCK, M.R.*).—*COOPER v. STUBBS*, [1925] 2 K. B. 753; 94 L. J. K. B. 903; 133 L. T. 582; 41 T. L. R. 614; 69 Sol. Jo. 743, C. A.

114. — Retail of wholesale purchase — Commodity outside usual business.]—*Appl.*, who was an agricultural machinery merchant, bought a gigantic consignment of linen & set to work to make people buy it, & he succeeded in selling it within a year by organising a vast activity for that purpose. He was assessed to income tax under Schedule D. on his profits on the sale of the linen, & on appeal to the Special Comrs. he contended that he did not carry on any trade in connection with linen, that the transaction was a gamble, & that the profit was not an annual profit chargeable to income tax. The Special Comrs. held that

in exercising these activities *applt.* was for the time being carrying on a trade the profits of which were chargeable to income tax :—*Held* : there was evidence on which the Special Comrs. could find the transaction to be in the nature of a trade, & that the fact of the profits being the income of a trade & belonging to the year of assessment was enough to make the profits "annual" within Schedule D., Case VI., & the decision of the Special Comrs. must be affirmed.—*MARTIN v. LOWRY, MARTIN v. INLAND REVENUE COMRS.* (1925), 42 T. L. R. 233, C. A.

Compare Nos. 92, 93, ante.

115. Farmer marketing own produce.]—*BACK v. DANIELS*, No. 74, *ante*.

116. Profits from betting—Sole means of livelihood.]—Apart from certain bank deposit interest, an individual's sole means of livelihood was, & had been for many years, betting on horses from his private residence with bookmakers at starting prices only. He was assessed to income tax under Schedule D. in respect of his betting transactions, & the General Comrs., on appeal, confirmed the assessment :—*Held* : his winnings from betting were not profits or gains assessable to income tax, Schedule D., either under Case I. or Case II. as from a trade or vocation, or under Case VI.—*GRAHAM v. GREEN*, [1925] 2 K. B. 37; 94 L. J. K. B. 494; 133 L. T. 367; 41 T. L. R. 371; 69 Sol. Jo. 478; 9 Tax Cas. 309.

117. Not contained in any other schedule — Trade carried on exclusively abroad.]—*COLQUHOUN v. BROOKS*, No. 433, *post*.

118. — Whether arising from occupation of land—Animal kept at stud.]—*Appl.*, the tenant of a farm, elected to be assessed to income tax in respect of the occupation of the lands let to him under Income Tax Act, 1853 (c. 34), Sched. B. He kept a stallion not merely for the service of his own stock on the farm, but for that of mares of other owners at their own farms. In respect of the fees so received the tenant was assessed to income tax under Schedule D. :—*Held* : whether the stallion was kept for the purpose of the farm or for the sake of getting fees for his services from the owners of mares in the neighbourhood, was a question of fact. The comrs. found that the use of the stallion was a use that provided a profit or gain to *applt.* which did not arise from the occupation of this land, & he had rightly been assessed under Schedule D.—*MALCOLM v. LOCKHART*, [1919] A. C. 463; 88 L. J. P. C. 46; 120 L. T. 449; 35 T. L. R. 231; 63 Sol. Jo. 264; 7 Tax Cas. 99, H. L.

Annotations :—*Consd. McLaughlin v. Bailey* (1920), 7 Tax Cas. 508. *Refd. Howden Boiler & Armaments Co. v. Stewart* (1924), 9 Tax Cas. 205.

See, also, No. 99, ante.

119. — Poultry farm.]—*JONES v. NUTTALL*, No. 77, *ante*.

B. Profits arising from Sale of Land.

See Schedule D., 1 (a) ii; Rules applicable to Cases I. & II., r. 1.

120. Company—Chartered company receiving land from Crown—Proceeds of sale applied partly as income.]—*Deft. co.* was incorporated by Royal Charter in the year 1670, a large tract of land in

PART V. SECT. 2, SUB-SECT. 1.—A.

118 i. Not contained in any other schedule—Whether arising from occupation of land—Animal kept at stud.]—The owner & occupier of a farm, which was devoted chiefly to the breeding of racehorses & hunters for sale, possessed two stallions for the service of her own mares, & also received

for the service by those stallions of mares belonging to other owners. All the mares were served on the farm :—*Held* : the profits derived from stallion fees were not profits arising in respect of the occupation of land, but were trade profits assessable to income tax under Schedule D.—*McLAUGHLIN v. BAILEY* (1920), 7 Tax Cas. 508.—*IR.*

PART V. SECT. 2, SUB-SECT. 1.—B

a. Company—Single transaction.]—*Resp. co.* was formed in May, 1902, for the purpose of acquiring 525 acres of the M. Estate. Its memorandum of assocn. empowered it to do so, & to acquire other land, to manage & turn to account the lands acquired as might seem expedient, & to sell any lands

the North West of Canada being granted to it by the Crown with important trading rights. From time to time they sold portions of land which they had acquired as part of the consideration for the surrender of their charter to the Crown on the foundation of the Dominion of Canada; & they distributed the proceeds as dividends among their shareholders. In the year 1903 part of the proceeds of land so sold was used for the purpose of reducing capital. The amount of the balance of the land account for this year was £177,857, & in respect of this sum the question arose whether deft. co. were liable to bring the same into account for the purpose of assessment to income tax:—*Held*: (1) the sum in question could not be regarded as profits or gains derived by deft. co. from carrying on a trade or business; (2) they were not carrying on the trade of selling land, but were doing no more than a private landowner did who was minded to sell from time to time as opportunity offered portions of his property, & therefore the sum in question was not liable to income tax.—*STEVENS v. HUDSON'S BAY CO.* (1909), 101 L. T. 96; 25 T. L. R. 709; *sub nom.* HUDSON'S BAY CO. *v.* STEVENS, 5 Tax Cas. 424, C. A.

Annotations:—As to (1) *Consd.* *Beynon v. Ogg* (1918), 7 Tax Cas. 125; *Cape Brandy Syndicate v. I. R. Comrs.* (1920), 37 T. L. R. 33. *Expld. & Distd.* *Thew v. South West Africa Co.* (1924), 9 Tax Cas. 141. *Refd.* *Tebrau (Johore) Rubber Syndicate v. Farmer* (1910), 5 Tax Cas. 658; *Liverpool & London & Globe Insce. v. Bennett* (1911), 80 L. J. K. B. 1269; *Collins v. Firth-Brearley Stainless Steel Syndicate* (1925), 133 L. T. 616. As to (2) *Consd.* *Hudson's Bay Co. v. Thew* (1919), 89 L. J. K. B. 1215; *Thew v. South West Africa Co.* (1924), 131 L. T. 248. *Refd.* *Beynon v. Ogg* (1918), 7 Tax Cas. 125; *Cape Brandy Syndicate v. I. R. Comrs.* (1920), 37 T. L. R.

121. **Sale of land in developing estate Company formed to realise for original owners.**—Resp. co. was incorporated in 1904 with the primary object of acquiring, managing & developing with a view to ultimate sale, certain lands in British Columbia which were held in trust for various persons who were interested therein either as owners, joint owners or as trustees. Subject to an extraordinary resolution, the co. had power to deal in other lands, but it had not at any time exercised that power. The share capital of the co. was fixed at a nominal amount, solely to facilitate division among the beneficiaries, & was not determined by reference to the value of the lands acquired. All the ordinary shares had been allotted in consideration of the conveyance of the lands to the co., & these shares had been

continuously held by the original allottees, or their representatives. Working capital had been provided by the issue to ordinary shareholders of preference shares for cash. In 1908 the co. created & allotted to persons other than the ordinary shareholders deferred shares in return for services which enhanced the value of the lands:—*Held*: the surplus arising from the sale by the co. of portions of the lands was not the profits of a trade or business, & the function of the co. was merely to realise the capital value of the respective interests in the land under the trust.—*RAND v. ALBERNI LAND CO., LTD.* (1920), 7 Tax Cas. 629.

122. ——— **No appropriation to capital or income.**—Resp. co. was incorporated in England in 1892 under the Co.'s Acts for the objects (*inter alia*) to acquire & purchase certain concessions in German South West Africa & to acquire, hold, prospect, develop, utilise, work & turn to account all or any of the properties comprised in the concessions. Assessments to income tax made upon resp. co. for the year to Apr. 5, 1916, & Apr. 5, 1917, included sums realised as profit on the sale by resp. co. of certain of the lands it had acquired under the concessions. The comrs. found that the acquisition of the lands by resp. co. was part of a broad & multiform scheme for the development of the territory & that the gradual sale of the land was contemplated from the first as part of the scheme of business of resp. co. They considered themselves bound, however, by the decision of the Ct. of Appeal in *Stevens v. Hudson's Bay Co.*, No. 120, *ante*, to hold that the profits of resp. co. from the sales of land were not assessable to income tax as profits or gains derived by it from carrying on its trade or business & they reduced the assessments accordingly. The Crown appealed:—*Held*: as resp. co.'s objects included the turning to account of the land as one of the objects of an adventure with a view to profit, the case was distinguishable from *Stevens v. Hudson's Bay Co.*, No. 120, *ante*, & the profits from the sale of lands could not be excluded from assessment as profits & gains of the co.'s trade.—*THEW v. SOUTH WEST AFRICA CO., LTD.* (1924), 9 Tax Cas. 141, C. A.; *affg.* 131 L. T. 248.

C. Operations of Charities.

See Schedule D., 1 (a) ii; Case I.; Rules applicable to Cases I. & II., r. 1; 1921 Act, s. 30.

123. Asylum—Profits from fees of paying

acquired as the directors might think fit. Immediately the co. was formed it purchased the 525 acres for £26,250, & in the same month sold 4 acres to N. & Co. for £1,000. In Oct. following resp. co. sold the balance of the land, 521 acres, for £78,225, of which sum £15,645 was paid before Mar. 31, 1904; & it was on the profit on the

balance of the purchase money, which fell due between that date & Mar. 31, 1905, that applt. claimed income tax. The co., after it had existed only six months, went into voluntary liquidation:—*Held*: resp. co. had been formed for the purpose of dealing in land; the co. had been on the business of dealing in land, & therefore the profit made on such dealing was income derived from business.—*TAXES COMR. v. MIRAMAR LAND CO., LTD.* (1906), 20 N. Z. L. R. 723.—N.Z.

b. ——— **Payment in fully-paid shares.**—Co. formed for the purpose of acquiring & reselling mining property. After acquiring & working various properties, it resold the whole

to a second co. receiving payment in fully-paid shares of the latter co.:—*Held*: the difference between the purchase price & the value of the shares for which the property was exchanged was a profit assessable to income tax.—*CALIFORNIAN COPPER SYNDICATE, LTD. v. HARRIS (SURVEYOR OF TAXES)* (1905), 5 Tax Cas. 159.—SCOT.

c. ——— **Houses erected burdened with feu duties—Duties sold—Land & houses retained.**—A co., whose business consisted in buying & selling land & rights in land, bought a piece of vacant ground for £898, & after erecting houses upon it burdened each house with a feu duty, the duties in all amounting to £114 *per annum*. The co. then sold the feu duties for £3,135 but retained the land & houses. The Inland Revenue claimed income tax on the difference between £898 & £3,135, as profit earned by the co.:—*Held*: the claim could not be sustained, inasmuch as the price of £3,135 could not have been obtained if the ground had remained vacant, but was partly due to the erection of houses by the co.—

FURTADO v. CARDONALD FEUING CO., LTD., [1907] S. C. 36.—SCOT.

d. ——— **Proceeds of sale placed against cost of land.**—A land development co. had sold for a large amount portion of its land on a system of deferred payments running over a term of ten years, upon agreements of purchase & sale which it was optional to the purchasers to carry out or allow to become void by making default, under penalty of forfeiting as liquidated damages any amounts already paid by them. The co. had placed the whole amount received by it on the sales against the cost of the land, & had not yet recovered sufficient to pay off the capital invested:—*Held*: the co. was not liable to be assessed for income tax for the current year upon the amount of the deferred payments, as such unpaid portions of the purchase price were not gains or profits derived or received within the current year.—*AFRICAN REALTY TRUST, LTD. v. INCOME TAX COMR.* (1906), 23 S. C. 373; 16 C. T. R. 553.—S. AF.

INCOME TAX.

Sect. 2.—Case I.—Trades: Sub-sect. 1, C.; sub-sect. 2, A., B. & C.]

patients—Solely expended on charitable objects.]—NEEDHAM v. BOWERS, No. 469, post.

124. Charitable institution—Profits from business—Solely applied for charitable purposes.]—GROVE v. YOUNG MEN'S CHRISTIAN ASSOCN., No. 278, post.

125. ———.]—Appl't. society was established by Royal Charter in 1840 with the primary object of the general advancement of English agriculture, &, as part of its activities, holds an annual agricultural show. The town in which the show is held varies from year to year, & is chosen solely with a view to agricultural interests, & without regard to profit-making possibilities. A separate account is kept of the receipts & expenditure in connection with each year's show, the chief items of receipt being fees for exhibits & for entries for prizes, & payments by the public for admission to the show. Any surplus arising out of the show is applied to the general purposes of the society, which has been admitted to be a "charity" within the meaning of the Income Tax Acts:—*Held*: the society was assessable to Income Tax under Schedule D., Case I. in respect of the profits of the annual show as carrying on a concern in the nature of trade.—**ROYAL AGRICULTURAL SOCIETY OF ENGLAND v. WILSON (1924), 132 L. T. 258; 40 T. L. R. 763; 9 Tax Cas. 62.**

126. ——— Letting room for hire.]—COMAN v. ROTUNDA HOSPITAL, DUBLIN (GOVERNORS), No. 462, post.

127. Public school—Profits from fees—Applied for educational purposes.]—In 1873 Brighton College, which was founded in 1846 as a public school, was taken over by a co. incorporated under Cos. Acts as a co. limited by guarantee, the principal object of the co. being to provide thereby a general education in conformity with the doctrines of the Church of England—an object admittedly charitable. The surplus income, after providing for the annual expenditure, was devoted to the improvement of the college & could not be divided in any way among the members of the co. For several years there had been a surplus of receipts over expenditure, & this surplus was mainly derived from fees charged for the education of the pupils. Upon an appeal by the co. against an assessment to income tax under Schedule D. in respect of this surplus, the Comrs. for the Special Purposes of the Income Tax Acts decided that a trade was being carried on & substantially affirmed the assessment:—*Held*: (1) the co. in providing education for money was

carrying on a trade, notwithstanding that the whole purpose & object of the charity was the carrying on of the school, & that the surplus receipts, though applicable to the purposes of the charity, were profits or gains arising from a trade, & were chargeable to income tax under Schedule D.; (2) the profits from the school fees were not exempt from taxation under 1918 Act, s. 37 (1) (b), as being an annual payment forming part of the income of a body established for charitable purposes only.

Whether in any particular case activities which may properly be described as charitable, have become trading, or commercial, must always be a question of fact (LORD BLANESBURGH).—**BRIGHTON COLLEGE v. MARRIOTT, [1926] A. C. 192; 134 L. T. 417; 42 T. L. R. 228; 70 Sol. Jo. 245, H. L.**

SUB-SECT. 2.—CARRIED ON BY PERSONS RESIDENT WITHIN UNITED KINGDOM.

A. By Private Individuals.

See Schedule D., Case I.; Miscellaneous Rules applicable to Schedule D., r. 2; Rules applicable to All Schedules, r. 3.

128. Residence "for some temporary purpose only"—Permanent residence in Great Britain—Not occupied for six months in year of assessment.]—A statute imposing a duty on the property of persons residing in Great Britain, applies to persons residing there for any length of time, however short, although they may at the same time have a more permanent residence elsewhere. An exemption of persons coming to reside, "for some temporary purpose only, & not with any view or intent of establishing a residence therein & who shall not have actually resided in Great Britain for the period of six successive calendar months" does not include a person taking a house in London & furnishing & residing in it for a less period than six months at any one time, & who then goes elsewhere with his establishment & resides for the remainder of the year there, leaving behind him some one merely to take care of the house. Such a person is therefore within Income Tax Act, 1806 (c. 65), but not within the exemption of sect. 51.—**A.-G. v. COOTE (1817), 4 Price, 183; 146 E. R. 433.**

Annotations:—**Reid, Lloyd v. Sulley (1884), 2 Tax Cas. 37; Cooper v. Cadwalader (1904), 5 Tax Cas. 101.**

129. ——— Hunting—Hunting-box occupied less than six months in year of assessment.]—LOWENSTEIN v. DE SALIS (1926), 161 L. T. Jo. 235.

130. Reside—Foreigner residing on yacht—Within limits of English port.]—A citizen of the

PART V. SECT. 2, SUB-SECT. 2.—A.

a. "Reside"—Master of British vessel—Greater part of year spent abroad—Family occupying house rented in United Kingdom.]—The master of a British vessel, trading to & from a port in the United Kingdom, & being tenant of a house there, in which his wife & family live, & in which he himself lives when in this country, is chargeable as "a person residing in the United Kingdom," notwithstanding that he may be absent during the greater part of the year.—**Re YOUNG (1875), 1 Tax Cas. 57.—SCOT.**

1. ——— Ordinary residence & business abroad—Yearly visits to United Kingdom.]—A British subject who had for many years had his only place of business & two residences, a town & country house, in Italy, became possessor of an estate in Great Britain in 1875, & was in the habit of living there during

the summer months. During the financial year 1883-84 he & his family lived there from July 6 to Oct. 31:—*Held*: he was a person residing in Great Britain, & was therefore liable to be assessed for income tax on his trade profits for that year.—**LLOYD v. INLAND REVENUE SOLICITOR (1884), 11 R. (Ct. of Sess.) 687; 21 Sc. L. R. 482.—SCOT.**

g. ———.]—An American citizen having his ordinary residence & practising his profession in New York held for some years a lease of a furnished shooting lodge & shootings in Scotland. He resided at the shooting lodge for two months in each year & the lodge was ready for his use at any time. His residence in New York was also kept open for his use at any time.—*Held*: he was a person residing in the United Kingdom, & was therefore liable to assessment for income

& he did not fall within the exemption of a person in Great Britain for some temporary purpose only, & not with any view or intent of establishing his residence therein.—**INLAND REVENUE v. CADWALADER (1904), 7 F. (Ct. of Sess.) 146; 42 Sc. L. R. 117; 12 S. L. T. 449.—SCOT.**

h. ——— Permanent residence abroad—Previous yearly visits to United Kingdom—House in wife's name in United Kingdom.]—A merchant carrying on business in Madras resided there, with his wife, during the whole of the year of assessment, not visiting the United Kingdom at all. His usual residence was in Madras, but, in nearly every year prior to the year of assessment, he had visited the United Kingdom, residing latterly with his wife & family in a house purchased in his wife's name out of moneys belonging to her & himself & owned by her.

United States had for the last twenty years lived on board his own yacht, which was anchored in tidal navigable waters within the port of Colchester in the county of Essex, obtaining provisions & necessaries from the nearest village. The yacht had always been kept fully manned & ready to go to sea at any moment:—*Held*: the owner was a "person residing in the United Kingdom" within Income Tax Act, 1853 (c. 34), s. 2, sched. D. & was assessable to income tax accordingly.—*BROWN v. BURT* (1911), 81 L. J. K. B. 17; 105 L. T. 420; 27 T. L. R. 572; 5 Tax Cas. 667, C. A.

131. — **Official of foreign company—Greater part of year spent abroad—Family occupying house rented in United Kingdom.**—An agent in West Africa of a British Co. was assessed to income tax for the year 1919–20 under Schedule D., Case V., in respect of his earnings as agent. His duties were wholly performed in West Africa. Under his agreement with the co. the commission which formed the bulk of his remuneration was payable by the co. in the United Kingdom. The whole of this remuneration was paid by the co. into a banking account in England on which his wife had the power of drawing. He rented & was the rated occupier of a house in the United Kingdom in which his wife & family resided. He spent a few days in the United Kingdom during the year of assessment. The Special Comrs. held on appeal that he was resident in the United Kingdom & that he was assessable to income tax under Schedule D., Case V., in respect of his earnings as agent:—*Held*: (1) the Special Comrs. were entitled to regard him as resident in the United Kingdom; but (2) the earnings were not income from a foreign possession assessable under Schedule D., Case V., as the source of income was not wholly abroad; (3) in the circumstances the matter ought not to be remitted to the Comrs. to make an assessment under some other case.—*FOULSHAM v. PICKLES*, [1925] A. C. 458; 94 L. J. K. B. 418; 133 L. T. 5; 41 T. L. R. 323; 69 Sol. Jo. 411; *sub nom.* *PICKLES v. FOULSHAM*, 9 Tax Cas. 261, H. L.

B. By Partnership.

132. **Principal establishment abroad—Branch in United Kingdom.**—A firm of merchants having their principal establishment at New York, but having also branch establishments in England & other countries, carried on the business of buying goods in America, England & other European countries, & of selling them at a profit in New York. Deft., a partner resident in England, & at the branch establishment, bought goods in England & shipped them to New York for the firm:—*Held*: the firm was not liable to be assessed to the income tax in respect of the profits earned by the firm from the purchase of the goods in England, & deft. was not bound to make a return of the profits of the firm, as the firm did not exercise trade in this country within the mean-

ing of the Income Tax Acts, but in America, where the profits were received & the principal place of business was situated. Deft., however, was liable to be assessed in respect of his own share of the whole profits as a partner in the firm.—*SULLEY v. A.-G.* (1860), 5 H. & N. 711; 29 L. J. Ex. 464; 2 L. T. 439; 24 J. P. 676; 6 Jur. N. S. 1018; 8 W. R. 472; 2 Tax Cas. 149, n.; 157 E. R. 1364, Ex. Ch.; *reversq.* S. C. *sub nom.* *A.-G. v. SULLEY* (1859), 4 H. & N. 769.

Annotations:—*Expld. & Distd.* *A.-G. v. Alexander* (1874), L. R. 10 Exch. 20. *Consd.* *Cesena Sulphur Co. v. Nicholson*, *Calcutta Jute Mills Co. v. Nicholson* (1876), 1 Ex. D. 428. *Distd.* *Erichsen v. Last* (1881), 7 Q. B. D. 12. *Consd.* *Pommery & Greno v. Apthorpe* (1886), 56 L. J. Q. B. 155; *Colquhoun v. Brooks* (1887), 19 Q. B. D. 400; *Grainger v. Gough*, [1896] A. C. 325; *Watson v. Sandie* (1897), 67 L. J. Q. B. 319; *Crookston v. Furtado* (1910), 5 Tax Cas. 602; *Hood v. Magee* (1918), 7 Tax Cas. 327; *Smidth v. Greenwood* (1922), 8 Tax Cas. 193. *Refd.* *Tischler & Rundzheer v. Apthorpe* (1885), 1 T. L. R. 344; *Werle v. Colquhoun* (1888), 20 Q. B. D. 753; *San Paulo (Brazilian) Ry. v. Carter*, [1896] A. C. 31; *Taxation Comrs. v. Kirk*, [1900] A. C. 588; *Lovell & Christmas v. Comr. of Taxes*, [1908] A. C. 46; *Liverpool & London & Globe Insee. v. Bennett* (1911), 80 L. J. K. B. 1269.

133. — **Room with one clerk in office of English agents—One partner attending for four months in the year.**—*TISCHLER & Co. v. APTHORPE*, No. 169, *post*.

134. — **Partner resident in United Kingdom—Trade carried on wholly abroad.**—*COLQUHOUN v. BROOKS*, No. 433, *post*.

135. **Joint adventure of English & foreign firms—Profits from joint transactions shared.**—*MORDEN RIGG & Co. & ESKRIGGE (R. B.) & Co. v. MONKS*, No. 190, *post*.

C. By English Corporations.

See Schedule D., I. (a) i., ii.

136. **Registered office & management in England—Business carried on wholly abroad—Whole profits liable to tax.**—The *Cesena Co.* was incorporated under Cos. Acts, 1862 & 1867, & was afterwards registered for all purposes in Italy. It was founded with the object of carrying on the business of sulphur miners, manufacturers, & merchants in Italy, & for that purpose, of purchasing certain sulphur mines & plant there. So far as its affairs in the United Kingdom were concerned, the co. was managed by a board of directors, who held their meetings at the co.'s registered office in England. By the arts. of assocn., the working & disposal of the mines & the general business of the co., were wholly under the management of the board, subject in certain respects to the control of general meetings of the shareholders which were to be held in London. There was an Italian delegation, consisting of two or three members of the board resident in Italy, by whom all the practical management of the co.'s property & affairs in Italy was carried on. All the operations connected with the manufacture & sale of sulphur were exclusively carried on in Italy, where the co.'s profits, if any, were earned; & the dividends required for the English

During the year of assessment some of his children resided in this house:—*Held*: during the year of assessment he was not chargeable with income tax as a person residing in the United Kingdom.—*TURNBULL v. FOSTER* (1904), 6 Tax Cas. 206.—*SCOT*.

k. — **Agent of foreign company—Greater part of year spent abroad—Family occupying house rented in United Kingdom.**—Appl't. was employed as agent by a co. trading in Nigeria. In the year of assessment he was serving under a separate agreement with the co. in respect of each journey to that

country, & it was a condition of his earning salary or commission that he should remain in Nigeria during the period of his agreement. On his return to the United Kingdom he ceased to be in the service of the co. or to receive remuneration from them. During the year of assessment he was the rated owner of a residence in the United Kingdom where his wife & family resided, & he was personally present there during four months of the year. Sums were paid by his direction out of his remuneration to his wife during his absence abroad & the balance of his

earnings, less some sums expended by him abroad, were received by him in the United Kingdom:—*Held*: appl't. was resident in the United Kingdom during the year of assessment & was correctly charged with income tax on his remuneration so far as received by his wife or himself in the United Kingdom.—*THOMSON v. BENSTED (SURVEYOR OF TAXES)* (1918), 7 Tax Cas. 137.—*SCOT*.

PART V. SECT. 2, SUB-SECT. 2.—C.
1. **Registered office & management in India—Business carried on wholly**

Sect. 2.—Case I.—Trades: Sub-sect. 2, C

shareholders were the only parts of its profits sent to the United Kingdom. Of the shares, about one-third were held in England, & the rest in foreign countries. The Calcutta Co. was also incorporated under Cos. Acts of 1862 & 1867, but was not registered elsewhere than in England. It was founded with the object of buying jute mills in Bengal, carrying on the business of manufacturers & dealers in jute & other similar materials, & establishing agencies for the purposes of the co. throughout the world. The memorandum of assocn. provided that the co.'s registered office should be situate in England. In fact, the co. had no office or other place of business in the United Kingdom, though for registration it had an address in London at the office of one of the directors, & when meetings of the English members of the co. were held there it was by his favour. So far as its affairs in the United Kingdom were concerned, the co. was managed by a board of directors, who had, under the arts. of assocn., general powers similar to those conferred upon the board of the Cesena Co. The board had power to & did appoint agents & a director who resided in Calcutta & had the entire control of the business in India. The buying of the raw material, the manufacture & sale thereof, & all the operations connected with the co.'s business, were exclusively carried on in India, where alone the profits, if any, were earned. The co. had no property in the United Kingdom, & nothing came into the hands of the English directors except what was sent from India to pay necessary expenses in England, & except such proportion of the profits as was divisible among the shareholders in the United Kingdom. After receiving such proportion the directors called a meeting of the shareholders & declared the amount to be distributed as dividend for the current year. Of the shares, about one-third were held by shareholders in the United Kingdom. Both cos. contended that they were liable to income tax only upon the proportion of profits actually received in the United Kingdom:—*Held*: both cos. were "residing in the United Kingdom" within Income Tax Act, 1853 (c. 34), s. 2, sched. D., & were liable to pay income tax upon the whole of their profits wherever earned.—*CESENA SULPHUR CO. v. NICHOLSON, CALCUTTA JUTE MILLS CO. v. NICHOLSON* (1876), 1 Ex. D. 428; 45 L. J. Q. B. 821; 35 L. T. 275; 25 W. R. 71; 1 Tax Cas. 83, 88.

Annotations:—*Appld.* Imperial Continental Gas Assocn. v. Nicholson (1877), 37 L. T. 717. *Consd.* Colquhoun v. Brooks (1889), 14 App. Cas. 493; London Bank of Mexico & South America v. Apthorpe, [1891] 1 Q. B. 383; St. Louis Breweries v. Apthorpe (1898), 79 L. T. 551. *Expld.* Apthorpe v. Peter Schoenhofen Brewing Co. (1899), 80 L. T. 395. *Consd.* A.-G. v. Jewish Colonization Assocn., [1900] 2 Q. B. 556; De Beers Consolidated Mines v. Howe, [1906] A. C. 455; Swedish Central Ry. v. Thompson, [1925] A. C. 495. *Repld.* Bartholomay Brewing Co. (of Rochester) v. Wyatt, Nobel Dynamite Trust Co. v. Wyatt, [1893] 2 Q. B. 499; San Paulo (Brazilian) Ry. v. Carter, [1896] A. C. 31; Kodak v. Clark (1903), 4 Tax Cas. 549; Goerz v. Bell, [1904] 2 K. B. 136; New Zealand Shipping Co. v. Stephens (1907), 5 Tax Cas. 553; American Thread Co. v. Joyce (1912), 6 Tax Cas. 1; New Zealand Shipping Co. v. Thew (1922), 8 Tax Cas. 208; Bradbury v. English Sewing Cotton Co. (1923), 8 Tax Cas. 481. *L. Rogers v. L. C. & D. Ry.* (1877), 26 W. R. 192.

—.]—An English co. was formed for the purpose of purchasing oil wells in G. & of carrying on the business of miners & mineral oil merchants in G. & elsewhere. The registered office of the co. was at Westminster,

& all the shareholders resided in the United Kingdom. The management of the business was vested in a board of directors, who met at the registered office, where the dividends were declared & paid. There was a resident manager abroad who had power to enter into contracts for the sale of the oil. The oil was sold abroad. A portion only of the profits made was remitted to England, the balance being retained for the purpose of sinking new wells & for other purposes of the co. in G.:—*Held*: the co. was chargeable under Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Case I., upon the whole of the profits made, & not under Case V., upon only the amount of profits remitted to England.—*GROVE v. ELLIOTS & PARKINSON, ELLIOTS & PARKINSON v. GROVE* (1896), 3 Tax Cas. 481.

138. —.]—An English co. working a brewery in the United States of America:—*Held*: chargeable with income tax on all their profits, though part was not received here.—*JONES (FRANK) BREWING CO. v. APTHORPE* (1898), 15 T. L. R. 113; 4 Tax Cas. 6, D. C.

Annotations:—*Folld.* United States Brewing Co. v. Apthorpe (1898), 4 Tax Cas. 117. *Consd.* Kodak v. Clark (1903), 4 Tax Cas. 549.

139. *Control with local board of directors.*—A co. incorporated in England carried on from there an hotel business in Egypt till 1908. In that year they altered their arts. of assocn. by resolutions which provided that the Egyptian business of the co. should be carried on & managed by a local board to the exclusion of any board of directors other than the local board. The local board were to meet only in Egypt, were to be affected by resolutions of general meetings in Egypt only, & were to exercise all the powers of the co. requisite for the Egyptian business. They were to retain the profits in Egypt & remit to England what might be necessary to pay dividends to shareholders resident here & for expenses incurred by the London board. The London board were to keep accounts, recommend dividends, & control the capital. The only business carried on by the co. was the Egyptian hotel business. Since the alteration of the arts. the London board had recommended a dividend & authorised the borrowing of a sum of money for that purpose. On an appeal by the co. from an assessment to income tax made upon the full amount of the co.'s profits the General Comrs. found that the controlling power of the co. remained with the London board & affirmed the assessment:—*Held*: (1) (LORD PARKER, LORD SUMNER) the division of the profits formed no part of the profit-earning business of the co. & the co.'s business was wholly carried on abroad, & consequently the co. was assessable to income tax under Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Case V., in respect only of profits remitted to this country; (2) (LORD LOREBURN, LORD PARMOOR) there was evidence to support the finding of the Comrs., & the co. was assessable under Sched. D., Case I., in respect of the whole of its profits.—*MITCHELL v. EGYPTIAN HOTELS, LTD.* [1915] A. C. 1022; 84 L. J. K. B. 1772; 113 L. T. 882; 31 T. L. R. 546; 59 Sol. Jo. 649; *sub nom* EGYPTIAN HOTELS, LTD. v. MITCHELL, 6 Tax Cas. 542, H. L.

Annotations:—*As to* (1) *Consd.* New Zealand Shipping Co. v. Thew (1922), 8 Tax Cas. 208. *Expld.* Alianza Co. v. I. R. Comrs., [1924] 1 K. B. 870. *Consd.* A.-G. v. Aramayo, Aramayo v. Ogston, Eccott v. Aramayo Frank

on profits of a co. which
n manufacture carried

said to accrue or arise in British India

control the business in Bombay.—*F*
AURANGABAD MILLS, LTD. (1921)
L. L. R. 45 Bom. 1286.—*IND.*

Mines, [1925] 1 K. B. 86; Swedish Central Ry. v. Thompson, [1925] A. C. 495. *Reid. Re Aramayo Francke Mines*, [1917] 1 Ch. 451; Hood v. Magee (1918), 7 Tax Cas. 327; I. R. Comrs. v. Ransom, [1918] 2 K. B. 709; I. R. Comrs. v. Korean Syndicate, [1920] 1 K. B. 598; Bradbury v. English Sewing Cotton Co., [1923] A. C. 744; Alianza Co. v. I. R. Comrs., [1925] A. C. 644. *Generally, Mentd. Pole Carew & St. Levan v. Craddock* (1919), 89 L. J. K. B. 65.

140. ——— London brokers employed by local board for sale of produce.]—An English co. was formed to carry on the business of general merchants & mine owners in Bolivia. As from Apr. 1, 1917, the control & management of its Bolivian business was transferred to a local board in that country, the duties of the directors in London being confined to the declaration of dividends & the formal business necessary for its continuance as a co. The greater part of the produce of the mines was shipped to the United Kingdom, & the manager of the local board instructed a London firm, who had up to the date in question been the co.'s sole general, commercial & financial agents, to sell as brokers on commission all material consigned to them. In fact, however, the London firm continued the course of business previously followed by them, & did not themselves sell the mining produce as brokers, but employed brokers to do so, the brokers accounting for the proceeds to the London firm who in turn accounted to the local board after deducting (*inter alia*) payments made on bills of exchange drawn on the firm by the local board at the time of shipment, commission, & the cost of goods required by the local board in Bolivia purchased by the firm on the instructions of the manager of the co. itself.

The English co., while denying liability to income tax for 1917-18, made a return for that year requesting that it might be assessed by the Special Comrs. The Special Comrs., however, made an assessment under Schedule D., Case I., on the local board in the name of the London firm as agents. On appeal against the assessment the Special Comrs. decided that a trade was being carried on in the United Kingdom by the local board through the London firm who must be regarded as its duly authorised agents, & confirmed the assessment.

As the tax due under the assessment so confirmed remained unpaid, proceedings for its recovery were commenced by way of information against the individual members of the London firm, who then took the objection, not previously raised, that, as no requirement had been made either by the firm or by the local board that the Special Comrs. should assess them, the assessment was invalid as being *ultra vires*. Meanwhile as a precautionary measure before the time limit expired, the Special Comrs. made an alternative assessment for 1917-18, under Schedule D., Case I., on the co. itself in the same amount as that previously made on the local board. On appeal, the co. contended that this was a double assessment, & the Special Comrs. discharged the assessment on the ground that there was no reason for assuming that the previous assessment was not a valid one & sufficient to tax the profits charged by the second assessment:—*Held*: (1) having regard to the correspondence & other facts in the case, the London firm must be taken to have acquiesced in the jurisdiction of the Special Comrs. to make the assessment upon the local board in their name; but (2) that assessment was bad, since it was the co. itself that carried on the business, the local board acting throughout merely as servants of the co. & on its behalf; (3) by Taxes Management Act, 1880 (c. 19),

s. 59 (4), the duty charged under that assessment should have been paid, but, as the Crown had only brought the information to trial at the same time as the hearing of the appeal against the assessment upon which it was based & that assessment was then held to be bad, the information must be dismissed; (4) the assessment under Schedule D., Case I., upon the co. itself was rightly made, inasmuch as (a) co. was resident in this country, & (b) the produce of its mines being marketed & dealt with in London, the co.'s business could not be held to be carried on wholly outside the United Kingdom in spite of the existence of the local board in Bolivia.—*ARAMAYO FRANCKE MINES, LTD. v. ECCOTT*, [1925] A. C. 634; 94 L. J. K. B. 688; 133 L. T. 561; 41 T. L. R. 542; 69 Sol. Jo. 825; *sub nom. A.-G. v. ARAMAYO, ARAMAYO & Co. v. OGSTON, ECCOTT v. ARAMAYO FRANCKE MINES, LTD.*, 9 Tax Cas. 445, H. L.

141. ——— Business carried on partly abroad—Part of profits retained abroad—Whole profit liable to tax.]—A co., registered under the Joint Stock Companies Acts, carried on business as bankers in London, with branches abroad. The directors & shareholders met at the head office in London, where the business of bankers, others than that of current banking accounts, was carried on, & from whence the affairs of the co. were directed & managed, the seat of power being in London with the directors. All usual banking business was conducted at the branches abroad by managers, subject to general directions & instructions for management issued by the head office in London. The co.'s dividends were paid in London, an adjustment of balances being from time to time made between the head office & the branches, & no special remittance of profits from the branches for the purpose of paying the dividends was ordinarily made. Of the profits earned at one of the branches in Mexico, a portion was not remitted to England, but was applied to paying, in Mexico, the consideration for certain rights & concessions purchased by the co. from another bank in that country:—*Held*: on the above facts, the co. were liable to pay income tax under Income Tax Act, 1853 (c. 34), s. 2, Sched. D., in respect of the portion of the profits earned in Mexico & not remitted to England.—*LONDON BANK OF MEXICO & SOUTH AMERICA v. APHORPE*, [1891] 2 Q. B. 378; 60 L. J. Q. B. 653; 65 L. T. 601; 56 J. P. 86; 39 W. R. 564; 7 T. L. R. 567; 3 Tax Cas. 143, C. A.

Annotations:—*Appld. San Paulo (Brazilian) Ry. v. Carter*, [1895] 1 Q. B. 580. *Reid. Bartholomay Brewing Co. (of Rochester) v. Wyatt, Nobel Dynamite Trust Co. v. Wyatt*, [1893] 2 Q. B. 499; *Grainger v. Gough*, [1895] 1 Q. B. 71.

142. ——— ——— ——— ———.]—Where a trade is carried on either wholly in the United Kingdom or partly within & partly outside it, & profits accrue therefrom to a person or a corp'n. residing in the United Kingdom, the assessment for income tax falls under Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Case I., & does not fall under Case V., & the duty is to be computed upon the full amount of the balance of the profits or gains of the trade, & not only upon the actual sums annually received in the United Kingdom. A co. registered under Cos. Acts, whose registered office was in England, were the proprietors of a railway in Brazil. The working of the railway was under the control & direction of, & the business of the co. was managed by, the directors in England. The directors purchased in England & sent out to Brazil the materials & plant necessary for the purposes of the railway. The accounts were kept & the balance sheet & reports were made out in London, where

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also the meetings were held, & all dividends were declared & paid. With the exception of certain small amounts for transfer fees & annual interest on money, the whole revenue of the co. arose from moneys paid to them in Brazil for the carriage of passengers & goods on the railway & for other matters connected with the railway:—*Held*: it was not necessary to decide the question whether the business of the co. was carried on wholly in the United Kingdom, since it was clearly carried on partly in England & not, as in *Colquhoun v. Brooks*, No. 433, *post*, wholly outside the United Kingdom; & the co. were therefore assessable to income tax, under Sched. D., Case I., upon the full amount of the balance of the profits or gains of their business, & not, under Case V., only upon the actual sums annually received in the United Kingdom.—*SAN PAULO (BRAZILIAN) RY. CO. v. CARTER*, [1896] A. C. 31; 65 L. J. Q. B. 161; 73 L. T. 538; 60 J. P. 84, 452; 44 W. R. 336; 12 T. L. R. 107; 3 Tax Cas. 407, H. L.

Annotations:—*Folld. Grove v. Elliotts & Parkinson*, Elliotts & Parkinson v. Grove (1896), 3 Tax Cas. 481; *Apthorpe v. Peter Schoenhofen Brewing Co.* (1899), 80 L. T. 395. *Expld. R. v. Clerkenwell General Comrs. of Taxes*, [1901] 2 K. B. 879. *Consd. Kodak v. Clark* (1903), 4 Tax Cas. 549; *Ogilvie v. Kitton* (1908), 5 Tax Cas. 338; *American Thread Co. v. Joyce* (1912), 106 L. T. 171; *I. R. Comrs. v. Sansom*, [1921] 2 K. B. 492; *Swedish Central Ry. v. Thompson*, [1925] A. C. 495. *Refd. St. Louis Breweries v. Apthorpe* (1898), 63 J. P. 135; *Taxation Comrs. v. Kirk*, [1900] A. C. 588; *Gresham Life Assce. Soc. v. Bishop* (1902), 71 L. J. K. B. 618; *Goerz v. Bell*, [1904] 2 K. B. 136; *Alianza Co. v. Bell*, [1905] 1 K. B. 184; *De Beers Consolidated Mines v. Howe*, [1905] 2 K. B. 612; *Liverpool & London & Globe Insee. v. Bennett, Brice v. Ocean Accident & Guarantee Corpn., Brice v. Northern Assce.* (1912), 6 Tax Cas. 327; *Egyptian Hotels v. Mitchell* (1915), 6 Tax Cas. 542; *The Polzeath* (1916), 85 L. J. P. 241; *Hood v. Magee* (1918), 7 Tax Cas. 327; *Bradbury v. English Sewing Cotton Co.* (1923), 8 Tax Cas. 481.

143. Registered office in England—Business & management abroad—Local board servants of English company.]—ARAMAYO FRANCKE MINES, LTD. v. ECCOTT, No. 140, *ante*.

144. ——— English office performing administrative functions only—Dual residence.]—A registered co. can have more than one residence for the purposes of the Income Tax Acts.

A co. was incorporated in 1870 under Cos. Acts, 1862 & 1867, with the object of constructing & working a railway in Sweden. The registered office of the co. was in London. In 1900 the co. leased its railway to a traffic company for fifty years at an annual rent of £33,500, which was to be paid to the co. in England. The co.'s articles were afterwards altered for the purpose of removing the control & management of the business of the co. from England to Sweden, & it was admitted that the business of the co. had since been & now was controlled & managed from the head office in Sweden. In 1920 a committee was appointed by the directors of the co. to transact merely formal administrative business in the United Kingdom, such as dealing with transfers of shares in the United Kingdom, affixing the seal of the co. to share & stock certificates, & signing cheques on the London banking account of the co. Since 1920 no meetings of the co. had been held in the United Kingdom. All dividends had been declared in Sweden, & no profits had been transmitted to the United Kingdom except in payment of dividends to the shareholders in the United Kingdom. Since 1920 the annual rent under the lease to the traffic co. had been paid to the co. in Sweden. On an appeal by the co. against an assessment to income tax under Schedule D., Case V., in respect of the rent of the railway for the years ending on

Apr. 5, 1921 & 1922, the Special Comrs., while finding that the business of the co. was controlled & managed from Sweden, held that the co. was a person residing in the United Kingdom & affirmed the assessment:—*Held*: the co. might have a residence here as well as abroad &, on that assumption, there was evidence to support the conclusion of the Comrs.—*SWEDISH CENTRAL RY. CO., LTD. v. THOMPSON*, [1925] A. C. 495; 94 L. J. K. B. 527; 133 L. T. 97; 41 T. L. R. 385; 9 Tax Cas. 342, H. L.

Annotation:—*Refd. A.-G. v. Aramayo, Aramayo v. Ogston, Eccott v. Aramayo Francke Mines*, [1925] 1 K. B. 86.

145. Company incorporated by English Act of Parliament—Business carried on wholly abroad—Whole profits liable to tax.]—A joint-stock co., established & incorporated by Act of Parliament in England, but carrying on its business entirely abroad, is assessable to income tax upon the whole of the annual profits of its business, whether such profits are or are not remitted to this country, or are or are not distributed as dividends amongst its shareholders resident in England or abroad, or are applied to some other legitimate purposes of the co. abroad.

Appls., a co-partnership assocn., established to supply foreign cities & towns with gas, & incorporated by Act of Parliament in England, had offices in London, where the directors met & the business of the co. was transacted, & whence all the orders emanated. They possessed interests, of various natures & tenures, in gasworks in France & other continental countries, the profits of which arose wholly in those countries, & in such of them as had a tax equivalent to an income tax, those profits were there assessed to such tax. The entire profits of the co. arose & accrued abroad, &, in making their return to the income tax in England, the co. admitted their liability to the tax upon the amount or profits as from "foreign possessions" actually remitted to this country, & applicable to the payment of dividends to their shareholders, whether resident here or abroad, but denied their liability in respect of their profits *ultra* such remittance, & which were never transmitted to England or applied in payment of dividends, but were retained abroad & applied in liquidation of other legitimate engagements of the co. abroad. The special comrs. assessed the co. in respect of the whole of their profits, including the last-mentioned portion of them, & upon appeal therefrom, on a case stated for the ct.:—*Held*: (1) the co., though a foreign undertaking in a continental country, incorporated & resident in England, were in the position of a person residing in the United Kingdom, & were therefore taxable under Income Tax Acts, 1842 (c. 35), s. 100, Sched. D., Case I., 1853 (c. 34), Sched. D., in respect of the whole of the profits arising from their business abroad, including not only the portion remitted to England & applied in payment of dividends to shareholders resident there or abroad, but also the portion retained & applied to the other purposes of the co. abroad; (2) the provisions of Income Tax Act, 1842 (c. 35), s. 60, Sched. A., No. III., r. 3, which treat gasworks as "property," relate exclusively to gasworks in this country, & do not include or relate to gasworks on the Continent, & such last-mentioned works are not "foreign possessions" within Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Case V.—*IMPERIAL CONTINENTAL GAS ASSOCN. v. NICHOLSON* (1877), 37 L. T. 717; 1 Tax Cas. 138.

Annotations:—*As to* (1) *Consd. London Bank of Mexico & South America v. Apthorpe*, [1891] 1 Q. B. 383. *Refd. Bartholomay Brewing Co. (of Rochester) v. Wyatt, Nobel Dynamite Trust Co. v. Wyatt*, [1893] 2 Q. B. 499.

146. English company holding controlling interest in foreign company.]—BARTHOLOMAY BREWING CO. (OF ROCHESTER) *v.* WYATT, NOBEL DYNAMITE TRUST CO. *v.* WYATT, No. 437, *post*.

147. —.]—An English co. was formed for the purpose of acquiring breweries in the United States. Two of such breweries were in the State of New York, & were held in the name of an American co., all the shares in which, except three, were owned by the English co. Meetings of the English co. were held at the registered office in England, where the books were kept. The dividends were declared in England by the co. in general meeting. The amount required for the dividends to the English shareholders were transmitted to England, the dividends on the shares held in America being paid there. The co. contended that none of the profits made in America were chargeable with income tax except as far as they were transmitted to England, & that if any such profits were chargeable, such portion as was derived from the breweries in New York should be exempted by reason of the same being the property of an American co.:—*Held*: the case was not distinguishable from that of *Jones, Frank, Brewing Co. v. Apthorpe*, No. 138, *ante*.—UNITED STATES BREWING CO., LTD. *v.* APTHORPE (1898), 4 Tax Cas. 17.

Annotations:—*Consd.* Stanley *v.* Gramophone & Typewriter (1908), 5 Tax Cas. 358. *Refd.* Kodak *v.* Clark, [1903] 1 K. B. 505; I. R. Comrs. *v.* Sansom, [1921] 2 K. B. 492.

148. Dividends of foreign shareholders in English company paid by foreign company.]BARTHOLOMAY BREWING CO. (OF ROCHESTER) *v.* WYATT, NOBEL DYNAMITE TRUST CO. *v.* WYATT, No. 437, *post*.

149. — Directing power in English company.]—An English co. registered under Cos. Acts, & with a registered office in London was formed to acquire the whole or any part of the capital stock of the St. L. B. A. in America, to carry on the business of brewers, & for other purposes. It acquired 50,872 shares out of 50,886 of the St. L. B. A. The brewing business upon which the whole of the profits depend is carried on exclusively at St. Louis in America under the immediate management of the directors of the American corp'n. These directors in the printed reports of the English co. are termed the "board of management in St. Louis." The banking account of the American corp'n. & all the books are kept at St. Louis. An English accountant is appointed by applt. co., who proceeds to America at the end of each financial year & audits the accounts of the eighteen breweries at St. Louis. At the same time a balance sheet of the American corp'n. & a profit & loss account are prepared showing the result of the brewing business for the past year. A copy is forwarded by the American corp'n. to applt. co., & the directors of applt. co. then consider the accounts & agree upon the rate of dividend which they consider should be declared. They communicate their decision to the American corp'n., who then have always declared a dividend upon the shares of the American corp'n. at the rate mentioned. The directors of the American corp'n. having declared the dividend, the directors of applt. co. then declare a dividend upon the shares of applt. co. No dividend warrant is issued by the American corp'n. Each shareholder upon production of his certificate is entitled to be paid the amount due to him. The amount of dividend on the shares held by applt. co. is sent over in bulk by telegram, so far as it is required for the English shareholders

& for the current expenses in England. Such portion of the dividend as is required for American shareholders is retained in America by the American co. & distributed there direct:—*Held*: this was a business carried on in America by the English co., & they were therefore liable to pay income tax on the whole of the profits.—ST. LOUIS BREWERIES, LTD. *v.* APTHORPE (1898), 79 L. T. 551; 63 J. P. 135; 47 W. R. 334; 15 T. L. R. 112; 43 Sol. Jo. 114; 4 Tax Cas. 111, D. C.

Annotations:—*Consd.* Gramophone & Typewriter *v.* Stanley, [1908] 2 K. B. 89; I. R. Comrs. *v.* Sansom, [1921] 2 K. B. 492. *Refd.* R. *v.* Clerkenwell General Comrs. of Taxes, [1901] 2 K. B. 879; Kodak *v.* Clark, [1903] 1 K. B. 505; Daimler Co. *v.* Continental Tyre & Rubber Co. (Great Britain), [1916] 2 A. C. 307.

150. —.]—An English co., registered under Cos. Acts & having its registered office in London, was formed for the purpose of acquiring the shares in an American brewery co., & for the purpose of carrying on a brewery business. The vendors of the American co. sold to the English co. all the shares except three, in the American co., & all the personal property of the American co. was transferred to the English co. In order to avoid any difficulties with regard to the American laws of real property, the American co. was kept on foot. The English co. found the capital for carrying on the brewery business which was wholly carried on in America. All the profits were earned in America. The directors of the English co. had the entire right of control of the affairs of the American co., & of the staff & business in America with full power to appoint or dismiss any of the managers or officials of the business in America. In fact, the directors of the English co. delegated these powers to the managers of the brewery in America, who were also directors of the American co., & appointed them managers of the business in America. A portion of the profits earned was transmitted to England for the expenses incurred in England & for distribution amongst the English shareholders. The rest of the profits remained in America, & were distributed among American shareholders:—*Held*: the business was in fact partly carried on in England, & therefore the English co. was liable to pay income tax upon the whole of the profits earned by the business, & not merely upon that part of the profits which was transmitted to England.—APTHORPE *v.* PETER SCHOENHOFEN BREWING CO., LTD. (1899), 80 L. T. 395; 15 T. L. R. 245; 4 Tax Cas. 41, C. A.

Annotations:—*Folld.* Frank Jones Brewing Co. *v.* Apthorpe (1898), 4 Tax Cas. 6; United States Brewing Co. *v.* Apthorpe (1898), 4 Tax Cas. 17. *Consd.* Gramophone & Typewriter *v.* Stanley, [1908] 2 K. B. 89; I. R. Comrs. *v.* Sansom, [1921] 2 K. B. 492. *Refd.* R. *v.* Clerkenwell General Comrs. of Taxes, [1901] 2 K. B. 879; Kodak *v.* Clark, [1903] 1 K. B. 505; American Thread Co. *v.* Joyce (1912), 6 Tax Cas. 1; Daimler Co. *v.* Continental Tyre & Rubber Co. (Great Britain), [1916] 2 A. C. 307.

—.]—BRADBURY *v.* ENGLISH SEWING COTTON CO., No. 445, *post*.

— Jurisdiction of commissioners to decide fact of control.]—See No. 1, *ante*.

152. — No control by English company.]—An English co. carrying on business in the United Kingdom owned 98 per cent. of the shares in a foreign co., which gave it a preponderating influence in the control, election of directors, etc., of the foreign co. The remaining shares in the foreign co. were, however, held by independent persons, & there was no evidence that the English co. had ever attempted to control or interfere with the management of the foreign co.:—*Held*: the foreign co. was not carried on by the English co., nor was it the agent of the English co. & the

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English co. was not, therefore, assessable to income tax under Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Case I., upon the full amount of the profits of the foreign co.—**KODAK, LTD. v. CLARK**, [1903] 1 K. B. 505; 72 L. J. K. B. 369; 88 L. T. 155; 67 J. P. 213; 51 W. R. 459; 19 T. L. R. 243; 47 Sol. Jo. 296; 4 Tax Cas. 549, C. A.

Annotations:—Consd. *Gramophone & Typewriter v. Stanley*, [1908] 2 K. B. 89. *Reid. De Beers Consolidated Mines v. Howe*, [1905] 2 K. B. 612; *Ogilvie v. Kitton* (1908), 5 Tax Cas. 338; *Liverpool & London & Globe Insee. v. Bennett*, [1913] A. C. 610; *Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co., Same v. Tilling*, [1915] 1 K. B. 893; *Hood v. Magee* (1918), 7 Tax Cas. 327; *I. R. Comrs. v. Sansom*, [1921] 2 K. B. 492.

153. — Whether conclusive as to identity of companies.]—An English co. carrying on business in the United Kingdom was the holder of all the shares in a German co.:—*Held*: that fact alone did not make the business of the German co. the business of the English co. so as to render the English co. liable to income tax under Income Tax Act, 1853 (c. 34), Sched. D., upon the full amount of the profits made by the German co.; & the English co. was only liable to pay income tax upon such profits of the German co. as had been received in this country.—**GRAMOPHONE & TYPEWRITER, LTD. v. STANLEY**, [1908] 2 K. B. 89; 77 L. J. K. B. 834; 99 L. T. 39; 24 T. L. R. 480; 15 Mans. 251; *sub nom. STANLEY v. GRAMOPHONE & TYPEWRITER, LTD.*, 5 Tax Cas. 358, C. A.

Annotations:—Consd. *American Thread Co. v. Joyce* (1912), 106 L. T. 171; *Continental Tyre & Rubber Co. (Gt. Britain) v. Daimler Co., Continental Tyre & Rubber Co. (Great Britain) v. Tilling*, [1915] 1 K. B. 893; *I. R. Comrs. v. Maxse*, [1918] 2 K. B. 715; *I. R. Comrs. v. Sansom*, [1921] 2 K. B. 492; *Singer v. Williams*, [1921] A. C. 41. *Reid. Salmon v. Quin & Axtens*, [1909] 1 Ch. 311; *Logan v. Davis* (1911), 104 L. T. 914; *Liverpool & London & Globe Insee. v. Bennett, Brice v. Northern Assee., Brice v. Ocean Accident & Guarantee Corpn.*, [1912] 2 K. B. 41; *Smith v. Incorporated Council of Law Reporting for England & Wales*, [1914] 3 K. B. 674; *Hood v. Magee* (1918), 7 Tax Cas. 327; *New Zealand Shipping Co. v. Thew* (1922), 8 Tax Cas. 208; *Bradbury v. English Sewing Cotton Co.*, [1923] A. C. 744; *Gas Lighting Improvement Co. v. I. R. Comrs.*, [1923] A. C. 723.

154. — — —.]—BRADBURY v. ENGLISH SEWING COTTON Co., No. 445, post.

Insurance companies.]—See Sub-sect. 8, post.

D. By Foreign Corporations.

See Schedule D., 1 (a) (i) & (ii).

155. General rule—Place of residence place of management & control—Question of fact.]—A foreign corpn. may reside in this country for the purposes of income tax. The test of residence is not where it is registered, but where it really keeps house & does its real business. The real business is carried on where the central management & control actually abides. Whether any particular case falls within that rule is a pure question of fact, to be determined not according to the construction of this or that regulation or bye-law, but upon a scrutiny of the course of business & trading.

Appl. co. was registered in the Cape Colony, & its business was mining for diamonds in mines which it possessed in South Africa, & selling the diamonds when found. Its head office was in South Africa, & general meetings were always held there. Some of the directors resided in South Africa, & weekly meetings of the directors were held there. But the majority of the directors resided in England, & the meetings in London were the meetings at which the real control was exercised in all the important business of the co., except the actual mining operations. The sales

of the diamonds were controlled by the London board:—*Held*: the co. was resident in the United Kingdom for the purposes of income tax.—**DE BEERS CONSOLIDATED MINES, LTD. v. HOWE**, [1906] A. C. 455; 75 L. J. K. B. 858; 95 L. T. 221; 22 T. L. R. 756; 50 Sol. Jo. 666; 5 Tax Cas. 198; 13 Mans. 394, H. L.

Annotations:—*Appl. American Thread Co. v. Joyce* (1913), 108 L. T. 353; *New Zealand Shipping Co. v. Thew* (1922), 8 Tax Cas. 208. *Consd. Bradbury v. English Sewing Cotton Co.*, [1923] A. C. 744; *Swedish Central Ry. v. Thompson*, [1925] A. C. 495. *Reid. New Zealand Shipping Co. v. Stephens* (1907), 24 T. L. R. 172; *Smith v. Incorporated Council of Law Reporting for England & Wales*, [1914] 3 K. B. 674; *Mitchell v. Egyptian Hotels* (1915), 59 Sol. Jo. 649; *Usher's Wiltshire Brewery v. Bruce*, [1915] A. C. 433. *Mentd. Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307; *The Polzeath* (1916), 85 L. J. P. 241; *Re Hilckes, Ex p. Muhesa Rubber Plantations*, [1917] 1 K. B. 48.

156. — — —.]—A co. was registered & had its registered office in New Zealand, but the Income Tax Comrs. found that it was resident in the United Kingdom for the purposes of assessment to income tax, as the central management & control was in the United Kingdom:—*Held*: as this was a question of fact, & as there was evidence to support the finding of the Comrs., the decision must be affirmed.—**NEW ZEALAND SHIPPING Co., LTD. v. STEPHENS** (1907), 24 T. L. R. 172; 52 Sol. Jo. 113; 5 Tax Cas. 553, C. A.

Annotations:—Consd. *New Zealand Shipping Co. v. Thew* (1922), 8 Tax Cas. 208. *Reid. American Thread Co. v. Joyce* (1912), 106 L. T. 171; *Egyptian Hotels v. Mitchell* (1912), 108 L. T. 558; *Smith v. Incorporated Council of Law Reporting for England & Wales*, [1914] 3 K. B. 674.

157. — — — How far finding of commissioners conclusive.]—(1) Where comrs. for the general purposes of the Income Tax Acts have found as a fact that a co. registered abroad is resident within the United Kingdom, & liable to be assessed to income tax under Income Tax Act, 1853 (c. 34), s. 2, Sched. D., such finding is final, & the ct., on a case stated, will only consider whether there was evidence to justify such finding.

A co. resides for the purpose of income tax assessment, at the place where its real business is carried on, that is where the control & management of the co. is exercised, notwithstanding that the details of its trade may not be ordinarily dealt with there.

Where the business of a co. registered abroad was controlled by a board of directors who met in England, & all the ordinary stock of the co. was held in England:—*Held*: (2) there was evidence that the co. was resident in the United Kingdom, although the co. did not do any trade in the United Kingdom, & had not any banking account here.—**AMERICAN THREAD Co. v. JOYCE** (1913), 108 L. T. 353; 29 T. L. R. 266; 57 Sol. Jo. 321; 6 Tax Cas. 163, H. L.

Annotations:—*As to (1)* *Appl. Smith v. Incorporated Council of Law Reporting for England & Wales*, [1914] 3 K. B. 674; *I. R. Comrs. v. Maxse*, [1918] 2 K. B. 715; *Currie v. I. R. Comrs.*, [1921] 2 K. B. 332. *Reid. New Zealand Shipping Co. v. Thew* (1922), 8 Tax Cas. 208; *Pool v. Guardian Investment Trust Co.*, [1922] 1 K. B. 347; *Gloucester Ry. Carriage & Wagon Co. v. I. R. Comrs.* (1924), 131 L. T. 595. *As to (2)* *Appl. Bradbury v. English Sewing Cotton Co.*, [1923] A. C. 744. *Reid. Mitchell v. Egyptian Hotels* (1915), 59 Sol. Jo. 649; *Swedish Central Ry. v. Thompson*, [1925] A. C. 495. *Generally, Mentd. Re Hilckes, Ex p. Muhesa Rubber Plantations*, [1917] 1 K. B. 48.

158. Whether more than one residence possible.]—**SWEDISH CENTRAL RY. Co., LTD. v. THOMPSON**, No. 144, ante.

159. Foreign bank having business in London—Meetings held & dividends declared in London.]—The Imperial Ottoman Bank was a corpn. created by Turkish law. Its seat was fixed by the

concession & the statutes which constituted it at Constantinople, with power to establish branches & agencies at other places. It was the state bank of Turkey, where it was a bank of issue, & was charged with the collection of the revenue, & with certain operations relating to the currency, & with the payment of interest on the public debt, & received from the state a subsidy on account of the public business transacted by it. On its creation it took over & continued to carry on the business of an English bank in London; & since its creation in 1863, the annual meetings of shareholders had always been held, & dividends declared, in London, though by its statutes the annual meetings might be held at any place which the committee of management might fix:—*Held*: the bank was not liable to be assessed to income tax in respect of its whole profits, as a "person residing within the United Kingdom" under the first clause of Income Tax Act, 1853 (c. 34), s. 2, Sched. D., but was liable only in respect of the profits arising from its business carried on in England, under the second clause of the schedule. —A.-G. v. ALEXANDER (1874), L. R. 10 Exch. 20; 44 L. J. Ex. 3; 31 L. T. 694; 23 W. R. 255.

Annotations:—*Consd.* Cesena Sulphur Co. v. Nicholson, Calcutta Jute Mills Co. v. Nicholson (1876), 1 Ex. D. 428; Gilbertson v. Fergusson (1879), 5 Ex. D. 57; Erichsen v. Last (1881), 7 Q. B. D. 12; Goerz v. Bell, [1904] 2 K. B. 136; De Beers Consolidated Mines v. Howe, [1905] 2 K. B. 612; Swedish Central Ry. v. Thompson, [1924] 2 K. B. 495.

160. Company registered abroad—Head office & control in United Kingdom.—A co. registered abroad, but having its head office in London, where the meetings of the directors are held & where the directing & controlling power is exercised, is assessable to income tax on the whole of its profits as "a person residing in the United Kingdom" within Income Tax Act, 1853 (c. 34),

s. 2, Sched. D.—GOERZ & Co. v. BELL, [1904] 2 K. B. 136; 73 L. J. K. B. 448; 90 L. T. 675; 53 W. R. 64; 20 T. L. R. 348; 48 Sol. Jo. 354; 68 J. P. Jo. 136.

Annotations:—*Consd.* De Beers Consolidated Mines v. Howe, [1905] 2 K. B. 612; Swedish Central Ry. v. Thompson, [1925] A. C. 495.

161. — Head office abroad—Office & some directors meetings in London.—DE BEERS CONSOLIDATED MINES, LTD. v. HOWE, No. 155, *ante*.

162. — Control in United Kingdom.—NEW ZEALAND SHIPPING CO., LTD. v. STEPHENS, No. 156, *ante*.

163. — — — — —.—AMERICAN THREAD CO. v. JOYCE, No. 157, *ante*.

164. — Policy controlled from United Kingdom—Business controlled by local board of directors—Whether local management separate trade or business.—Applts., a shipping co. incorporated in New Zealand with limited liability, has its registered office at Christchurch, New Zealand. A board of directors in London conducts all the business affairs of the co. in the United Kingdom, has exclusive control of the financial & administrative business of the co., & decides all important questions of policy. Subject to the powers vested in the London board, a separate board of directors in New Zealand conducts the business affairs of the co. in Australasia & negotiates independently the most important of the freight contracts. General meetings are held half yearly in London & Christchurch, but the general account books of the co. are kept at the London office, where the accounts are made up & dividends declared. Registers of shareholders are kept in both countries:—*Held*: the evidence before the Special Comrs. was sufficient to support the conclusion of fact that for income tax purposes applt. co. was resident in the United Kingdom, &

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162 i. Company registered abroad—Head office abroad—Control in United Kingdom.—Applt., who resided in Aberdeen, was the sole owner of a business of woollen warehousemen carried on by managers on his behalf at Toronto, Canada. Applt. alone was entitled to the profits & liable for the losses in connection with the business, & it was found, as a fact, by the district comrs. that he was vested with the sole right to manage & control every department of its affairs:—*Held*: applt. assessable under Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Case I., & not under Case V. on remittances only.—OGILVIE v. KRITON (SURVEYOR OF TAXES) (1908), 5 Tax Cas. 338.—SCOT.

m. — — — — —.—A co. incorporated in England, & having its registered office in London, conducted its Australian business at Melbourne in Victoria, & its practical operations of mining & treating & smelting ore at Broken Hill & Cockle Creek in New South Wales. By a contract made in London the co. agreed to sell to purchasers a large quantity of concentrates produced from Broken Hill slimes, delivery of which was to be made at Broken Hill in instalments extending over a period of years. Pursuant to the contract, the purchasers paid a sum of £63,000 in advance, but before any concentrates were delivered they made default in further payments which had become due. An agreement was then made in London by which the original contract was cancelled as from the date of the cancelling agreement, & the co. were to be entitled to retain for their use all moneys which had been paid under the contract. No concentrates or slimes were ever appropriated, set

apart, or treated by the co. for the purchasers. Of the £63,000 the balance held by the co., after deduction of commission & brokerage, was £61,425:—*Held*: for income tax purposes the £61,425 should be treated as profits from the business of mining, etc., carried on by the co. in New South Wales & taxable as such subject however to the co.'s right to show that portion of it was not attributable to the business carried on in New South Wales.—*Re MEEKS, TAXATION COMRS. v. MEEKS* (1915), 15 S. R. N. S. W. 379; 32 N. S. W. W. N. 50; 19 C. L. R. 568.—AUS.

n. — — — — —.—A co. whose directors & head office were in Bellary wherefrom the business of the co. was controlled had a factory in Raichur (i.e. in the Nizam's Dominions), earned all its income only in Raichur by pressing cotton for its customers & usually paid its dividends according to its agreement only at that place:—*Held*: notwithstanding the fact that some money was received in Bellary from Raichur for office expenses & for convenient payment in Bellary of dividends to some shareholders, the co. could not be assessed to income tax in British India as no portion of its income "accrued, arose or was received" in British India.—*BOARD OF REVENUE v. RIPON PRESS* (1923), 1 L. R. 46 Mad. 706.—IND.

o. — — — — —.—Deft. co. had its registered & head office in Melbourne. It owned extensive kauri forests in New Zealand, & had many timber mills & timber depôts in New Zealand. It carried on business in Victoria, New South Wales, & elsewhere, & in New Zealand. Its principal business in New Zealand was the conversion of its timber-trees into timber, partly in balk, partly in fitches & boards

of various dimensions. A large part of the timber, in this condition, was exported by the co. from New Zealand, to Sydney, where parts of it were cut up into smaller dimensions. Part of the timber so exported was sold, either in balk, or after being so cut up, in Australia & England; part was manufactured in Sydney into doors, sashes, & other articles, & was then sold in its manufactured condition. The purchase-moneys were received by the co. in Melbourne. Other portions of the timber were sold in New Zealand:—*Held*: the co. was not liable to income tax in New Zealand upon the whole of the profits made by it upon timber exported by it from New Zealand & sold elsewhere, whether or not after further cutting or manufacture outside of New Zealand, but was liable only upon that part of the profit which was derived by it from the business carried on by it in New Zealand.—*TAXES COMR. v. KAURI TIMBER CO., LTD.* (1904), 24 N. Z. L. R. 18.—N.Z.

p. Operations carried on within colony—Head office abroad—Product sold abroad.—Mining cos. carried on their operations in the Colony of N. S. W. upon Crown lands held under leases from the Crown. The head offices of the cos. were outside the colony. The ore was extracted from the soil, & converted into a marketable product in the colony, but the product was afterwards sold, & the price of it received, outside the colony:—*Held*: the cos. had income liable to taxation as being derived either from lands of the Crown or from trade or from some other source, & were not exempt on the ground that the income was earned outside the colony.—*TAXATION COMRS. v. KIRK* (1900), 83 L. T. 4.—AUS.

q. Company registered in

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the local management in New Zealand did not constitute a separate trade or business.—**NEW ZEALAND SHIPPING CO., LTD. v. THEW** (1922), 8 Tax Cas. 208, H. L.

Annotations:—*Refd.* Swedish Central Ry. v. Thompson, [1925] A. C. 495. *Mentd.* Currie v. I. R. Comrs., [1921] 2 K. B. 332.

165. Company registered in England—Management & control abroad—Administrative functions only performed in England.]—SWEDISH CENTRAL RY. CO., LTD. v. THOMPSON, No. 144, *ante*.

SUB-SECT. 3.—CARRIED ON IN THE UNITED KINGDOM BY PERSONS, COMPANIES AND FIRMS RESIDENT ABROAD.

A. What are.

166. Whether factor or agent in receipt of profits essential.]—Applts., manufacturers of wines in France, domiciled & resident there, through an agent resident in the United Kingdom were advertised as sellers of wines, & through the agent were in the habit of making contracts for the sale to customers in the United Kingdom of wines, which were forwarded direct from France to the customers, the latter paying the cost of the packing & carriage of the wines. Applts. had no banking account, or stock of wines, or office or establishment in the United Kingdom, but their names appeared on an inside door of the agent's office. Payments by the customers were made sometimes to the agent & transmitted by the agents to applts., & sometimes by bills of exchange drawn by applts. on the customers. The agents had no interest in any sale other than their commission on the transaction:—*Held*: a "trade" was "exercised within the United Kingdom" within the meaning of Income Tax Act, 1853 (c. 34), s. 2, Sched. D., in respect of the annual profits arising from which income tax might be charged.

A foreigner not resident within the United Kingdom may be assessed to the income tax under Income Tax Acts, 1853 (c. 34), & 1842 (c. 35), in respect of annual profits accruing to him from a trade exercised within the United Kingdom, notwithstanding that he has not within the United Kingdom a factor or agent in receipt of the profits within the meaning of sect. 41 of Income Tax Act, 1842 (c. 35), the provisions of this sect. being in aid & not in derogation of the duties granted by Income Tax Act, 1853 (c. 34).—**WERLE & CO. v. COLQUHOUN** (1888), 20 Q. B. D. 753; 57 L. J. Q. B. 323; 58 L. T. 756; 52 J. P. 644; 36 W. R. 613; 4 T. L. R. 396; 2 Tax Cas. 402, C. A.

Annotations:—*Consd.* Grainger v. Gough, [1896] A. C. 325; Crookston v. Furtado (1910), 5 Tax Cas. 602; Wilcock v. Pinto, [1925] 1 K. B. 30. *Refd.* Watson v. Sandie & Hull (1897), 14 T. L. R. 124; Brooke v. I. R. Comrs. (1917), 7 Tax Cas. 261; Williams v. Singer, Pool v. Royal Exchange Assce., [1919] 2 K. B. 108; MacLaine v. Eccott (1924), 131 L. T. 601; Whitney v. I. R. Comrs. (1925), 42 T. L. R. 58. *Mentd.* R. v. Newmarket Income Tax Comrs., *Ex p.* Huxley, [1916] 1 K. B. 788; Brighton College v. Marriott, [1925] 1 K. B. 312.

167. Trade contracts made by agent within

& abroad—Central management & control exercised in Ireland.]—A co., which was registered both in Ireland & in the United States of America, carried on a business which consisted of purchasing raw linen goods in Scotland & Ireland, contracting for the manufacture of the goods by other firms, folding the finished goods in its own warehouse in Belfast & selling them, principally in the American

markets. A small portion of the co.'s goods was sold in the United Kingdom. The sole director of the co. resided in the United States of America & under the arts. of assocn. he exercised, so long as he remained a director, exclusive & supreme control of the co., although as a shareholder he did not possess a majority of the votes attaching to the shares. The registered office of the co. was situate in Belfast, where

United Kingdom—Goods exported for sale abroad.]—SULLEY v. A.-G., No. 132, *ante*.

168. — Foreign cable company—Profits from messages sent from United Kingdom.]—Applts., a foreign co. domiciled in Copenhagen, had three marine cables in connection with the telegraph lines of the Post Office in the United Kingdom. They had also work rooms with clerks in London, Newcastle & Aberdeen. Messages from this country were forwarded over the lines of the Post Office & the cables of applts. to Denmark, & thence by their wires & the wires of foreign govts. to Russia, China, Japan & India. The total charges paid for transmitting such messages were collected by the Post Office, & after deducting their dues, handed to applts., who retained the amount due to them for the transmission of messages over their cables & lines, & paid the residue to the various govts. & cos. respectively entitled to it. No profits were made by applts. from the transmission of messages over the land lines in the United Kingdom:—*Held*: applts. must be taken to exercise a trade in the United Kingdom under Income Tax Act, 1853 (c. 34), s. 2, sched. D., & they were chargeable to income tax on the balance of profits or gains from their receipts in this country from the transmission of messages.—**ERICHSEN v. LAST** (1881), 8 Q. B. D. 414; 51 L. J. Q. B. 86; 45 L. T. 703; 46 J. P. 357; 30 W. R. 301; 4 Tax Cas. 422, C. A.

Annotations:—*Foll.* Pommery & Greno v. Apthorpe (1886), 58 L. J. Q. B. 155. *Apld.* Werle v. Colquhoun (1888), 20 Q. B. D. 753. *Apprvd.* Grainger v. Gough, [1896] A. C. 325. *Consd.* De Beers Consolidated Mines v. Howe, [1905] 2 K. B. 612; MacLaine v. Eccott (1924), 132 L. T. 173. *Apld.* Wilcock v. Pinto, [1925] 1 K. B. 30. *Refd.* Watson v. Sandie & Hull (1897), 14 T. L. R. 124; New Zealand Comr. of Taxes v. Eastern Extension Australasia & China Telegraph Co., [1906] A. C. 526; Lovell & Christmas v. Comr. of Taxes, [1908] A. C. 46; Crookston v. Furtado (1910), 5 Tax Cas. 602; Beynon v. Ogg (1918), 7 Tax Cas. 125; Weiss, Biheller & Brooks v. Farmer, [1918] 2 K. B. 725; Smidth v. Greenwood (1922), 8 Tax Cas. 193; Brighton College v. Marriott, [1925] 1 K. B. 312. *Mentd.* Kirkwood v. Gadd, [1910] A. C. 422.

169. — Goods not consigned to agent.]—Applts., a firm of wine merchants, carrying on business & residing at Bordeaux, shipped wines either direct to purchasers in the United Kingdom or through agents carrying on business therein, such agents receiving a commission on all wines sold in the United Kingdom. In the offices of the agents the French firm rented a room, where they kept a clerk & had their name painted; & during four months in every year one of their partners stayed at an hotel in London for the purpose of soliciting custom. Having been charged with income tax in respect of profits made in the United Kingdom, & the assessment having been affirmed by the comrs.:—*Held*: (1) applts. were not resident in the United Kingdom so as to be chargeable with income tax under the first clause of Income Tax Act, 1853 (c. 34), sched. D., but they exercised a trade within the United Kingdom, & were chargeable under the second clause of the sched.; (2) an assessment on the firm is good, as the powers of assessing the agent under Income Tax Act, 1842 (c. 35), s. 41, does not relieve the principal from his liability to assessment where he can be served with the proper

general meetings were held, the minute book kept, the co.'s accounts audited & dividends declared:—*Held*: the co. was for income tax purposes resident at the registered office in Belfast where central management & control was exercised, & the co. was assessable to income tax in respect of the whole of its profits.—**HOOD (JOHN) & CO., LTD. v. MAGEE** (1918), 7 Tax Cas. 327.

notices.—*TISCHLER & Co. v. APTHORPE* (1885), 52 L. T. 814; 49 J. P. 372; 33 W. R. 548; 1 T. L. R. 344; 2 Tax Cas. 89, D. C.

Annotations:—As to (1) *Consd. Crookston v. Furtado* (1910), 5 Tax Cas. 602. *Refd. Pommery & Greno v. Apthorpe* (1886), 56 L. J. Q. B. 155; *Grainger v. Gough*, [1896] A. C. 325; *Watson v. Sandie & Hull* (1897), 14 T. L. R. 124; *Brooke v. I. R. Comrs.* (1917), 7 Tax Cas. 261. As to (2) *Apprvd. Werle v. Colquhoun* (1888), 20 Q. B. D. 753. *Refd. R. v. Newmarket Income Tax Comrs., Ex p. Huxley*, [1916] 1 K. B. 788; *Williams v. Singer, Pool v. Royal Exchange Assce.*, [1919] 2 K. B. 108; *MacLaine v. Eccott* (1924), 131 L. T. 601; *Whitney v. I. R. Comrs.* (1925), 42 T. L. R. 58.

170. ——— Some sale from stock in England.]—Appls., a firm of wine merchants at Rheims, employed an agent in London for the sale of their wines in England. He obtained orders & sent them direct to applts. at Rheims. Small orders were supplied from a stock of wine kept in London; larger orders were supplied by applts. direct to the customers. Amounts due were collected by the agent on behalf of applts., who kept a banking account in London. Drafts given in payment were sent to applts. for indorsement. The agent received a commission on all wine of applts. sold in England:—*Held*: applts. carried on a trade within the United Kingdom within Income Tax Act, 1853 (c. 34), s. 2, sched. D., & were assessable to the income tax in respect of the profits thereof.—*POMMERY & GRENO v. APTHORPE* (1886), 56 L. J. Q. B. 155; 56 L. T. 24; 35 W. R. 307; 3 T. L. R. 242; 2 Tax Cas. 182.

Annotations:—*Apprvd. Werle v. Colquhoun* (1888), 20 Q. B. D. 753. *Consd. Crookston v. Furtado* (1910), 5 Tax Cas. 602. *Refd. Grainger v. Gough*, [1896] A. C. 325; *Watson v. Sandie & Hull* (1897), 14 T. L. R. 124.

171. ———.]—*WERLE & Co. v. COLQUHOUN*, No. 166, *ante*.

172. .]—(1) The intention & effect of Finance (No. 2) Act, 1915 (c. 89), s. 31 (7), were to exempt from taxation in the name of a resident agent or other person in the position of an agent all sales & transactions between non-residents, even though effected through the medium of that agent or other person, except in cases where the agent or other person receives the profits, or where the goods, which are the subject of the transactions, reach this country.

(2) A firm carrying on an extensive business as merchants in Java was associated with a London firm, which acted as their agents in England. A case was stated arising out of assessments to income tax made upon the London firm, as agents of the Java firm, for the decision of the Ct. as to liability to tax in respect of profits deemed to arise to the Java firm from the exercise of trade in the United Kingdom. The Java firm, carrying on the business of merchants, sold goods through the London firm by contracts made in London, but the goods were not consigned to the London firm:—*Held*: the Java firm was, through the London firm, exercising a trade in the United Kingdom.

It is true that the goods were not consigned to the London firm nor was the purchase-money paid to them, & that in every case the goods were delivered by the Java firm to purchasers outside the United Kingdom; but the contracts were made in London through the agency of the London firm, & the purchase-money was in most cases paid through a London bank. I think it is clear that this part of the trade of the Java firm was exercised within the United Kingdom (*LORD CAVE, C.*).

(3) The British Govt. during the War bought 54,000 tons of sugar from the Java firm through the British firm, i.e. the contract was made in England, the sugar was to be delivered in England, & the price was to be paid in England:—*Held*:

an assessment [on the Java firm as exercising a trade in the United Kingdom] was rightly made.

(4) Further transactions with the British Govt. for the purchase of large consignments of sugar took place under which the Java firm purchased sugar for the Sugar Commission under agreements negotiated by the London firm. The successive contracts were made upon the terms of a model contract providing for delivery in London & for payment in London:—*Held*: the Java firm was exercising a trade in London with regard to these transactions.

(5) Further transactions took place in respect of which the Java firm acted in Java as agents for the British Govt. to buy sugar for them on commission:—*Held*: a trade was being carried on in Java & not in London in respect of these transactions.—*MACLAINE & Co. v. ECCOTT* (1926), 42 T. L. R. 416, H. L.; *varying* (1924), 132 L. T. 173, C. A.

Annotation:—As to (2) *Consd. Wilcock v. Pinto*, [1925] 1 K. B. 30.

173. ———.]—An Egyptian firm habitually sold cotton in England through one agent in Manchester. Sometimes the firm cabled to the agent that they had a specified quantity of cotton for sale at a price not below a specified limit & upon terms fixed by them in each case; sometimes the agent obtained from intending purchasers offers to buy cotton, which offers he transmitted to the firm for their approval or rejection. In the first case the agent sold the cotton according to the firm's instructions. In the second case, if the firm approved the offers they informed the agent & he accepted the offers & made the necessary contracts in each case. The firm then shipped the goods & drew on the purchaser a bill payable in London for an amount including the cost of the goods & freight & insurance from Alexandria. They discounted the bill with bankers in Alexandria who sent the bill with the bill of lading to the purchaser. The goods were released when the purchaser had discharged or made himself responsible for the bill, but not before; & they were released to him direct & not through the agent. The agent was not responsible to the firm for bad debts. He was at liberty to do, but did not in fact do any business other than that of the firm. The firm sold some of their cotton in Liverpool through a broker:—*Held*: (1) the firm was exercising a trade in England, the contracts for the sale of the cotton having been made in England & the price of the goods being payable in England; & probably delivery of the goods taking place there, though it was not necessary to decide this; (2) the firm was exercising the trade through an agent being an authorised person carrying on its regular agency within Finance (No. 2) Act, 1915 (c. 89), s. 31 (6), & was therefore chargeable in the name of the agent to income tax in respect of profits & gains arising through the agency.—*WILCOCK v. PINTO & Co.*, [1925] 1 K. B. 30; 94 L. J. K. B. 101; 132 L. T. 74; 69 Sol. Jo. 178; 9 Tax Cas. 111, C. A.; *affg.*, [1924] 1 K. B. 304.

Annotation:—As to (1) *Apld. MacLaine v. Eccott* (1924), 132 L. T. 173.

174. ——— Goods consigned to agent.]—Foreign principals were in the habit of consigning goods to agents in this country for sale. The agents, who invoiced the goods to their purchasers in their own names & guaranteed payment by the purchasers, remitted to their principals the proceeds of the sales less their charges & commission. On a claim by the Crown against the foreign principals for income tax:—*Held*: (1) though there might be a presumption as between the

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agents & their purchasers that the agents & not the foreign principals were the vendors, there was no corresponding presumption as between the foreign principals & the agents that the property in the goods had passed from the principals to the agents; (2) the sales by the agents in this country were as between them & their principals made on behalf of the principals, & the principals were consequently liable to income tax as exercising a trade within the United Kingdom within the meaning of Income Tax Act, 1853 (c. 34), s. 2, Sched. D.—*WATSON v. SANDIE & HULL*, [1898] 1 Q. B. 326; 67 L. J. Q. B. 319; 77 L. T. 528; 46 W. R. 202; 14 T. L. R. 124; 42 Sol. Jo. 151; 3 Tax Cas. 611, D. C.

Annotations:—As to (2) Consd. Crookston v. Furtado (1910), 5 Tax Cas. 602. *Refd. Weiss, Biheller & Brooks v. Farmer*, [1918] 2 K. B. 725.

175. —.]—*MACLAINE & Co. v. ECCOTT*, No. 181, *post*.

176. — Goods delivered & price paid in United Kingdom.]—*MACLAINE & Co. v. ECCOTT*, No. 172, *ante*.

177. On approval of foreign principal.]—A foreign co. had an agent in England, who on receipt of an offer for the co.'s goods, communicated that offer to the co., & on receiving the authority of the co., accepted the offer. All goods for delivery in the United Kingdom were put on board ship by the co. free at Boston, U.S.A., consigned to Liverpool in the name of the agent, who distributed them to the customers:—*Held*: (1) the contracts with the English customers & the delivery of the goods were made in this country, & the co. was exercising a trade here.

(2) Even if the contract had been made in New York, the delivery of the goods here would have constituted an exercising of trade in this country.—*TURNER v. RICKMAN* (1898), 4 Tax Cas. 25.

Annotation:—As to (2) Refd. Crookston v. Furtado (1910), 5 Tax Cas. 602.

178. — Acceptances posted by agent in United Kingdom.]—Applt. B., a resident in the United Kingdom, was appointed as the agent for the United Kingdom, Canada & Australia by Messrs. T. S. B., who carried on the business of silk manufacturers & merchants at Cernobbio, Italy. Applt. took orders from persons in the United Kingdom & transmitted them to Messrs. T. S. B. in Italy, who, if they decided to accept the offer, sent a form of acceptance to applt., who

posted it in the United Kingdom to the purchaser Messrs. T. S. B. sent the goods to the purchaser direct through forwarding agents in Italy. It did not appear whether the forwarding agents were employed by the vendors or by the purchasers, nor who paid the freight from Italy to the United Kingdom, nor at whose risk the goods were during transit. The invoice for the goods was sent in blank to applt., who completed it & forwarded it to the customers. Payment was made by cheques sent by purchasers direct to Messrs. T. S. B. in Italy. Applt. had no authority to accept payment on behalf of the Italian firm. Applt. appealed against assessments to income tax under Schedule D. made upon Messrs. T. S. B. in the name of applt. as their agent, on the ground that there was in the circumstances no trade exercised by Messrs. T. S. B. in the United Kingdom. Applt. also contended that he was not an agent assessable on behalf of Messrs. T. S. B. & that his assessment was prohibited by Finance (No. 2) Act, 1915 (c. 89), s. 31 (6).

The Special Comrs. held that Messrs. T. S. B. did not carry on a trade within the United Kingdom:—*Held*: (1) Messrs. T. S. B. carried on a trade in the United Kingdom through the contracts with purchasers which were made in the United Kingdom by the posting by applt. of the acceptances of orders; (2) the fact that the acceptances contained the words: "On account of present difficulties we cannot guarantee execution of this order" did not prevent the contracts from being made by the posting of the acceptances, for the purpose of the question as to where the trade was exercised; (3) applt. was not in the circumstances "a broker or general commission agent" & was not within the exception of Finance (No. 2) Act, 1915 (c. 89), s. 31 (6).—*BELFOUR v. MACE* (1925), 133 L. T. 385.

179. — Agent authorised to quote prices—But not to accept orders.]—Appls., who were silk manufacturers in Italy, had agents in London, who were general commission agents. These agents had no authority to accept orders on behalf of applts., but were able to quote prices to intending customers, who paid the agents for the goods. The agents deducted their commission from the moneys so received. Appls. were assessed to income tax in the name of their agents:—*Held*: applts. exercised a trade in the United Kingdom, & as the agents did not occupy, in relation to applts., the position of brokers or general commission agents but were really working on

PART V. SECT. 2, SUB-SECT. 3.—A.

1771. Trade contracts made by agent within United Kingdom—On approval of foreign principal.]—Appls. carried on business as merchants & commission agents in the United Kingdom, & sold goods on behalf of a firm of manufacturers at Verviers, Belgium. There was no written agency agreement. Offers received by applts. were submitted to the manufacturers for approval, & if approved, were accepted by applts. on behalf of the manufacturers. The goods were consigned to applts. for delivery to customers in the United Kingdom. Appls. received payment for the goods & discharged the accounts on behalf of the manufacturers. Appls. sent sale accounts to the manufacturers monthly & rendered a quarterly statement for expenses & commission. They were paid by commission on business done & were liable for one-half of the bad debts:—*Held*: the manufacturers were exercising a trade within the United Kingdom, & the decision of the comrs. in assessing

applts., as agents in respect of the profits derived by the manufactures from the exercise of such trade, was right.—*MACPHERSON & Co. v. MOORE* (1912), 6 Tax Cas. 107.—*SCOT*.

r. — Goods shipped from abroad.]—Appls. were the agents in the United Kingdom of a Parisian co. which owned & worked phosphate mines in French territory in Algeria. They were remunerated by a commission which was remitted from Paris. Appls. had authority to sell the co.'s phosphates without reference to the co. at or over minimum prices fixed by the co. According to the documents used the sales to the purchasers purported to be made by the co. through applts. The phosphates were shipped by the co. at Bona, in Algeria, no stock being kept by applts. The bills of lading, which arrived while the goods were still at sea, were endorsed as soon as received by applts. to the purchasers & passed to the latter with the invoices & insurance policies, in exchange for an instalment of the price. Payments were to be made by

cash in London, & this involved the use of crossed cheques, which were drawn by the purchasers in favour sometimes of the co., at other times of applts. The cheques as received, endorsed where necessary, were invariably sent by applts. to the co. & were in no case paid into a bank in the United Kingdom:—*Held*: the co. did not exercise a trade in the United Kingdom, & applts. were not agents having the receipt of profits.—*CROOKSTON BROTHERS v. FURTADO* (SURVEYOR OF TAXES) (1910), 5 Tax Cas. 602.—*SCOT*.

t. — Foreign shipping company.]—A co. registered in Christiana, where its registered office was, & its share list & books were kept, & where the shareholders' meetings were held, owned a ship, & elected as managers two gentlemen in Norway, one of whom acted as director of the management. The chartering & all voyage receipts & disbursements were dealt with by a firm resident in Glasgow, who received & retained all funds until required for payment of expenses

appls.' staff, applts. were assessable in the name of their agents.—*GAVAZZI v. MACE* (1926), 42 T. L. R. 389.

180. — Price not controlled by foreign principal—Profits divided.]—Appls. were an English limited co. carrying on business in London as manufacturers & sellers of incandescent & other mantles, &, under an agreement with a Dutch co. called the R. Union, were the sole sellers in the United Kingdom of the goods manufactured by the R. Union, which had its head office in Holland, where its books were kept & its general business transacted. Appls.' transactions with the R. Union formed only a small part of applts.' business. Under the agreement the R. Union manufactured mantles & added to the cost 10 per cent. for expenses, & applts. sold the mantles in England at the best possible price. Appls. were entitled to 5 per cent. commission for their expenses & the *del credere*, & the profits were divided. Appls. agreed to keep a separate day-book showing the selling prices, & this book was to be open to the directors of the R. Union. The name of the R. Union did not appear on the invoices sent by applts. to their customers in England, but applts.' premises had on them the name of applts. as agents for the R. Union, though it was not proved that this had been authorised by the R. Union. An assessment to income tax was made on applts. as agents for the R. Union in respect of profits derived by the R. Union from exercising the trade of vendors of gas mantles within the United Kingdom. The comrs. confirmed the assessment, & their decision was affirmed. On appeal:—*Held*: there was evidence on which the general comrs. could find that the R. Union was exercising a trade within the United Kingdom within Income Tax Act, 1853 (c. 34), s. 2, Sched. D., & on which they could find that applts. were the agents of the R. Union within Income Tax Act, 1842 (c. 35), s. 41.—*WEISS, BIELLER & BROOKS, LTD. v. FARMER*, [1923] 1 K. B. 226; 92 L. J. K. B. 179; 128 L. T. 471; 39 T. L. R. 118; 8 Tax Cas. 381, C. A.

Annotation:—*Reid. Maclaine v. Eccott* (1924), 131 L. T. 601.

181. — Foreign principals themselves agents.]—A firm carrying on an extensive business as merchants in Java was associated with a London firm, which acted as their agents in England. A case was stated arising out of assessments to income tax made upon the London firm, as agents of the Java firm, for the decision of the ct. as to liability to tax in respect of profits deemed to arise to the

or dividends:—*Held*: the co. was not resident in the United Kingdom, but it exercised a trade within the United Kingdom, for the profits of which the Glasgow firm, as its agents, were assessable to income tax.—*WINGATE (JAMES) & CO. v. WEBBER* (1897), 3 Tax Cas. 569.—*SCOT*.

a. Contracts made & executed abroad—Orders obtained by agent abroad.]—As the agent of a firm situated in Paris, A. bought raw skins in Madras & exported them to Paris where the firm sold them for profit:—*Held*: as the profits accrued solely in France they were not taxable in British India:—*Held*: further, s. 33 (1) of the Indian Income Tax Act did not create a new category of income which could be charged under the Act in addition to incomes mentioned under s. 5 as chargeable under the Act but that s. 33 (1) merely provided a machinery by which non-resident foreigners (amongst others), trading in British India or having business connection in British India could be taxed on income derived by them in British India (*Greenwood v. Smidh*,

[1922] 1 A. C. 417 followed).—*BOARD OF REVENUE v. MADRAS EXPORT CO.* (1922), 1 L. R. 46 Mad. 360.—*IND*.

b. — Orders obtained by agent in New Zealand.]—If the business of a principal is the sale or disposition of property in New Zealand by sample, price list, or negotiation, or if it results from the solicitation of his agent in New Zealand, then, although the principal is out of New Zealand, & although the contract for the sale or disposition of the property is made out of New Zealand, the income derived from the transaction is taxable in New Zealand, & the principal is a non-resident trader, & the agent must render returns accordingly.—*CHAMBERS & SON, LTD. v. TAXES COMR.* (1916), 35 N. Z. L. R. 617.—*N.Z.*

c. Principal place of business abroad—Foreign shipping company—Carrying goods from Australia.]—A shipping co. whose principal place of business was in England carried goods from Fremantle to London, but the ship leaving Australia carried them only to Singapore, where they were transhipped to other ships of the same

Java firm from the exercise of trade in the United Kingdom.

(1) The Java firm collected goods from planters in the East Indies, undertaking to sell them on commission on behalf of the owners. If such goods were sent to London for disposal, the London firm made contracts for the sale of the goods, delivered the goods to the purchasers, received payment for them, &, after deducting commission, accounted for the proceeds to the Java firm, which firm in turn accounted to the person who consigned the goods:—*Held*: the Java firm was exercising a trade or vocation in this country.

(2) The Java firm, carrying on the business of merchants, transmitted goods to the London firm, which sold them through brokers or otherwise:—*Held*: the Java firm was, through the London firm, exercising the trade of merchants in the United Kingdom.—*MACLAINE & CO. v. ECCOTT* (1924), 132 L. T. 173, C. A.; *on appeal*, (1926) 42 T. L. R. 416, H. L.

Annotation:—As to (1) *Reid. Wilcock v. Pinto*, [1925] 1 K. B. 30.

Compare No. 140, *ante*.

182. — Execution of order not guaranteed.]—*BELFOUR v. MACE*, No. 178, *ante*.

183. — Goods to be purchased abroad—For delivery in United Kingdom.]—*MACLAINE & CO. v. ECCOTT*, No. 172, *ante*.

184. — — — — — Purchase on commission.]—*MACLAINE & CO. v. ECCOTT*, No. 172, *ante*.

185. Contracts made & executed abroad—Orders obtained by agent in United Kingdom.]—(1) A foreign merchant, who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, does not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts so long as all contracts for the sale & all deliveries of the merchandise to customers are made in a foreign country.

(2) *Semble*: the words in Income Tax Act, 1842 (c. 35), s. 41, "having the receipt of any profits or gains," apply to "factor" & "agent" as well as to "receiver."—*GRAINGER & SON v. GOUGH*, [1896] A. C. 325; 65 L. J. Q. B. 410; 74 L. T. 435; 60 J. P. 692; 44 W. R. 561; 12 T. L. R. 364; 3 Tax Cas. 462, H. L.

Annotations:—As to (1) *Folld. Turner v. Rickman* (1898), 4 Tax Cas. 25. *Consd. Crookston v. Furtado* (1910), 5 Tax Cas. 602. *Folld. Smidh v. Greenwood* (1922), 8 Tax Cas. 193. *Consd. Maclaine v. Eccott* (1924), 132 L. T. 173; *Wilcock v. Pinto*, [1925] 1 K. B. 30. *Reid*.

co. for conveyance to London:—*Held*: the co. was liable to assessment & income tax in respect only to the freight earned by the ships which carried the goods from Australia to Singapore.—*OCEAN S.S. CO., LTD. v. FEDERAL COMR. OF TAXATION*, [1918] 25 C. L. R. 412.—*AUS*.

d. Joint adventures by Australian & foreign companies.]—By an agreement made in America between a co. incorporated in America & carrying on there the business of a manufacturer & vendor of motor cars & a co. incorporated in New South Wales, it was agreed that the American co. should sell to the Australian co. motor cars to be from time to time agreed upon between the parties. The cars were to be delivered on rail at the American co.'s factory in the United States, & to be at the sole risk of the Australian co. from that point. The price f.o.b. rail was fixed by the agreement, & the Australian co. was to pay freight, insurance, Customs duty, packing & all other incidental forwarding charges, & was allowed five months from the date of

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Watson v. Sandie & Hull (1897), 14 T. L. R. 124; *Taxation Comrs. v. Kirk*, [1900] A. C. 588; *Lovell & Christmas v. Comr. of Taxes*, [1908] A. C. 46; *Egyptian Hotels v. Mitchell*, [1914] 3 K. B. 118; *Greenwood v. Smidth*, [1922] 1 A. C. 417; *Weiss, Biheller & Brooks v. Farmer*, [1923] 1 K. B. 226. *As to* (2) *Reid*. *Crookston v. Furtado* (1910), 5 Tax Cas. 602; *Scales v. Atalanta S.S. Co. of Copenhagen* (1925), 41 T. L. R. 591. *Generally*, *Mentd. La Bourgogne* (1898), 68 L. J. P. 9; *Stephenson v. Rogers* (1899), 80 L. T. 193; *Badische Anilin und Soda Fabrik v. Thompson* (1902), 88 L. T. 492, n.; *Scott v. Solomon*, [1905] 1 K. B. 577; *Kirkwood v. Gadd*, [1910] A. C. 422.

186. ———.]—Finance (No. 2) Act, 1915 (c. 89), s. 31 (2), is not a charging sub-sect., but merely sums up the effect of sect. 41 of Income Tax Act, 1842 (c. 38), as extended by sect. 31 (1) of the Act of 1915, still keeping within the limits of Schedule D., & consequently does not bring into taxation profits made by non-residents from a trade not exercised within the United Kingdom.

Resps. were a Danish firm resident in Copenhagen manufacturing & dealing in cement making & other similar machinery which they exported all over the world. They had an office in London in charge of a qualified engineer who was their whole time servant. He received inquiries for machinery such as *resps.* could supply, sent to Denmark particulars of the work which the machinery was required to do, including samples of materials to be dealt with, & when the machinery was supplied he was available to give the English purchaser the benefit of his experience in erecting it. The contracts between *resps.* & their customers were made in Copenhagen & the goods were shipped f.o.b. Copenhagen. *Resps.* were assessed to income tax in respect of the profits derived from dealings in machinery with purchasers in the United Kingdom:—*Held*: they did not exercise a trade within the United Kingdom within the meaning of Income Tax Act, 1853 (c. 34), s. 2, Sched. D., & were not assessable to income tax either under that Schedule or under Finance (No. 2) Act, 1915 (c. 89), s. 31 (2).—*GREENWOOD v. SMIDTH* (F. L.) & Co., [1922] 1 A. C. 417; 91 L. J. K. B. 349; 127 L. T. 68; 38 T. L. R. 421; 66 Sol. Jo. 349; *sub nom.* *SMIDTH* (F. L.) & Co. *v. GREENWOOD*, 8 Tax Cas. 193, H. L.

Annotations:—*Reid*. *Weiss, Biheller & Brooks v. Farmer*, [1923] 1 K. B. 226; *MacLaine v. Eccott* (1924), 131 L. T. 601; *Wilcock v. Pinto*, [1925] 1 K. B. 30.

187. Goods delivered to purchaser in United Kingdom.]—TURNER v. RICKMAN, No. 177, *ante*.

See, also, Nos. 166, 169, 173, 181, *ante*.

188. Produce sold wholly in United Kingdom.]—

the arrival of the cars in Australia within which to pay for the cars, but, if time was taken for payment, interest at a certain rate was chargeable on the amount shown in the particular invoice after the expiration of fifteen days from the date of the invoice. Motor cars were supplied pursuant to the agreement & time was taken for payment & interest was paid to the American co.:—*Held*: such interest arose from business transacted & wholly carried out in America & was not income of the American co. arising from a source in New South Wales, & was not assessable to income tax.—*STUDEBAKER CORPN. OF AUSTRALASIA v. NEW SOUTH WALES TAXATION COMR.* (1921), 21 S. R. N. S. W. 497; 29 C. L. R. 225; 38 N. S. W. W. N. 49.—*AUS.*

g. Income derived from or received in New Zealand—Foreign cable company—Profits from messages originating in New Zealand.]—*Resps.* were an incorporated co. having its head office in London, but carrying on business in New Zealand, Australia,

& elsewhere. They were the owners of submarine cables from New Zealand to Australia & from Australia to India, & their business was to transmit telegraphic messages between various parts of the world:—*Held*: *resps.* were not chargeable with income tax in New Zealand on the profits derived by them from sending messages originating in New Zealand from Australia to India, such profits not being received in or derived from New Zealand.—*NEW ZEALAND TAXES COMR. v. EASTERN EXTENSION TELEGRAPH CO.* (1906), 95 L. T. 308.—*N.Z.*

f. — Sale abroad on commission—Produce consigned from New Zealand.]—Where contracts form the essence of a business the profits are taxable where such contracts are made; but where a co. registered in London, carried on there the business of selling on commission produce consigned to them for sale on commission by farmers in New Zealand, in pursuance of contracts entered into with an agent of the co. resident in New Zealand, & the sales were made in London & the com-

A co. was registered in Cape Colony as a limited co. & as an incorporated co., but was never registered in the United Kingdom. The co. owned diamond mines in South Africa, & its business consisted in finding diamonds there & selling them. By the arts. of assocn. it was provided that the head office of the co. should be at K., in Cape Colony, or in such other place or country as the directors should think fit. The co. had offices at K. & in London. There were regular weekly meetings of the directors at K., where also all meetings of shareholders were held, & the general accounts were kept. It was provided also that some of the directors should reside in South Africa, & some, sufficient to form a quorum, in the United Kingdom. The sale of the co.'s diamonds was always carried out by the directors resident in the United Kingdom. It was done by means of a yearly contract arranged between the directors resident in the United Kingdom & a syndicate of London diamond merchants. These directors also carried through other important financial operations on behalf of the company:—*Held*: it exercised its trade within the United Kingdom, so as to be chargeable with income tax under Income Tax Act, 1853 (c. 34), s. 2, Sched. D.

DE BEERS CONSOLIDATED MINES, LTD. v. HOWE, [1905] 2 K. B. 612; 74 L. J. K. B. 934; 93 L. T. 63; 54 W. R. 9; 21 T. L. R. 578, C. A.; *affd.* on other grounds, [1906] A. C. 455, H. L.

Annotations:—*Reid*. *New Zealand Shipping Co. v. Stephens* (1907), 24 T. L. R. 172; *American Thread Co. v. Joyce* (1913), 108 L. T. 353; *Mitchell v. Egyptian Hotels* (1915), 59 Sol. Jo. 649; *New Zealand Shipping Co. v. Thew* (1922), 8 Tax Cas. 208; *Bradbury v. English Sewing Cotton Co.*, [1923] A. C. 744; *Swedish Central Ry. v. Thompson*, [1925] A. C. 495. *Mentd.* *Smith v. Incorporated Council of Law Reporting for England & Wales*, [1914] 3 K. B. 674; *Usher's Wiltshire Brewery v. Bruce*, [1915] A. C. 433; *Daimler Co. v. Continental Tyre & Rubber Co.* (Great Britain), [1916] 2 A. C. 307; *The Polzeath* (1916), 85 L. J. P. 241; *Re Hilckes, Ex p. Muhesa Rubber Plantations*, [1917] 1 K. B. 48.

189. Foreign bank issuing loans in United Kingdom—Issue made through London banks.]—The Industrial Bank of Japan carried on business in Japan, & had a privileged position with the Japanese Govt. Between 1906 & 1912 it was authorised to offer & did offer some seven loans for subscription in the United Kingdom. For this purpose, as it had no office in London, it employed three banks in London to issue & distribute prospectuses of the loans & to receive the subscriptions. One of these banks, appts., collected from the other two banks the subscriptions received by them, & after deducting

mission was earned there, the balance of the proceeds of the sales being remitted to New Zealand after deducting the commission & any advances made by the co. against the produce so shipped:—*Held*: the co. did not carry on business in New Zealand, & were not liable to pay income tax there, their profits not being derived from or received in New Zealand.—*LOVELL & CHRISTMAS, LTD. v. TAXES COMR.* (1907), 97 L. T. 651; [1908] A. C. 46.—*N.Z.*

g. Income received in Punjab—Earned abroad.]—Income earned & received in British Baluchistan, & subsequently brought into or transmitted to the Punjab:—*Held*: not liable to be assessed to income tax, as such income was not received in the Punjab.—*SUNDAR DAS v. COLLECTOR OF GUJRAT* (1922), 1 L. R. 3 Lah. 349.—*IND.*

h. Goods shipped from abroad—Under partnership agreement—Interest on balance for costs, etc.]—*Resp.*, a co. registered & carrying on business in England under partnership agreements

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their commission appts. remitted the whole amount of the subscriptions to the Bank in Japan or to the Japanese Govt. The three banks in London had accounted for & paid income tax on all the commissions received by them, for work done in connection with the loans, & there was no evidence that anything beyond these commissions was payable or paid to the Industrial Bank for what was done in this country. Comrs. having found that during the years in question the Industrial Bank was carrying on in the United Kingdom the business of issuing loans on behalf of clients, & was chargeable to income tax in respect of its profits from such business to the extent to which those profits were earned in the United Kingdom:—*Held*: the Industrial Bank had not traded or carried on business in the United Kingdom in connection with the loans, but had merely employed appts. as bankers to carry out the business, & were therefore not chargeable with income tax on their profits.—*YOKOHAMA SPECIE BANK v. WILLIAMS* (1915), 85 L. J. K. B. 950; 113 L. T. 860; 6 Tax Cas. 634.

Annotation:—*Consd. MacLaine v. Eccott* (1924), 132 L. T. 173.

190. Joint adventures by English & foreign firms—Profits from joint transactions.—Applt. firms carry on business as cotton merchants & brokers in Liverpool & America respectively. Under an arrangement concluded between them the American firm buys cotton in America on account of the Liverpool firm, & pays for the goods so purchased by drawing bills on the latter firm. The cotton is usually sold in the United Kingdom by the Liverpool firm, but sales are occasionally effected in America by the American firm when the markets there are favourable. The American firm receives a commission on purchases & bears the office expenses in America incidental to the buying. The Liverpool firm bears the Liverpool office expenses in connection with the sales & takes credit in account for a commission on sales. The cotton consigned to Liverpool is sent on c.i.f. terms for account & risk of the Liverpool firm. Accounts of the joint transactions are made up annually & profits or losses thereon are shared or borne equally. Appls. contended that no partnership existed between them, that the payments to the American firm were merely remuneration for services & were a business expense of the Liverpool firm, that the American firm's business was wholly transacted outside, & its proprietor not resident in, the United Kingdom, & that its profits were accordingly outside the scope of the United Kingdom income tax:—*Held*: as regards the joint transactions in cotton, applt. firms carried on a partnership, the profits from which were assessable to income tax under Income Tax Act, 1842 (c. 35), s. 100, sched. D., Rules applicable to Cases I. & II., r. 3.—*MORDEN RIGG & Co. & ESKRIGGE (R. B.) & Co. v. MONKS* (1923), 8 Tax Cas. 450. C. A.

Profits shared between principal & agent.—*See* No. 180, *ante*.

B. Method of Assessment.

See Rules applicable to All Schedules, rr. 5–14 Finance (No. 2) Act, 1915, s. 31.

made with certain South African firms, purchased in its own name goods requisitioned by the firms & then invoiced & shipped the same, debiting the firms concerned with costs, freight, charges & commission, together with interest at 5 per cent. on the balance due from time to time:—*Held*: the interest received by resp. being the

result of the employment in England of resp.'s own capital in its own business was not received from any source within the Union, & was not taxable as income.—*TAXES COMR. v. DUNN & Co., LTD.*, [1918] App. D. 607.—S. AF.

PART V. SECT. 2, SUB-SECT. 4.

2001. Trade set up within three years

191. Assessment on non-resident principal—Although agent within United Kingdom—Principal able to be served.—*TISCHLER & Co. v. APTHORPE* No. 169, *ante*.

192. — Where no agent in United Kingdom.—*WERLE & Co. v. COLQUHOUN*, No. 166, *ante*.

193. Assessment on agent—“Factor, agent or receiver” having receipt of profits.—*GRAINGER & SON v. GOUGH*, No. 185, *ante*.

194. — For foreign agent of foreign principal.—*MACLAINE & Co. v. ECCOTT*, No. 181, *ante*.
Compare No. 140, *ante*.

195. Person carrying on non-resident's regular agency.—*WILCOCK v. PINTO & Co.*, No. 173, *ante*.

196. ——*GAVAZZI v. MACE*, No. 179, *ante*.

197. — Both principals foreign—Profits not received by agent.—*MACLAINE & Co. v. ECCOTT*, No. 172, *ante*.

198. — Goods not consigned to United Kingdom.—*MACLAINE & Co. v. ECCOTT*, No. 172, *ante*.

Assessment on agents, generally, *see* Part VIII., Sect. 1, sub-sect. 1, *post*.

SUB-SECT. 4.—METHOD OF COMPUTATION.

See Schedule D., Rules applicable to Cases I. & II., rr. 1 (2), 5 (2), 8 (1).

199. Trade set up within three years—Company formed to acquire existing partnership business.—*RYHOPE COAL Co. v. FOYER*, No. 208, *post*.

200. — Single ship company—Trading with successive ships.—A limited co. registered under the Cos. Acts, 1862 to 1900, was formed to purchase & trade with a certain steamship mentioned in the memorandum of assocn. &, in the event of the loss, sale, or disposition of that vessel or of any vessel subsequently acquired, to acquire from time to time some other steamship, but so that the co. should not own at any one time more than one ship; & the co. was to carry on the business of shipowners with respect to such steamship. The articles of assocn. provided that there should be a manager of the co. in lieu of directors; that the manager might insure the steamship for the time being owned by the co.; & that he might in the event of the loss of the steamship for the time being owned by the co., with the approval of the shareholders, buy another steamship out of the proceeds of the insurances of the ship so lost, or he was to divide & pay the net proceeds of the insurances ratably amongst the shareholders & wind up the co.

The co. acquired the steamship mentioned in the memorandum of assocn. & traded with her from 1901 till Apr. 1, 1906, when she was lost at sea. In May, 1906, the manager of the co., with the approval of the shareholders, purchased a second steamship out of the proceeds of the insurances on the first. On Oct. 17, 1906, the co. commenced trading with the second steamship:—*Held*: the co. carried on one trade or adventure throughout with the two ships in succession, & the trade or adventure which they carried on with the second ship was not first set up on Oct. 17, 1906, when that ship began trading. Therefore, for the purpose of assessment to income

—*Single ship company.*—A co. acquired one ship & commenced trading in Sept. 1911. The first accounts were made up to Nov. 20, 1912, & covered a period of a year & sixty-nine days. The assessment under Schedule D. for the year 1912–13 was based on these accounts, the liability for the year being computed proportionately

Sect. 2.—Case I.—Trades: Sub-sects. 4 & 5, A.]

tax for the year 1907-8:—*Held*: the co. were to be assessed on the balance of their profits & gains on an average of three years preceding the year of assessment, & not for one year on the average of the balance of the profits & gains from Oct. 17, 1906.—*MERCHISTON S.S. Co., LTD. v. TURNER*, [1910] 2 K. B. 923; 80 L. J. K. B. 145; 102 L. T. 363; 11 Asp. M. L. C. 487; 5 Tax Cas. 520.

201. Deductions in respect of freehold & leasehold property—Increase in assessment—Deduction of amount of assessment for each of the three years—Before striking average under Schedule D.]—GENERAL HYDRAULIC POWER Co., LTD. v. HANCOCK, No. 228, *post*.

Deductions from gross profits.]—See Sect. 2, sub-sect. 7, *post*.

202. Diminution of profits due to war—Finance Act, 1914 (Sess. 2) (c. 7), s. 13 (1).]—(1) A co. made profits for their financial year 1913 of £76,000, for the year 1914 of £36,000, & for the year 1915 of £16,000. For the year 1916 they made a loss of £11,000. The diminution in their profits for the year 1916, due to circumstances attributable directly or indirectly to the war, was taken to be the sum of £6,000. The co. were assessed by the comrs. to income tax in respect of the year 1916 upon the average profits of the three years preceding the year of assessment, namely, 1913, 1914, 1915, in the sum of £42,000, less the sum of £6,000, being the amount of diminution of the profits & gains in the year of assessment attributable to the war. Upon appeal from that assessment, the judge held that the combined result of above sub-sect., the Income Tax Act, 1842 (c. 35), s. 133, & the Revenue Act, 1865 (c. 30), s. 6, was that the co. were liable to be assessed for the year 1916 upon the average of the profits for the year of assessment & the two preceding years, the profits for the year of assessment being taken to be the average of the profits for the three years preceding the year of assessment less the amount by which the profits of the co., during the year of assess-

ment, had been diminished by circumstances attributable to the war. Upon that footing he held that the co. were taxable on £29,000, & therefore entitled to a relief of £13,000 upon the original assessment:—*Held*: the judge had not given effect to the Revenue Act, 1865 (c. 30), s. 6, which provided that no reduction should be made unless the profits of the year of assessment were proved to be less than the profits for one year on the average of the last three years, including the year of assessment.

In ascertaining the result of the co.'s trading in 1916 the profits should be determined by an examination of the books & the preparation of an account, excluding from the debit side all non-war losses, & not by reference to any average profits or the profits of a preceding year. Having thus ascertained the profits of the year of assessment, an average must be taken of those profits & the profits of the two preceding years, & that average would show the amount by which the original assessment should be altered. In the present case no examination of the books having been made, the materials for that method of computation were not before the ct., but adopting the only possible method of estimating the non-war losses the result was as follows: As between the years 1915 & 1916 there was a diminution of £27,000. Of this £6,000 represented war losses, & £21,000 non-war losses. Excluding the latter there was a profit of £10,000. The profits of the last three years respectively, including the year of assessment, stood, therefore, at £36,000, £16,000, & £10,000, producing an average of £21,000, to which amount the original assessment of £42,000 must be reduced.

(2) Income Tax Act, 1842 (c. 35), s. 133, as amended by Revenue Act, 1865 (c. 30), s. 6, did not confer upon the comrs. an absolute discretion to amend an assessment to any figure they thought fit, provided the assessment was not reduced lower than the basis fixed in the Act of 1865. They had power only to amend the assessment having regard to the actual profits & gains

from the taxable profits shown by the accounts. The co. contended that as the accounts were made up to a date some time subsequent to Apr. 5, 1912, they should not, so far as subsequent to that date, be taken into account & that the assessment should be computed on the basis of a proportion of the profits resulting from the first two voyages which ended on July 25, 1912:—*Held*: the contention of the co. was wrong & the assessment had been made on the proper basis.—*GLENSLOY S.S. Co., LTD. v. LETHAM* (1914), 6 Tax Cas. 453.—*SCOT*.

k. — Separate trades or single trade with different departments.]—A firm of boilermakers having secured a large shell contract from the French Govt. converted their business into a private limited co. in Feb. 1915, with objects which included the carrying on of the trades or businesses of boilermaking, engineering, & machinery, armaments & shellmaking. The shell manufacture was carried on in new premises erected for the purpose adjacent to, but having no intercommunication with, the original works, which continued to be used exclusively for the manufacture of boilers. Each manufacture had its own separate plant, separate workmen & technical & clerical staff, & separate set of books & trading accounts, but both manufactures were under the same general direction & management. All the accounts were brought into one common profit & loss account & balance sheet, bank interest & management

expenses being charged against the co. generally without apportionment. The manufacture of shells ceased in Apr. 1918, the staff engaged thereon was dispersed, the shellmaking plant was sold, & the premises used for shellmaking were let. The income tax, Schedule D, assessment on the co. for the year 1920-21 was based on the average of the whole of its profits, including those derived from shellmaking, for the preceding three years. On appeal against this assessment the co. contended that it had been carrying on two separate businesses, boiler-making & shellmaking, & that for the year 1920-21 it was only liable to assessment in respect of its boiler-making business on the average of its boiler-making profits for the three preceding years. The general comrs. found as a fact that the co. had carried on one business with two departments & not two businesses, & that it was accordingly liable to income tax, Schedule D., on the average of the whole of its profits including shellmaking profits.—*HOWDEN BOILER & ARMAMENTS Co., LTD. v. STEWART* (INSPECTOR OF TAXES) (1924), 9 Tax Cas. 205.—*SCOT*.

l. Income derived from both personal exertion & property.]—Under the provisions of a will, the trustees thereby appointed carried on certain business in Victoria which had belonged to testator & paid to applt. a fifth share in the annual profit thereby made:—*Held*: in respect of the income so received by applt. he was entitled to be

assessed as upon income derived from personal exertion, & he was wrongly assessed as upon income the produce of property.—*SYME v. TAXES COMR.*, [1914] A. C. 1013; 84 L. J. P. C. 39; 111 L. T. 1043; 30 T. L. R. 689.—*AUS*.

m. —.]—*FORSYTH v. FEDERAL COMR. OF TAXATION* (1916), 21 C. L. R. 636.—*AUS*.

n. —.]—Where income is derived from both personal exertion & property, the proper method of working out the deduction under Income Tax Assessment Act, 1915-1916, s. 19, is, after making the deductions permitted by sect. 18, first to apportion the sum of £156 *pro rata* between the income from personal exertion & that from property; then from the income from personal exertion to deduct the proportional sum attributable to the income from personal exertion less £1 for every £4 by which the income from personal exertion exceeds that proportional sum, & from the income from property to deduct the proportional sum attributable to the income from property less £5 for every £11 by which the income from property exceeds that proportional sum.—*BOWLES v. FEDERAL COMR. OF TAXATION* (1919), 26 C. L. R. 205.—*AUS*.

o. Discontinuance of portion of undertaking.]—A railway co. discontinued certain steamships which it had been running at a loss:—*Held*: in the following year the assessment

for the year of assessment.—YUANMI GOLD MINES v. EBORALL, [1921] 2 K. B. 544; 90 L. J. K. B. 636; 125 L. T. 326; 37 T. L. R. 571, O. A.

203. Trade at a standstill—No actual discontinuance of business—Application of three years average.]—Applt. co. was incorporated in 1912 to purchase & acquire as a going concern the business of builders & contractors & constructional engineers theretofore carried on by a firm, & to carry on a similar business. During 1913 & the early part of 1914 it was engaged in completing old contracts entered into by the vendors, but although it sought to obtain contracts for itself, it was not able to do so. In 1914 applt. co.'s works were acquired by the War Office, & from Dec. 1914, until Feb. 1920, it had no works or plant. During this period no contracts were concluded or trading operations conducted, & apart from capital receipts no money was received, but the co. persisted in its efforts to obtain contracts through its managing director. Throughout its existence applt. co. retained its registered office & held its statutory meetings year by year. The directors' fees & the secretary's salary were paid, & small general office expenses were incurred, & payments were made on account of travelling expenses of the directors & legal expenses & experts' fees in connection with negotiations for contracts. In 1920 the shares were acquired by other shareholders & new directors were appointed, works were acquired & contracts were obtained & substantial profits made for the year ending Apr. 5, 1922, in respect of which applt. co. was assessed to income tax under Schedule D. on the basis that a trade had been set up & commenced in 1920 within the meaning of Rule 1 (2) or Rule 8 (1) of the Rules applicable to Cases I. & II. Applt. co. contended that its trade had never been discontinued & consequently had not been "set up or commenced" in 1920 & that therefore the assessment should be made on the basis of the average profits of three years as provided in Schedule D., Rule applicable to Case I.:—*Held*: applt. co. had continued to carry on a trade or business & no trade or business had been set up or commenced in 1920, & the assessment should be made upon the basis of the three years' average.—

on the co. must be based on the net profits of the whole undertaking in the year preceding the year of assessment.—HIGHLAND RY. CO. v. INCOME TAX SPECIAL COMRS. (1885), 2 Tax Cas. 151.—SCOT.

p. Trade set up within a year—Assessment for year proportionate to period of trading for that year.]—Applt. co. was incorporated on Apr. 1, 1918, but, for the purposes of the excess profits duty, it had been agreed that trading did not commence until the middle of May, 1918. The first accounts were made up to Mar. 31, 1919, & the second accounts for the twelve months to Mar. 31, 1920. The co. appealed against an estimated assessment in respect of its profits under Schedule D. for the year 1919–20, & contended that, as complete accounts had been made up for its financial year preceding the year of assessment, viz. to Mar. 31, 1919, the tax for that year should be computed; (a) on the profits shown in such accounts; or, alternatively, if such accounts could not be regarded as covering a complete year's trading; (b) on the profits for twelve months proportionate to those for the actual period of trading to Mar. 31, 1919, as shown by the first accounts, without taking into consideration the profits arising in the year of assessment. The district court reduced the assessment to an amount arrived at by adding to the

KIRK & RANDALL, LTD. v. DUNN (1924), 131 L. T. 288; 8 Tax Cas. 663.

204. Application of three years' average—Third year resulting in loss.]—In Oct. 1924, applicants, a trading co., were assessed to income tax by the General Comrs. for the year ending Apr. 5, 1925, under Schedule D., Case I., on an amount computed on their average profits for the three preceding years. At the time the assessment was made it was impossible for applicants to ascertain whether there would be a balance of profits for the year in question, & no notice of appeal against the assessment was given. After the time for appealing had expired, applicants alleged that they had ascertained that during the year of assessment their business had resulted in a loss, whereupon, claiming that they were not liable to be assessed at all, they obtained a rule for a writ to prohibit the General Comrs. from making, allowing, confirming, enforcing, or otherwise proceeding upon the assessment:—*Held*: prohibition would not lie to the General Comrs., who had acted in accordance with their statutory duty in making the assessment & had not exceeded their jurisdiction.—R. v. SWANSEA INCOME TAX COMRS., *Ex p.* ENGLISH CROWN SPELTER CO., [1925] 2 K. B. 250; 94 L. J. K. B. 718; 133 L. T. 143; 41 T. L. R. 505; 69 Sol. Jo. 606; 9 Tax Cas. 437, D. C.

SUB-SECT. 5.—ASSESSMENT OF COMPANY OR PARTNERSHIP.

A. In General.

See Schedule D., Rules applicable to Cases I. & II., r. 10.

205. Joint owners of ship—Liability of ship's husband to make return.]—A.-G. v. BORRODAILE, No. 108, *ante*.

206. Ship owned by company alone—Another ship by company & other persons—Two assessments.]—The S. co. owned the steamship B. & fifty-nine sixty-fourths of the steamship G., the remaining five sixty-fourths being owned by other persons:—*Held*: the co. was rightly assessed by two assessments, one in respect of the steamship B. & the other in respect of the steamship G.,

profits for the trading period of ten & a half months to Mar. 31, 1919, one & a half twelfths of the profits for the year to Mar. 31, 1920:—*Held*: the assessment upon the co. for the year 1919–20 should be computed solely by reference to the profits as shown by the accounts for the period to Mar. 31, 1919, & not by reference also to the profits for the succeeding year.—BURNTISLAND SHIPBUILDING CO., LTD. v. WELDEN (INSPECTOR OF TAXES) (1923), 8 Tax Cas. 409.—SCOT.

q. Deductions in respect of money paid on guarantee.]—Applt. was a sugar manufacturer & farmer & a shareholder in a limited liability co. From time to time he guaranteed advances made to the co. by a bank obtaining no gain or payment from the co. in return for such guarantee. Thereafter the co. went into liquidation & applt. paid to the bank, under his guarantee a sum of money exceeding the total income derived by him during the period of assessment for income tax from his occupation as a sugar manufacturer & farmer:—*Held*: applt.'s transaction in relation to the co. did not amount to the carrying on of a trade, & he was not entitled to deduct the loss in respect of these transactions from his income as a sugar manufacturer & farmer.—PLATT v. INLAND REVENUE COMR., [1922] App. D. 42.—S. AF.

PART V. SECT. 2, SUB-SECT. 5.—A.

r. Effect of reduction of capital.]—Income Tax Act, 1903, s. 9, has not the effect of rendering taxable as income profits of a co. which would not be income in the ordinary sense of that term. The fact of the reduction of the capital of a co. is not by itself decisive of the question of what are the profits of the co. for the purposes of the Income Tax Acts.—WEBB v. AUSTRALIAN DEPOSIT, ETC. BANK, LTD. (1910), 11 C. L. R. 223.—AUS.

t. Profits applied in making reserve fund for depreciation, etc.]—A co. treated all its moneys, including shareholders' capital & borrowed money, as one common fund, but excluded accumulated stocks of metal until sold. From this fund all payments were made without being appropriated to any particular source. In 1903 the co. sold a large accumulation of metal & applied the money in making up a reserve fund for depreciation & in adding to fixed capital & in paying off debentures & deposits:—*Held*: the co. was liable to pay income tax in respect of all the money applied by them for the above-mentioned purposes.—DAVIDSON v. TAXES COMR. (1917), 117 L. T. 389.—AUS.

a. Amount in appropriation account as accumulated profits.]—The account kept by a co. under the name of the profit & loss account did not

Sect. 2.—Case I.—Trades: Sub-sect. 5, A. & B.]

as the latter was an adventure carried on by them jointly with other persons within Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Rules applicable to Cases I. & II., r. 3.—*FARRELL v. SUNDERLAND S.S. Co., LTD.* (1903), 88 L. T. 741; 67 J. P. 209; 9 Asp. M. L. C. 416; 4 Tax Cas. 605.

207. Application of three years' average—Large profits earned in last year of existence—Property expropriated by government.]—On Nov. 2, 1895, the South African Republic granted H. a concession for the construction of a railway & the South African Republic guaranteed to a co. which was formed to take over the railway interest at 4 per cent. on its share capital. On Oct. 11, 1899, war having broken out, the line was seized & worked by the British military authorities until the end of the war. On Feb. 18, 1902, the British Govt. gave notice to expropriate the railway under the terms of the concession. They recognised the validity of the concession, & admitted liability to pay all arrears of interest. They paid £97,506 16s. 11d. as guaranteed interest on share capital at 4 per cent. *per annum* from Jan. 1, 1899, to Nov. 14, 1903, in addition to the other payments on the expropriation:—*Held*: the £97,506 16s. 11d. was not part of a sum paid by the British Govt. as the price of the co.'s undertaking; it must be treated as the gross revenue of the co. earned as a trading co. from Jan. 1, 1901, to Nov. 14, 1903, & after deducting certain expenses incurred by the co. during the same period the benefit of the three years' average must be applied, & income tax was payable on one third of the balance only.—*PRETORIA-PIETERSBERG RY. Co., LTD. v. ELWOOD* (1906), 98 L. T. 741; 6 Tax Cas. 508, C. A.

B. Succession to Business.

See Schedule D., Rules applicable to Cases I. & II., r. 11.

208. Succession — Company as successors to

show in respect of a particular year any sum brought forward from the preceding year or carried forward to the succeeding year, but showed a sum of profit or loss confined to the current year & as a balance transferred to another account called an appropriation account. The latter account showed the amount of accumulated profits brought forward from the preceding year, the amount paid as dividend & the amount carried forward to the succeeding year. For the year ending June 30, 1915, the dividend was larger than the amount of profit transferred from the so-called profit & loss account:—*Held*: the amount appearing in the appropriation account for that year as accumulated profits brought forward from the preceding year was an amount carried forward to the credit of the profit & loss account & was not to be deemed to be accumulated income.—*MEARES v. ACTING FEDERAL COMR. OF TAXATION* (1917), 23 C. L. R. 358.—AUS.

b. Increased value of assets appropriated for issue of debenture stock.]—A co. on a revaluation made in Nov. 1914, ascertained that the value of its assets on June 30, 1914, exceeded by £100,000, the amount at which those assets stood in the balance sheet for the half year ending on that date. No part of the increase in value appeared in any account or balance sheet of the co. before July 1, 1914. The increased value of the assets was appropriated for the purpose of providing for the issue of debenture stock to its shareholders. Applt. was assessed to income tax in respect of debenture stock received by him as a

shareholder in the co.:—*Held*: the £100,000 was undistributed income of the co. accumulated prior to July 1, 1914, & applt. was not liable to income tax in respect of such debenture stock.—*FORREST v. FEDERAL COMR. OF TAXATION* (1921), 29 C. L. R. 441.—AUS.

c. Dividends paid to foreign shareholders.]—Dividends paid to foreign shareholders out of an incorporated co. having its head office in Ontario are "income" within Assessment Act, 1914 (c. 195). A co., although it sends dividends by post to the foreign shareholders, is not "an agent, trustee or person" who collects or receives or is in possession or control of income for or on behalf of the foreign shareholders & so is not assessable in respect of such income under sect. 13 (1) of the Act.—*Re GAMBIE & ROBINSON & SAULT STE. MARIE (CITY)* (1923), 54 O. L. R. 93.—CAN.

d. Allowances—In respect of mortgage tax, etc.]—In arriving at the income tax payable by a co.:—*Held*: an allowance from its income must be made in respect of so much of it was derived from the sum upon which it paid mtge. tax, & from the sum upon which the debenture-holders paid mtge. tax, & a further reduction must be made in respect of so much of the capital of the co. as was represented by that which was exempt from land tax.—*WELLINGTON & MANAWATU RY. Co., LTD. v. TAXES COMR.* (1893), 11 N. Z. L. R. 618.—N.Z.

e. Company granting temporary advances.]—A co. in the course of a wool-

partnership.]—An ordinary partnership, carrying on business under the style of "The R. Coal Co.," having worked certain coal mines for a period of more than five years prior & up to Dec. 25, 1875, on that day formed themselves into & became incorporated as a limited co. called "The R. Coal Co., Ltd.," for the purpose of taking over & carrying on the business of the partnership, the assets of which, subject to its liabilities, were sold to the co. by the partners, who became holders of all the shares in the co. according & in proportion to their respective shares & interests in the partnership. Subsequently to Aug. 3, 1876, changes took place in the shareholders of the co., the shares having been bought & sold. The Income Tax Comrs. having assessed the co. to income tax under Income Tax Act, 1842 (c. 35), Sched. D., for the year 1876 ending Apr. 5, 1877, on an average of profits for the five preceding years, the latter appealed, contending that they were liable only on a computation for one year on an average of profits from Dec. 21, 1875, the date of their incorporation. The Comrs. thereupon stated a case for the opinion of the ct., in which it was found that "the profits & gains of applt.' business had fallen short since Dec. 21, 1875, from the following specific cause, viz. the extraordinary depression of the iron & coal trades, whereby applt. were unable to sell either so large a quantity of their coal as they had previously been enabled to do, or to obtain anything like so good a price for their coals"; & figures were added to the finding, from which it appeared that the profits from Dec. 1875, to Dec. 1876, were less by more than one-half than they were in the previous year:—*Held*: (1) the principle on which the comrs. had acted in assessing applt. was fundamentally erroneous, & the assessment on an average of five years wrong *in toto*: (2) as it had not been shown that the account required by Schedule A., Nos. II. & III., could not be made out "by reason of applt.' possession or interest in the concern having

broking business granted temporary advances on security of second mtges. or on wool & produce, the advances fluctuating in amount as the produce is realised:—*Held*: the co. was assessable on the balance of profit & not in respect of the full amounts remitted.—*SMILES (SURVEYOR OF TAXES) v. AUSTRALASIAN MORTGAGE & AGENCY Co., LTD.* (1880), 2 Tax Cas. 367.—SCOT.

f. Alternative assessments.]—A co. carrying on the business of borrowing money in this country & investing it abroad may in the option of the surveyor of taxes be assessed for income tax under Schedule D. either upon profits upon the interest received from abroad.—*SURVEYOR OF TAXES v. NORTHERN INVESTMENT Co. OF NEW ZEALAND, LTD.* (1887), 14 R. (Ct. of Sess.) 734.—SCOT.

PART V. SECT. 2, SUB-SECT. 5.—B.

g. Succession—Question of fact.]—A co. took over the business of a firm of whiskey distillers, blenders, etc. For some years previously the firm had not worked any distillery. The co. worked a distillery, & its accounts for about fourteen months from its formation included the results of the business carried on at such distillery as well as those of the business carried on elsewhere. The general comrs. being of opinion that the concern carried on by the co. was not a succession to the concern carried on by the firm, assessed the co. on the average of the profits of the fourteen months:—*Held*: the question as to the identity of the two concerns was one of fact & not of law, & there was nothing to show

commenced within the time for which the account is directed to be made out," applts. were not within Schedule A., No. IV., r. 6, & consequently were not thereby exempted from making out the five years' account; (3) applts.' business was a "trade or concern" within, & chargeable to duty under, Schedule D., Case I., r. 1, & turning the partnership into a limited co. did not make the business a "new trade or concern" or bring it within the proviso of that rule as a trade "set up & commenced within three years"; (4) applts. were a new assocn. carrying on an old trade previously carried on by the partnership, & had "succeeded" thereto within Schedule D., Rules applicable to Cases I. & II., r. 4, but that, the profits having fallen off from a "specific cause," which the cause stated by the case was held to be, applts. came within the exception at the end of that rule, & the five years' average did not apply; (5) the rule in Case VI. under Schedule D. was applicable to applts.' case as one not exactly hit by any other rule or schedule, & under that rule, the computation should be made on the full value of the profits for the current year; *i.e.* the year following the last assessment of the old firm up to the next assessment of the new co.—*RYHOPE COAL CO. v. FOYER* (1881), 7 Q. B. D. 485; 45 L. T. 404; 30 W. R. 87; 1 Tax Cas. 343, D. C.

Annotations:—As to (4) Consd. Bell v. National Bank of England, [1903] 2 K. B. 249. *Refd. Ferguson v. Aikin* (1898), 4 Tax Cas. 36; *Watson v. Lothian* (1902), 4 Tax Cas. 441. *As to (5) Refd. National Provident Institution v. Brown, Provident Mutual Life Assce. Assocn. v. Ogston* (1919), 35 T. L. R. 690.

209. — To part of a concern—Two separate businesses carried on by same company—Sale of one.]—A person cannot be a successor within Income Tax Act, 1842 (c. 35), Sched. D., Rules applicable to Cases I. & II., r. 4, of part of a concern, but if a co. is carrying on two separate businesses & sells one, the purchaser can be the successor of the separate business.—*STOCKHAM v. WALLASEY URBAN DISTRICT COUNCIL* (1906), 95 L. T. 834; 71 J. P. 244; 5 L. G. R. 200.

that the decision of the comrs. was wrong.—*FERGUSON (ALEXANDER) & CO., LTD. v. AIKIN* (1898), 4 Tax Cas. 36.—**SCOT.**

h. — — —.] —Applts., an old-established firm of timber importers & saw-millers, being in need of further premises, purchased a saw-mill in the same town from a firm who carried on a joinery business there, & transferred thither the direction of their own business. Owing to trade depression all work in the joinery business had ceased, & there were no current orders at the date of acquisition. Applts. took over no books, no list of customers, no debts & none of the vending firm's staff, except a few workpeople, nor could they identify any orders received since the purchase as coming from former customers of that firm. The purchase price was fixed by reference only to the value of the tangible assets, including the land, but, by the express terms of the agreement for sale, it was taken to cover the goodwill of the joinery business which was also to be transferred, & in a joint circular issued to the public by the two firms applts. were described as the successors of the joinery firm, & announced their intention of carrying on that business in addition to their original trade:—*Held*: the question whether or not there was in any particular case a succession was a question of fact; the special comrs. of income tax were entitled to hold that applts. had succeeded to the trade of the joinery firm, & the comrs. were not debarred from confirming the assessments made

upon applts. because the latter were unable to obtain particulars of the vendors' profits so as to verify such assessments.—*THOMSON & BALFOUR v. LE PAGE* (1923), 8 Tax Cas. 541.—**SCOT.**

j. — — —.] —Applt. co. carried on a foundry at M. at which it made a particular type of casting. To meet the demands of customers for general castings, the co., in Oct. 1920, acquired from another co. a foundry at H., & had, since Nov. 1, 1920, carried on the manufacture of general castings there. The subjects acquired included the goodwill of the business, but applt. co. neither sought, nor in fact received, orders from the former customers of the vending co., agreeing even that the principal shareholder in that co. should be free to canvass such customers on behalf of another concern. The books of the vending co. & the casting patterns held were not in fact transferred. The whole of the working staff at the H. foundry was retained by applt. co., but the entire management & administration was transferred to M. Assessments to income tax were made upon applt. co. for the years 1921–22 & 1922–23 on the combined average profits of the two foundries for the three years preceding the respective years of assessment, on the footing that it had succeeded to the business formerly carried on at the H. foundry. The co. contended that there was no succession, but that the business it carried on at the H. foundry was merely an extension of its business at M. The special comrs. held that there

210. Business in existence ten months only.]—A firm began a new business on Mar. 1, 1919, & prepared their first account for the ten months from Mar. 1, to Dec. 31, 1919. They sold their business as from Jan. 1, 1920, to a co., which decided to make up its accounts annually to Mar. 31 in each year. An account was made up for the three months from Jan. 1 to Mar. 31, 1920. It was admitted that the assessment to income tax for the financial year ending Apr. 5, 1920, ought to be apportioned between the firm & the co.:—*Held*: the liability to income tax for that year, upon the construction of Schedule D., Rules applicable to Cases I. & II., r. 1 (2), must be based on the account for the ten months' period from Mar. 1 to Dec. 31, 1919, & the three months' period from Jan. 1 to Mar. 31, 1920, must not be taken into consideration as, where the three years' period for calculating the average is not applicable, the period antecedent to the year of assessment must be the period over which the average is calculated.—*BETTS v. CLARE & HEYWORTH & CLARE & HEYWORTH, LTD.*, [1925] 2 K. B. 402; 94 L. J. K. B. 734; 41 T. L. R. 561; 69 Sol. Jo. 708; *reversd.* (1926) 161 L. T. Jo. 388, C. A.

211. Bank purchasing business of another bank—Branch established at premises of purchased bank—No separate profits shown.]—Resps., a bank with a large capital, whose head office was in London, & having numerous branches in England & Wales, purchased in 1899 the business & premises & other assets of the County of Stafford Bank, which had a comparatively small capital, & carried on business only at Wolverhampton. Resps. then for the first time opened a branch at that place upon the premises so purchased, & there carried on business with the manager & staff previously employed by the County of Stafford Bank. The profits & expenses of the business so carried on at Wolverhampton by resps. were merged in those of their concern as a whole, & there were no means of ascertaining whether there were any profits, or the proportion of increase or decrease, if any, in the profits of resps.' bank,

was neither a succession nor an extension of its existing business by applt. co., but that it had set up a new business at the H. foundry:—*Held*: the question at issue was one of fact, & the special comrs. could properly come to their decision on the evidence before them.—*FULLWOOD FOUNDRY CO., LTD. v. INLAND REVENUE COMRS.* (1924), 9 Tax Cas. 101.—**SCOT.**

k. — Company as successors to individual.]—A co., which was incorporated on Mar. 29, 1919, to take over the business of a shipbroker & coal merchant, was assessed to income tax, Schedule D., for the year 1922–23 on the average of the profits of the business for the three preceding years ending Oct. 31, 1921. The profits of the trading year ending Oct. 31, 1922, were less than the amount of the said assessment, & the co. claimed on adjustment of the assessment. The aggregate profits since the succession for the 3½ years to Oct. 1922, however, exceeded the aggregate assessments for that period, & also exceeded the aggregate profits for the 3½ years immediately preceding the succession, & the special comrs. decided that the profits had not fallen short since, or by reason of, the change, & confirmed the assessment:—*Held*: the profits of the co. had not fallen short so as to entitle it to an adjustment of the 1922–23 assessment.—*FISHER (J.) & SONS, LTD. v. DARE (INSPECTOR OF TAXES)* (1925), 9 Tax Cas. 292.—**IR.**

l. Purchase of trading vessel.]

INCOME

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Sub-sect. 5, B.;

SUB-SECT. 6.—CLAIMS FOR REPAYMENT.
See Part VIII., Sect. 3,

which had arisen from the business purchased as aforesaid. In the three years respectively subsequent to 1899, resp., in computing the average of their profits under Income Tax Act, 1842 (c. 85), s. 100, Sched. D., Case I., rule 1, did not include any profits earned by the County of Stafford Bank. Additional assessments were made upon them so as to include such profits, on the ground that there had been a succession by them to the business of the County of Stafford Bank within Schedule D., Rules applicable to Cases I. & II., r. 4:—*Held*: there had been such a succession, & the additional assessments were rightly made.—*BELL v. NATIONAL PROVINCIAL BANK OF ENGLAND*, [1904] 1 K. B. 149; 73 L. J. K. B. 142; 90 L. T. 2; 68 J. P. 107; 52 W. R. 406; 20 T. L. R. 97; 5 Tax Cas. 1, C. A.

212. Decrease of profits—How ascertained.]—By Rules applicable to Cases I. & II. of Sched. D., r. 11, "If within the year of assessment or the period of average on which the assessment is to be based . . . any person succeeds to a trade . . . the tax payable in respect of . . . the person so succeeding shall be computed according to the profits . . . during the respective periods prescribed by this Act . . . unless . . . the person succeeding . . . prove to the satisfaction of the Comrs. that the profits . . . have fallen or will fall short from some specific cause . . . since such . . . succession took place, or by reason thereof":—*Held*: (1) in ascertaining whether there has been a decrease of profits within the above rule a comparison must be made, not between the assessment for the year of assessment & the profits for that year but between the assessable profits for the period since succession & the actual profits for that period; (2) where there has been a phenomenal trade depression affecting the individual, this amounts to evidence on which the General Comrs. of Income Tax may hold that there has been a specific cause within the rule.—*OWL MILL CO. (1920), LTD. v. CROFT, ELLIOTT v. DUCHESS MILL, LTD. (1926)*, 42 T. L. R. 365.

213. Specific cause—Extraordinary depression in trade.]—*RYHOPE COAL CO. v. FOYER*, No. 208, ante.

214. ———.]—*OWL MILL CO. (1920), LTD. v. CROFT, ELLIOTT v. DUCHESS MILL, LTD.*, No. 212, ante.

—The mere purchase of a trading vessel does not of itself constitute succession to the adventure or concern of the former owners, & accordingly the purchaser falls to be assessed for income tax as for a new adventure & without regard to the profits earned by the ship prior to his purchase.—*WATSON BROTHERS v. INLAND REVENUE (1902)*, 4 F. (Ct. of Sess.) 795; 39 Sc. L. R. 604; 10 S. L. T. 49.—*SCOT.*

m — Purchase of going concern — Allowance for wear & tear.]—A limited co., A. co., incorporated in 1910 with the object of taking over the business of another limited co., B. co., purchased B. co.'s business as a going concern. A. co. was assessed as the person succeeding to the business of B. co. but objected to the assessment on the ground that the profits assessed were less than the unexhausted balance of the amount allowable by way of deduction for wear & tear to B. co. The Crown contended that the allowance of such balance must be regarded as personal to B. co., & this view was supported by the comrs. on appeal:—*Held*: the determination

of the comrs. was wrong.—*SCOTTISH SHIRE LINE, LTD. v. LETHBRIDGE (SURVEYOR OF TAXES) (1912)*, 6 Tax Cas. 91.—*SCOT.*

n. ———.]—*CRAIG (KILMARNOCK), LTD. v. INLAND REVENUE*, [1914] S. C. 338.—*SCOT.*

218i. Specific cause—Extraordinary depression in trade.]—A great depression in the coal trade whereby the profits of a colliery have fallen short of the average is a specific cause which may be proved in order to reduce the assessment, whether the depression occurs before or after the change of partnership or succession; & when it is proved the assessment should be laid on the actual profits of the year.—*MILLER v. FARIE (1878)*, 6 R. (Ct. of Sess.) 270; 16 Sc. L. R. 189.—*SCOT.*

PART V. SECT. 2, SUB-SECT. 7.—A.

o. "Wholly or exclusively laid out for purpose" of business—Expenses incurred by brewery company in printing & distributing anti-prohibition literature.]—A poll of the voters in New Zealand being about to be held under

SUB-SECT. 7.—DEDUCTIONS FROM GROSS PROFITS.
A. Trade Expenses in General.

See Schedule D., Rules applicable to Cases I. & II., r. 3 (a).

215. "Wholly or exclusively laid out for purposes" of business—Question of fact—Finding of commissioners conclusive—If supported by evidence.]—*SMITH v. INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND & WALES*, No. 262, post.

216. — Property acquired to further sale of commodities.]—*USHER'S WILTSHIRE BREWERY, LTD. v. BRUCE*, No. 287, post.

217. — Salary & commission paid by father to sons.]—A firm, as reconstituted on Jan. 1, 1920, consisted of a father & two sons, who were entitled to the profits in equal third shares. For some years prior to that date, the father had been sole partner & had employed his two sons in the business, their remuneration consisting of salary, & in addition, a commission on the profits at a rate fixed orally at the beginning of each year. Prior to 1915 the rate of commission for each son was 5 per cent. of the profits, but this was increased to 10 per cent. each for the years 1915 to 1917 inclusive, & to 33½ per cent. each for the years 1918 & 1919, a breakdown in the father's health in June, 1918, throwing the entire responsibility of the business upon the elder son until the end of that year when the younger son returned from military service. In the accounts of the business the commissions paid to the sons were shown as appropriations of their father's profit. Both sons had special knowledge of the business, & the firm claimed that the whole of the remuneration paid to the sons by way of salary & commission should be allowed as a deduction in arriving at the profits of the years entering into the average for the purposes of the computation of the liability to income tax for the years 1919–20, 1920–21 & 1921–22 in respect of the business profits.

The Special Comrs. on appeal decided that the commission for the years 1918 & 1919 was not on a commercial footing, & that only up to 10 per cent., instead of the full 33½ per cent., could it be regarded as paid to the sons for services rendered as managers of the business, & as deductible in

statutory authority on the question whether or not prohibition of intoxicants should be introduced, a brewery co. carrying on business in New Zealand expended money in printing & distributing anti-prohibition literature. The poll resulted in a small majority against prohibition. The co. sought to deduct the expenditure in the assessment of the income derived from their business for the purposes of Land & Income Tax Act, 1916, of New Zealand. By sect. 86 (1) (a) of that Act no deduction is to be made in respect of expenditure "not exclusively incurred in the production of the assessable income":—*Held*: the co. was not entitled to make the deduction having regard to sect. 86 (1) (a).—*WARD & CO., LTD. v. TAXES COMR.*, [1923] A. C. 145.—*N.Z.*

p. Subscriptions to trade association—For keeping up prices.]—A co. claimed that levies paid to a trade assocn., of which they were members, should be allowed as a deduction in the computation of their liability under Schedule D. The objects of the assocn. were to raise & keep up prices

arriving at the profits of the business for income tax:—*Held*: the amount deductible in respect of the commission in question, as being money wholly & exclusively laid out for business purposes, was a question of fact, & that, as there was evidence upon which the Special Comrs. could properly come to their decision, the ct. could not review it.—*STOTT & INGHAM v. TREHEARNE* (1924), 9 Tax Cas. 69.

218. Municipal corporation—Establishment expenses—Whether deductible from income from dues, tolls, etc.]—*A.-G. v. SCOTT*, No. 34, *ante*.

219. — Acting as gas undertakers—Expenses of lighting town—Whether deductible from profits of sale of surplus gas.]—By a local Act the duty was imposed upon resp. corpn. of lighting a town with gas, & the Act further provided that it should be lawful for resps., after lighting the town, to supply private customers with gas. Resps., from the supply of gas to private customers, earned profits, in which they were assessed to income tax. They claimed to deduct from these profits expenses incurred in lighting the town, as being money wholly & exclusively laid out or expended for the purposes of a trade, within Income Tax Act, 1842 (c. 38), s. 100, Sched. D., Rules applicable to Cases I. & II., r. 1:—*Held*: the lighting of the town & the supply of gas to private customers were separate & distinct operations; no trade was carried on until resps., after having lighted the town began to supply gas to private customers, & therefore the expenses incurred in lighting the town were not money laid out or expended for the purposes of a trade, & the deduction could not be allowed.—*DILLON v. HAVERFORDWEST CORPN.*, [1891] 1 Q. B. 575; 60 L. J. Q. B. 477; 64 L. T. 202; 55 J. P. 392; 39 W. R. 478; 3 Tax Cas. 31, D. C.

Annotation:—*Reid. Smith v. Lion Brewery Co.*, [1909] 2 K. B. 912.

220. Mine—Dead rent recoupable out of royalties—Royalties exceeding dead rent—Surplus repayable by lessor to lessee.]—By an agreement

& thus enable its members to earn larger profits. The co.'s appeal was heard by the special comrs. of income tax who required the production of the assocn.'s accounts for the three years forming the basis of the co.'s assessment in order that it might be seen precisely how & to what extent the sums received by the assocn. had been expended. The co. did not produce these accounts, alleging that the said accounts were not in their possession or under their control. In the absence of this evidence the special comrs. refused to admit the co.'s claim.—*GRAHAMSTON IRON CO. v. CRAWFORD* (1915), 7 Tax Cas. 25.—*SCOT*.

a. — For defraying expenses of Conciliation Board.]—A colliery co. paid annual levies to an assocn. of coal owners. Part of these levies was applied by the assocn. in defraying the expenses of the Conciliation Board (Scotland), in paying the subscriptions to the Mining Assocn. of Great Britain, & in experimenting with coal dust for the purpose of devising means to prevent explosions in mines, the experiments having been made at the request of the Home Secretary with a view to legislation:—*Held*: the levies, so far as they were applied to meeting Conciliation Board expenses, constituted a good deduction, but so far as applied to the other two purposes they were not a good deduction.—*LOCHGELLY IRON & COAL CO., LTD. v. INLAND REVENUE*, [1913] S. C. 810; 60 Sc. L. R. 597; [1913] 1 S. L. T. 381; *sub nom. LOCHGELLY IRON & COAL CO., LTD. v. CRAWFORD*, 6 Tax Cas. 287.—*SCOT*.

f. Insurance premiums—Paid by

*insurance company—For re-insurance of risks.]—*Premiums paid by an insurance co. carrying on business in the Commonwealth to other insurance cos. for the re-insurance of portions of the risks insured by it, such re-insurance being necessary in order that the co. might successfully carry on its business of insurance, are outgoings & are properly deducted from the gross income of the co. in ascertaining its taxable income, notwithstanding that the re-insurance premiums are paid outside the Commonwealth under contracts made outside the Commonwealth to cos. incorporated outside the Commonwealth.—*ALLIANCE ASSURANCE CO., LTD. v. FEDERAL COMR. OF TAXATION* (1921), 29 C. L. R. 424.—*AUS*.

t. Sale of imported goods by agent—Agent's expenses.]—The taxable amount of the income derived by an agent from the sale of imported goods on behalf of his principal is 5 per cent. of the total amount received from the sale of the goods, whether by the principal or agent:—*Held*: the agent is not entitled to deduct from the taxable amount so ascertained the expenses incurred by him in the production of his income.—*DAVIES v. TAXATION COMRS. (NEW SOUTH WALES)* (1911), 13 C. L. R. 197.—*AUS*.

a. Grazing business—Land tax.]—Land tax paid by a person who carries on the business of a grazier, in respect of land in Victoria on which he carries on that business, is an "outgoing actually incurred by" him "in production of income" & is also a "disbursement" of "money wholly &

for lease of coal mines for a term of years from Mar. 1874, the lessees agreed to pay a dead rent for the mines, & royalties at specified rates per ton on all coal worked; the dead rent to be recoupable out of royalties during the first sixteen years of the term, the effect being, that the lessor received on account of his share of the profits of the concern not less than a fixed annual sum, so that when his share of the royalties did not amount to the fixed sum he received that sum; but when his share of the royalties exceeded the fixed sum he received that sum only until the lessees had been reimbursed the excess paid to the lessor when his share of the royalties did not amount to the fixed sum. The lessees worked the mines for the first time in Oct. 1880, having paid the dead rent, less income tax, to the lessor up to that year. Upon an assessment to the income tax, made upon the lessees under Income Tax Act, 1842 (c. 35), s. 100, Sched. D. for the year 1881–2, it appeared that the lessor's share of the royalties for that year had exceeded the dead rent by the sum of £1,477:—*Held*: in estimating the profits of the concern for the particular year for the purpose of being assessed under Income Tax Acts, the lessees were not entitled to deduct the £1,477 from their gross profits.—*BROUGHTON COAL CO. v. KIRKPATRICK* (1884), 14 Q. B. D. 491; 54 L. J. Q. B. 268; 49 J. P. 119; 33 W. R. 278; 2 Tax Cas. 69.

Annotation:—*Distd. Gillatt & Watts v. Colquhoun* (1884), 33 W. R. 258.

221. English banking company—Carrying on business through foreign branches—Price of purchase of foreign bank.]—*LONDON BANK OF MEXICO & SOUTH AMERICA v. APTHORPE*, No. 141, *ante*.

222. Money lending company—Expenses of borrowing—Brokers' commission.]—Where the business of an incorporated co. consists in lending money on mtge., & the co. borrows money for the purpose of lending it in the course of business, commission paid to brokers for services rendered

exclusively laid out or expended for the purposes of such trade" within the Income Tax Act, 1895 (Vict.), s. 9; & therefore, for the purposes of assessing the income tax payable by him, he is entitled to deduct the sum paid for such land tax from his gross income.—*MOFFATT v. WEBB* (1913), 16 C. L. R. 120.—*AUS*.

b. Sum paid to underwriters—On issue of preference shares.]—Appls. claimed to deduct from the income on which they had been assessed a sum paid to underwriters on an issue of preference shares on the ground that it was "expenditure incurred for making profits in their business" within Indian Income Tax Act, 1918. The ct. decided against them.—*TATA IRON & STEEL CO., LTD. v. BOMBAY CHIEF REVENUE AUTHORITY* (1923), 39 T. L. R. 288.—*IND*.

c. Cost of professional assistance—In dispute as to excess profits duties.]—A, who traded on his own account held as part of his business a share in a firm consisting of himself & B., whose business was to deal in similar goods, & was subsidiary to A.'s. In a certain year A. made a profit in his own business, but sustained a loss as a partner:—*Held*: in arriving at the taxable income of A. for a particular year, charges & costs incurred by him in employing accountants & lawyers in connection with the dispute between him & the Govt. as to the amount of excess profits duty payable by him for a previous year, could not be deducted from the gross income, since such charges & costs were not expenditure incurred solely for the purpose of

Sect. 2.—Case I.—Trades: Sub-sect. 7, A., B. & C.]

in such borrowing does not come within the definition of "expenses" within Income Tax Act, 1853 (c. 34), Sched. D.—**TEXAS LAND & MORTGAGE CO., LTD. v. HOLTHAM** (1894), 63 L. J. Q. B. 496; 10 T. L. R. 337; 1 Mans. 429; 10 R. 398; 3 Tax Cas. 255, D. C.

223. Subscriptions to trade association — For mutual assistance in strikes.]—The owners of a colliery were subscribers to a coal owners' association, which indemnified its subscribers against losses occasioned by strikes. In returning the profits of the colliery for income tax purposes they claimed to deduct the yearly average excess of their contributions over the amounts received by them as indemnities:—*Held*: the money sought to be deducted was not money wholly & exclusively laid out for the purposes of trade, & therefore the deduction could not be allowed.—**RHYMNEY IRON CO. v. FOWLER**, [1896] 2 Q. B. 79; 65 L. J. Q. B. 524; 44 W. R. 651; 12 T. L. R. 404; 40 Sol. Jo. 546; 3 Tax Cas. 476, D. C.

Annotations:—**Consd.** Strong of Romsey v. Woodfield (1905), 93 L. T. 361. **Distd.** Guest, Keen & Nettlefolds v. Fowler, [1910] 1 K. B. 713. **Refd.** Moore v. Stewarts & Lloyds (1906), 6 Tax Cas. 501.

224. — For keeping up prices — Expenses & payments to trade pool of profits.]—Appls., who were manufacturers of steel hoops, were, with two other firms who carried on similar businesses, members of an assocn., called the Steel Hoop Manufacturers' Assocn., which was formed for the purpose of keeping up prices & thus enabling its members to earn larger profits by agreeing to adhere to fixed prices & thereby preventing competition among themselves. By the rules of the assocn. each of the firms was entitled to a fixed percentage of the total orders; the books of each firm showing the quantities of steel hoops invoiced were to be audited every six months, & an account was then to be made up showing the proportion due to each firm, & in the event of any firm having invoiced more than its proper percentage

it was to pay into a pool the sum of 10s. on each ton of the excess, which amount the assocn. distributed in due proportion amongst those firms who had invoiced less than their proportionate quantities. Appls., in arriving at the amount of the profits of their trade assessable to income tax, claimed to deduct the excess of the total payments made by them to the assocn. over the amounts received therefrom on an average of the three preceding years, such excess consisting of the excess of payments to the pool over the receipts therefrom, & payments towards the administration expenses of the association:—*Held*: the excess so paid by appls. was "money wholly & exclusively laid out or expended for the purposes of" their trade within Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Rules applicable to Cases I. & II., r. 1, & therefore appls. were entitled to the deduction claimed.—**GUEST, KEEN, NETTLEFOLDS, LTD. v. FOWLER**, [1910] 1 K. B. 713; 79 L. J. K. B. 563; 102 L. T. 361; 26 T. L. R. 337; 5 Tax Cas. 511.

Brewery company.]—See Sub-sect. 7, N. (a), post.

225. Cemetery company—Expense of upkeep of graves—Paid for in lump sum—Capitalisation of expense.]—Appls. were a commercial & dividend paying co. owning & occupying two cemeteries of which they were the freeholders. They undertook in perpetuity the repair of graves & monuments, & the decoration of graves, upon the payment of lump sums of money:—*Held*: in calculating the balance of profits upon which appls. were liable to be assessed to income tax under Income Tax Act, 1842 (c. 35), s. 60, Sched. A., No. III., there ought to be set against the lump sums not merely the sums annually expended by appls. in the maintenance, repair & decoration of the graves & monuments, but the capitalised value of the whole of the expenditure that appls. might be estimated to incur in discharging the obligations in perpetuity in respect of which the lump sums had been paid.—**LONDON CEMETERY CO. v. BARNES**, [1917] 2 K. B. 496; 86 L. J. K. B. 990; 15 L. G. R. 543; 7 Tax Cas. 92; *sub nom.*

earning such profits, but were charges incurred after the profits were earned.—**BOARD OF REVENUE v. MUNISWAMI CHETTI & SONS** (1923), 1 L. R. 47 Mad. 653.—**IND.**

d. Tax on companies.]—Tax on cos. should be deducted as a business allowance in assessing income.—**INCOME TAX COMRS. (MADRAS) v. LEDUNGADI BANK, LTD.** (1924), 1 L. R. 47 Mad. 667.—**IND.**

e. Guarantee.]—**ALYMER v. MAHAFFEY**, [1925] N. 167.—**IR.**

f. Loan repaid with bonus — Deduction of bonus.]—A co. borrowed a large sum of money, & undertook, along with repayment of the capital sum borrowed, to pay the lenders a bonus of 10 per cent. thereon:—*Held*: in estimating the balance of profits & gains chargeable under Schedule D., the co. were not entitled to deduct the amount of the bonus from the profits of the year in which it was paid.—**ARIZONA COPPER CO. v. SURVEYOR OF TAXES** (1891), 19 R. (Ct. of Sess.) 150.—**SCOT.**

g. In production of income as a whole.]—Under New South Wales Land & Income Tax Assessment Act, 1895, s. 27, the taxable amount of resp.'s income was limited to the amount of its income derived from mtges.; under sect. 28 (1) certain expenses incurred by the taxpayer "in the production of his income" were to be deducted:—*Held*: by the true construction of the sub-sect. resp. was entitled to deduct all expenses incurred in the production not merely of its

mtge. income, but of its income as a whole.—**TAXATION COMRS. v. TEECK**, [1899] A. C. 254; 79 L. T. 601.—**AUS.**

h. Removal to larger premises — Expenses of removal.]—A co. moved their business to larger premises, & defrayed the whole cost of removal out of revenue. In calculating their profits for assessment under Schedule D., the co. claimed a deduction for the expenses of carting from the old yard to the new, & of taking down & erecting two cranes:—*Held*: those items were not allowable deductions.—**GRANITE SUPPLY ASSOCN., LTD. v. KITTON (SURVEYOR OF TAXES)** (1905), 5 Tax Cas. 168.—**SCOT.**

k. Rubber company — Expense of superintending, weeding, etc., whole estate—Where small portion only productive.]—A rubber co. had an estate, of which in the year under review one-seventh only produced rubber, the other six-sevenths being in process of cultivation for the production of rubber. Rubber trees do not yield rubber until they are about six years old. Expenditure for superintendence, weeding, etc., was incurred by the co. in respect of the whole estate:—*Held*: in arriving at their assessable profits the co. were entitled to deduct the expenditure for superintendence, weeding, etc., on the whole estate & not one-seventh of such expenditure only.—**VALLAMBROSA RUBBER CO., LTD. v. FARMER (SURVEYOR OF TAXES)** (1910), 5 Tax Cas. 529.—**SCOT.**

l. Letting furnished house — Expense of renting house elsewhere.]—A

lady made a profit by letting her furnished house for two months, & when assessed for income tax thereon, claimed to deduct the rent of another house which she had taken to reside in during that period:—*Held*: this rent was not an expense necessarily incurred in earning the profit, & the deduction should be disallowed.—**WYLIE v. INLAND REVENUE**, [1913] S. C. 16.—**SCOT.**

m. Directors' dividends part remuneration.]—The arts. of assocn. of a co. contained a provision that the dividends on shares held by directors were to be regarded as part of the remuneration of the directors. The shares held by the directors had been acquired by them for valuable consideration & were held unconditionally:—*Held*: the dividends on the shares held by the directors were not an admissible deduction in computing the profits of the co.—**EYRES (SURVEYOR OF TAXES) v. FINNIESTON ENGINEERING CO., LTD.** (1916), 7 Tax Cas. 74.—**SCOT.**

n. Expenses on plan of alterations.]—In Jan. 1912, premises were purchased by a co. for £725. The co. proposed to alter the premises, & expended £60 on plans of the alterations:—*Held*: as Finance (1909-10) Act, 1910 (c. 8), s. 25 (4) (b), provided for deduction not of the amount of the expenditure for the purpose of any business but of the value attributable to that expenditure, the deduction of the sum of £60 was not in any event warranted, seeing that it had not created any value in the subjects.—**INLAND REVENUE v.**

LONDON CEMETERY CO. v. INLAND REVENUE COMRS., 117 L. T. 151.

226. Insurance premiums — On plant leased to subsidiary company—No obligation to insure.]— UNION COLD STORAGE CO., LTD. v. JONES, No. 270, *post*.

— **On tied houses owned by brewery.]—** See No. 287, *post*.

B. Annual Value of Land and Buildings Occupied in connection with Trades, etc.

Schedule D., Rules applicable to Cases I. & II., rr. 3 (c), 5 (1).

227. Bank premises — Part used as manager's house—Deduction in respect of whole building.]— By Income Tax Act, 1842 (c. 36), s. 100, Sched. D., Case I., r. 1, the duties in respect of any trade are to be charged on a sum not less than the full amount of the balance of the profits of the trade "without other deduction than is hereinafter allowed;" & by Rules applicable to Cases I. & II., r. 1, in reference to such duties, no deduction shall be allowed for "any disbursements or expenses whatever, not being money wholly or exclusively laid out or expended for the purpose of such trade," etc., "nor for the rent or value of any dwelling house, etc., except such part thereof as may be used for the purposes of such trade or concern not exceeding the proportion of the rent or value hereinafter mentioned." Resps., a banking co. carried on their business in buildings which contained accommodation occupied as a dwelling house by the manager or resident agent:—*Held*: resps. were entitled to deduct from their profits before returning them for assessment under Schedule D. the annual value of the whole bank premises, including the part occupied by the manager.—RUSSELL v. TOWN & COUNTY BANK (1888), 13 App. Cas. 418; 58 L. J. P. C. 8; 59 L. T. 481; 53 J. P. 244; 4 T. L. R. 500; 2 Tax Cas. 321, H. L.

Annotations:—*Consd.* Smith v. Lion Brewery Co., [1909] 2 K. B. 912. *Apld.* General Hydraulic Power Co. v. Hancock, [1914] 2 K. B. 21. *Expld.* Usher's Wiltshire Brewery v. Bruce, [1915] A. C. 433. *Apld.* Stevens v. Boustead, [1918] 1 K. B. 382. *Refd.* Dillon v. Haverfordwest Corpn. (1891), 39 W. R. 478; Tennant v. Smith, [1892] A. C. 150; Brickwood v. Reynolds, [1898] 1 Q. B. 95; Taxation Comrs. v. Antill, [1902] A. C. 422; Smith v. Moore, [1921] 2 A. C. 13. *Mentd.* Lewin v. Newnes, Lewin v. Warne (1904), 90 L. T. 160.

228. Method of computation — Average of three years — Assessment increased during average

SCOTTISH NEWSPAPER PUBLISHING CO., LTD., [1916] S. C. 463; [1916] 1 S. L. T. 248; 53 Sc. L. R. 723.—SCOT.

*o. Expenses incurred in reducing capital of limited company.]—*A limited co. which had incurred a large debit balance on its profit & loss account applied to the ct. to have its capital reduced so as to enable it to resume the payment of dividends out of profits which would otherwise have fallen to be applied in extinguishing the debit balance:—*Held*: the expense of carrying out the reduction was not a proper deduction from the profits for the purpose of assessment to income tax in respect that it was not made for the purposes of the trade of the co., but for the purpose of distributing the profits of the trade after they had been earned.—THOMSON (ARCHIBALD) BLACK & CO., LTD. v. INLAND REVENUE, [1919] S. C. 289; 56 Sc. L. R. 185; [1919] 1 S. L. T. 122.—SCOT.

PART V. SECT. 2, SUB-SECT. 7.—B.

*p. Method of computation—Ground rent paid.]—*A co. carrying on business in business premises occupied by it at a ground rent is not entitled, for the

purpose of ascertaining the balance of its income liable to income tax, to deduct as an outgoing any sum beyond the ground rent actually paid by it, as representing the fair annual value of the premises occupied by it for its business.—TAXES COMR. v. DUTHIE & CO., LTD. (1899), 17 N. Z. L. R. 139.—N.Z.

*q. Crown lands—Exempt from land tax.]—*The lessee of Crown lands which are exempt from land tax is not entitled to a deduction from income tax in respect of a sum representing the fair rental value of such land & the improvements thereon, such sum not being comprised among "losses, outgoings including interest & expenses actually incurred, . . . in the production of his income," & the only exemptions being in respect of land subject to land tax.—TAXATION COMRS. v. ANTILL (1902), 71 L. J. P. C. 81.—AUS.

*r. — Occupied for pastoral & agricultural purposes.]—*Land occupied & used solely for pastoral & agricultural purposes, is "business premises," & a pastoral tenant of the Crown in Western Australia is entitled to the deduction of 4 per cent. on the value of the land & of all improvements

period.]—A co. carrying on a business owned certain lands [freehold & leasehold] which were used exclusively for the purposes of the business. In an assessment made on the co. under Schedule D. of Income Tax Acts for the year ending Apr. 5, 1912, the annual value of the lands as represented by the Schedule A. assessment in each of the three previous years was deducted from the profits of each of the years before striking the average. The amount assessed under Schedule A. for the year of assessment was larger than in the previous years, & the co. claimed that the average profits for the three previous years should be ascertained without the deduction of the amount of the Schedule A. assessment in each of the years, & that from the amount of the average profits thus ascertained the amount of the Schedule A. assessment for the year of assessment should be deducted:—*Held*: the contention of the co. was erroneous & that the assessment had been made upon the right principle.—GENERAL HYDRAULIC POWER CO., LTD. v. HANCOCK, [1914] 2 K. B. 21; 83 L. J. K. B. 906; 111 L. T. 251; 30 T. L. R. 203; 6 Tax Cas. 445.

Annotation:—*Consd.* Stevens v. Boustead, [1918] 1 K. B. 382.

229. Premises occupied abroad — Deduction of annual value — Though not assessable under Schedule A.]— Resps. who carried on business in London & at Singapore & Penang claimed to deduct as an expense in arriving at the amount of their profits or gains assessable to income tax under Schedule D. the annual value of the premises owned & occupied by them at Singapore & Penang for the purpose of their business:—*Held*: the annual value of the premises in question was a proper deduction in arriving at resps. profits or gains assessable to income tax under Schedule D. & this was not affected by the fact that the premises being situated abroad were not assessable to income tax under Schedule A.—STEVENS v. BOUSTEAD (E.) & CO., [1918] 1 K. B. 382; 87 L. J. K. B. 321; 118 L. T. 294; 34 T. L. R. 143; 62 Sol. Jo. 211; 7 Tax Cas. 107, C. A.

See, now, Schedule D., Rules applicable to Cases I. & II., r. 5 (1), re-enacting 1918 Act, s. 26.

C. Sums Expended in Repairs.

See Schedule D., Rules applicable to Cases I. & II., r. 3 (d).

230. Operation of rule.] — USHER'S WILTSHIRE BREWERY, LTD. v. BRUCE, No. 287, *post*.

erected thereon by him for the purpose of carrying on his business of pastoralist & agriculturalist, but not on the value of buildings used solely as dwelling-houses by himself or his employees.—BURT v. TAXATION COMR. (1912), 15 C. L. R. 469.—AUS.

*t. School sports ground.]—*In making a return for assessment for income tax under Schedule D. of the Income Tax Acts a co. carrying on the business of a school deducted from the profits the amount of a duplicand falling due at definite periods & paid during the year in question for ground owned by the co. & used for the sports of the school:—*Held*: the payment was in respect of ownership of the ground apart from the business carried on in the school, & the co. were not entitled to deduct it in estimating the balance of the profits of their business for the purposes of assessment to income tax.—INLAND REVENUE v. MERCHISTON CASTLE SCHOOL, LTD., [1921] S. C. 853; 58 Sc. L. R. 585; [1921] 2 S. L. T. 140.—SCOT.

PART V. SECT. 2, SUB-SECT. 7.—C.

230 i. Operation of rule.]—The comrs. in assessing a railway co. under

INCOME TAX.

Sect. 2.—Case I.—Trades: Sub-sect. 7, C., D.
E. (a) & (b).]

231. "Premises occupied for the purpose of such trade"—Whether limited to premises occupied by person assessed—Tied houses owned by brewers.]—The provision of Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Rules applicable to Case I., r. 3, which authorises a deduction, in estimating the balance of profits & gains of a trade, in respect of the expenditure on repairs of "premises occupied for the purpose of such trade," applies only to premises occupied by the person assessed for the purpose of his trade. *Applts.*, a firm of brewers, in order to increase their trade, purchased licensed houses which they let to tenants who contracted to buy from them all the beer, wines, & spirits to be sold therein. By reason thereof *applts.*' profits had been materially increased. The repairs to these houses were executed & paid for by *applts.*, & they claimed in arriving, for the purpose of the income tax, at the balance of the profits & gains of their trade to be entitled to a deduction in respect of the sum expended on those repairs:—*Held*: *applts.* were not entitled to any deduction in respect thereof.—*BRICKWOOD & Co. v. REYNOLDS*, [1898] 1 Q. B. 95; 67 L. J. Q. B. 26; 77 L. T. 456; 62 J. P. 51; 46 W. R. 130; 14 T. L. R. 45; 3 Tax Cas. 600, C. A.

Annotations:—*Distd. Strong of Romsey v. Woodfield* (1905), 93 L. T. 361; *Guest, Keen & Nettlefolds v. Fowler*, [1910] 1 K. B. 713; *Smith v. Lion Brewery Co.*, [1911] A. C. 150. *Overd. Usher's Wiltshire Brewery v. Bruce*, [1915] A. C. 433. *Consd. Union Cold Storage Co. v. Jones* (1924), 8 Tax Cas. 725. *Reid. Southwell v. Savill* (1901), 4 Tax Cas. 430.

232. — Letting houses part of trade.]—*USHER'S WILTSHIRE BREWERY, LTD. v. BRUCE*, No. 287, *post*.

D. Loss Connected with or Arising out of Trade.

See Schedule D., Rules applicable to Cases I. & II., r. 3 (e).

233. Compensation paid to invitee—Guest at inn owned by brewery company—Damage caused by negligence.]—*STRONG & Co., LTD. v. WOODFIELD*, No. 290, *post*.

234. — Railway passenger.]—*STRONG & Co., LTD. v. WOODFIELD*, No. 290, *post*.

235. Penalties for breach of custom regulations.]—*Resps.*, who carried on the business of oil exporters, were sued for a penalty on an information exhibited by the A.-G. under Customs Consolidation Act, 1876 (c. 36), s. 139, as extended by Customs (War Powers) Act, 1915 (c. 31), s. 5 (1), for the breach of orders & proclamations relating to the requirements of the Board of Customs & Excise with respect to a consignment of oil shipped by them to Norway. The action was settled in ct. by consent on an agreement by *resps.* to pay

a mitigated penalty of £2,000, that sum to the costs of the Crown, all imputations on the moral culpability of *resps.* being withdrawn, & it being made clear to the public that *resps.* had not been taking part by connivance or consent in trading with the enemy, but had only been guilty of carelessness. Judgment in favour of the Crown was entered against *resps.* in the mitigated penalty of £2,000 to cover the costs of the Crown:—*Held*: the penalty was not a "loss connected with or arising out of" the trade or business within Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Rules applicable to Case I., r. 3, & was therefore not a proper deduction in arriving at the profits of *resps.*' trade or business for the purpose of excess profits duty, which is calculated upon the same principle as income tax, subject to certain modifications contained in Finance (No. 2) Act, 1915 (c. 89), s. 49 (1), not material to the present case. To be within the sect. the loss must be something within commercial contemplation & in the nature of a commercial loss.—*INLAND REVENUE COMRS. v. WARNES & Co.*, [1919] 2 K. B. 444; 89 L. J. K. B. 6; 121 L. T. 125; 35 T. L. R. 436.
Annotation:—*Apprvd. I. R. Comrs. v. Von Glehn*, [1920] 2 K. B. 553.

236. —.]—*Applts.*, who were general produce merchants, were sued for penalties on informations exhibited by the A.-G. under Customs Consolidation Act, 1876 (c. 36), s. 139, as extended by Customs (War Powers) Act, 1915 (c. 31), s. 5 (1), for breaches of the orders & proclamations relating to the requirements of the Board of Customs & Excise with respect to certain consignments of goods. The actions were settled by consent on an agreement by *applts.* to pay a penalty of £3,000, without costs upon terms that the record was withdrawn. *Applts.* incurred legal costs to the amount of £1,074 12s. 9d. in connection with these proceedings. They claimed that these sums of £3,000 & £1,074 12s. 7d. were proper deductions in arriving at profits for the purposes of excess profits duty. The special comrs. found that the penalty or loss of £3,000 & costs was incurred by *applts.* in the course of carrying on their trade, & was incidental thereto, & decided that the deductions were admissible. On appeal to the revenue judge this decision was reversed. On appeal:—*Held*: the penalty or loss of £3,000 & costs was not a "loss connected with or arising out of" the trade or business within 1842 Act, s. 100, Sched. D., Rules applicable to Case I., r. 3, & was therefore not a proper deduction in arriving at the profits of *resps.*' trade or business for the purpose of excess profits duty, which was calculated upon the same principle as income tax subject to certain modifications contained in Finance (No. 2) Act, 1915 (c. 89), s. 49 (1), not material to the present case. To be within the sect. the loss

Schedule D. for income tax allowed a deduction from income of sums expended or set aside for renewal & repairs of plant during the year.—*CALEDONIAN RY. CO. v. INCOME TAX SPECIAL COMRS.* (1880), 8 R. Ct. of Sess. 89; 18 Sc. L. R. 85.—*SCOT.*

230 ii. —.]—A harbour, assessed to income tax, under Income Tax Act, 1842 (c. 35), Sched. A., No. III., on the profits of the preceding year, cannot claim a deduction in respect of cost of repairs on the average of the three preceding years in terms of Schedule D. of that Act, in respect that such a method of deduction would be inconsistent with an assessment on the profits of one year.—*DUMBARTON S. C.*

230 iii. —.]—In assessing the pro-

fits of a co. under Schedule D. for the purpose of proviso (a) of Finance Act, 1915 (c. 62), s. 14 (1):—*Held*: the proper deduction from rents for repairs was the actual cost of repairs incurred, & not the one-sixth allowed under Finance Act, 1894 (c. 30), s. 35.—*ROSYTH BUILDING & ESTATE CO., LTD. v. INLAND REVENUE*, [1921] S. C. 372.—*SCOT.*

PART V. SECT. 2, SUB-SECT. 7.—D.

a. Mining company—Loss in treating ores.]—In ascertaining the taxable income of a mining co. the gross income is to be taken, less certain deductions, one of which deductions may be the loss sustained by the co. in treating their own ores.—*RE BRITISH COLUMBIA COPPER CO. ASSESSMENT* (1911), 17 W. L. R. 505; 16

B. C. R. 184.—*CAN.*

b. Railway company—Loss on subsidiary undertaking.]—A railway co. was assessed upon their income for the year preceding the year of assessment, & in estimating the amount of assessable income the comrs. disallowed a deduction which was claimed in respect of a loss upon the working & depreciation in the value of certain steamers, on the ground that the steamers had ceased to form part of the railway co.'s undertaking in the year of assessment. The steamer traffic had been introduced by the co. & carried on under statutory powers, which were still in force, but for the year of assessment part of that traffic had been taken over & carried on by a private trader under an agreement with the co. while the rest had been

must be something within commercial contemplation & in the nature of a commercial loss.—**INLAND REVENUE COMRS. v. VON GLEHN**, [1920] 2 K. B. 553; 89 L. J. K. B. 590; 123 L. T. 338; 36 T. L. R. 463, C. A.

E. Capital Withdrawn or Sums Employed as Capital.

(a) Loss or Exhaustion of Capital.

See Schedule D., Rules applicable to Case I., r. 1.

237. Initial capital outlay—Wasting assets—Coal mine.—**KNOWLES v. MCADAM**, No. 12, *ante*.

238. ——— Nitrate ground.—An English co. owned land abroad which they had bought for a large sum, & where they carried on a manufacture of nitrates & iodine by working up certain deposits found on the land. In estimating their yearly profits & gains from the sale of the nitrates & iodine for assessment to the income tax under Income Tax Act, 1842 (c. 35), s. 100, Schedule D.:—*Held*: the co. were not entitled to make any deduction in respect of the exhaustion of the deposits.

There is no doubt whatever that the scheme of the enterprise of this co. was to invest their capital in the acquisition of this property & then to proceed to work it as a mining concern (**LORD ROBERTSON**).—**ALIANZA CO., LTD. v. BELL**, [1906] A. C. 18; 75 L. J. K. B. 44; 93 L. T. 705; 54 W. R. 413; 22 T. L. R. 94; 50 Sol. Jo. 74; 5 Tax Cas. 172, H. L.

Annotations:—**Consd. Kauri Timber Co. v. Taxes Comr.**, [1913] A. C. 771; **Smith v. Moore**, [1921] 2 A. C. 13.

239. ——— Purchase of business—Uncompleted contracts.—(1) Part of the business taken over by a co. consisted of unexecuted contracts:—*Held*: the price paid for such contracts was not a deduction from the profits arising from their performance.

(2) The co. paid to the shareholders of other cos. without deducting income tax, interest during the construction of works contracted for:—*Held*: the co. must pay income tax on such interest.—**CITY OF LONDON CONTRACT CORPN. v. STYLES** (1887), 4 T. L. R. 51; 2 Tax Cas. 239, C. A.

Annotations:—*As to* (1) **Appld. Alianza Co. v. Bell**, [1905] 1 K. B. 184. **Distd. Liverpool & London & Globe Insce. v. Bennett** (1911), 80 L. J. K. B. 1269. **Consd. Stott v. Hoddinott** (1916), 7 Tax Cas. 85; **Hall v. I. R. Comrs.**, [1921] 3 K. B. 152. **Apprvd. Smith v. Moore**, [1921] 2 A. C. 13. **Refd. Vallambrosa Rubber Co. v. Farmer** (1910), 5 Tax Cas. 529; **Moore v. Hare** (1914), 6 Tax Cas. 572.

— **Purchase of tied house by brewery.**—See No. 284, *post*.

given up altogether:—*Held*: that steamer traffic was still part of the undertaking of the co. & the deduction should be allowed.—**HIGHLAND RY. CO. v. INCOME TAX COMRS.** (1885), 13 R. (Ct. of Sess.) 199; 23 Sc. L. R. 116.—**SCOT.**

PART V. SECT. 2, SUB-SECT. 7.—E. (a).

237 i. Initial capital outlay—Wasting assets—Coal mine.—In estimating the full amount of the balance of the profits & gains of a colliery which was worked by the proprietor:—*Held*: no allowance was to be made for depreciation of capital by the mine being worked out.—**MILLER v. FARIE** (1878), 6 R. (Ct. of Sess.) 270.—**SCOT.**

e. ———.—A co. which carries on the business of cutting, milling, & selling standing timber owned by it, which it is under no obligation immediately to cut down, is entitled, under the law of New land, in its assessment for income to deduct from the gross proceeds

of its business the cost to the co. of the timber trees cut down on the ground that they represent an exhausted portion of the original capital outlay for acquiring the timber rights with the necessary possession of land to enable these to be exercised.—**KAURI TIMBER CO., LTD. v. TAXES COMR.** (1913), 109 L. T. 22.—**N.Z.**

d. ——— Losses incurred in realising securities.—A bank maintained for the purposes of its business a large reserve fund, created out of profits, consisting partly of cash & partly of consols & other marketable securities, which in the course of the bank's business had to be realised from time to time. In the course of such realisation certain losses had been incurred, & the bank claimed to deduct these losses from its total income for the year in which the losses occurred. The comr. of taxes claimed that these were losses of capital & not deductible:—*Held*: the losses must be treated as losses incurred as part of the ordinary business of the bank.—**UNION BANK OF**

Capital expended in sinking shafts—Whether payments in nature of capital expenditure.—See No. 13, *ante*, Nos. 247, 248, *post*.

240. Loss on alteration of factory—Installation of machinery.—A co. to extend its business opened a manufactory & fitted machinery, but subsequently closed it, removed a portion of the machinery, & re-opened the manufactory on a smaller scale, & thereby lost a portion of the original expenditure:—*Held*: this was a loss of capital, & no deduction could be allowed.—**SMITH v. WESTINGHOUSE BRAKE CO.** (1888), 4 T. L. R. 649; 2 Tax Cas. 357, D. C.

Annotation:—**Refd. Reid's Brewery Co. v. Male**, [1891] 2 Q. B. 1.

241. Loss on shares taken up to secure contract.—Appl. carried on the business of architect, surveyor & engineer at Oldham, & in order to secure contracts for the erection of mills it was necessary for him to take up shares of the milling cos. granting the contracts. The shares taken up were subsequently sold at various dates at a loss. The sale of the shares was necessary to provide funds for securing new contracts:—*Held*: the loss was a loss of capital & was not an admissible deduction in arriving at applt.'s profits for assessment.—**STOTT v. HODDINOTT** (1916), 7 Tax Cas. 85.

(b) Payments in the Nature of Capital Expenditure.

See Schedule D., Rules applicable to Cases I. & II., rr. 3 (d), (f).

242. Whether payment capital or income—Question of fact.—**MORANT v. WHEAL GRENVILLE MINING CO.**, No. 247, *post*.

243. ———.—**OUNSWORTH v. VICKERS, LTD.**, No. 251, *post*.

See, also, No. 13, *post*.

244. Premium for lease.—In order to ascertain what are the profits & gains of a trade for the purposes of Income Tax Act, 1842 (c. 35), Sched. D., the annual expenditure, one element of which was the rent, should be deducted from the gross profits & gains. Where a lessee pays a ground rent of £250 *per annum*, having already paid £34,000 as a premium for a lease of twenty-two years, he has no right to deduct one twenty-second part of the premium in each year, although the lease sinks in value as every year is cut off from it. The right principle is to deduct nothing in the way of outlays of money in the shape of expenditure of capital for the future benefit of the estate, but only what may be called current expenditure, that

AUSTRALIA v. TAXES COMR., [1920] N. Z. L. R. 649.—**N.Z.**

e. ——— Depreciation in value of investments.—An investment trust co. took powers in its memorandum of assocn. to vary its investments & generally to sell or exchange any of its assets:—*Held*: the liability of profit made by realising investments at larger prices than were paid for them to assessment was not affected by a depreciation in the book value of other investments which the co. continued to hold.—**SCOTTISH INVESTMENT TRUST CO. v. FORBES** (1893), 3 Tax Cas. 231.—**SCOT.**

PART V. SECT. 2, SUB-SECT. 7.—E. (b).

244 i. Premium for lease.—The lease of certain business premises, occupied by a firm of furniture dealers, expired. The landlord demanded a cash payment as a condition of renewing the lease. The firm, being unable to find suitable premises elsewhere, paid the sum demanded, & obtained a renewal

Sect. 2.—Case I.—Trades: Sub-sect. 7, E. (b),

is, the average current repairs for a period of three years, or one year, as the case may be.—*GILLATT & WATTS v. COLQUHOUN* (1884), 33 W. R. 258; 2 Tax Cas. 76, D. C.

Annotations:—Folld. Smith v. Westinghouse Brake Co. (1888), 4 T. L. R. 849. *Consd. Alianza Co. v. Bell*, [1905] 1 K. B. 184; *Usher's Wiltshire Brewery v. Bruce*, [1914] 1 K. B. 357. *Reid. Reid's Brewery Co. v. Male*, [1891] 2 Q. B. 1.

— *Lease of tied house.*—*See No. 284, post.*

245. Annual sums set aside—For future restoration of plant, etc.—Property purchased in defective condition.—A corpn. purchasing gasworks in a defective structural condition is not entitled to deduct sums set aside annually to be expended in future years on restoring the plant & apparatus.—*CLAYTON v. NEWCASTLE-UNDER-LYME CORPN.* (1888), 2 Tax Cas. 416, D. C.

246. Mine—Expense of sinking shaft—Whether conclusively capital expenditure.—*COLTNESS IRON CO. v. BLACK*, No. 13, *ante*.

247. ——— “Cost book” mine.—Comrs. of Inland Revenue having decided that in the case of cost book mines, & under the Stannaries Acts, there was no such thing as capital, & that there could be no profit in working such a mine until every expenditure had been met, & that therefore the cost of sinking a new shaft was not capital expenditure, but working expenditure, & could be deducted in assessing the annual profits for income tax purposes:—*Held*: (1) the Comrs. were wrong in their finding that in such mines there could be no capital; (2) in this respect there was no difference between a cost book mine & any other mine, & (3) the question whether the cost of sinking the shaft was capital expenditure or working expenditure, or partly the one & partly the other, was a question of fact to be decided on the circumstances of the case.—*MORANT v. WHEAL GRENVILLE MINING CO.* (1894), 71 L. T. 758; 11 T. L. R. 67; 39 Sol. Jo. 82; 3 Tax Cas. 298, D. C.
Annotation:—As to (3) Consd. Bonner v. Basset Mines (1913), 108 L. T. 764.

248. ——— Expense of deepening shaft—Whether working costs.—A mining co. claimed to be allowed as a deduction the cost of deepening a main shaft, the bodies of ore accessible from the original level having been practically worked out:—*Held*: there was no evidence on which the opinion of the comrs., that the expenditure was proper working cost, could be supported & the deduction could not be allowed.—*BONNER v. BASSET MINES, LTD.* (1912), 108 L. T. 764; 6 Tax Cas. 146.

of the lease for five years at the old rent:—*Held*: for income tax purposes the cash payment was a capital expense, & it was not permissible to deduct, as an expense of trading for the year of charge, one-fifth of such payment in addition to the rent actually paid under the lease.—*MACTAGGART (INSPECTOR OF TAXES) v. STRUMP*, [1925] S. C. 599.—*SCOT*.

248 i. Mine—Expense of sinking shaft—Whether conclusively capital expenditure.—The expense incurred by a firm of coal & iron masters in sinking new pits to replace those worked out, & in erecting buildings in connection with such pits, is chargeable to capital, & is not a deduction allowable under Income Tax Acts.—*Re ADDIE & SONS* (1875), 1 Tax Cas. 1.—*SCOT*.

f. Issue of debenture stock.—*SOUTH BRISBANE GAS & LIGHT CO., LTD. v. HUGHES* (1917), 23 C. L. R. 396.—*AUS.*

g. Costs of defending patent.—Costs paid & incurred in connection with an action attacking the validity of a patent owned as part of a business, the profits of which had been partly derived from the sale of the patented article, is money used or intended to be used as capital in the business & cannot be deducted from the profits in ascertaining the income derived from the business.—*TAXES COMR. v. BALLINGER & CO., LTD.* (1903), 23 N. Z. L. R. 188.—*N.Z.*

h. Improvement in plant.—A railway co. is not entitled to deduct from its profits sums expended in improving a section of the line so as to bring it up to the standard of the main line, nor the cost of the extra weight of heavy rails & chairs substituted for lighter ones.—*HIGHLAND RY. CO. v. BALDERSTON (SURVEYOR OF TAXES)* (1889), 2 Tax Cas. 485.—*SCOT*.

249. Commutation of manager's Manager taken over on transfer of business—Agreement to commute part of consideration for transfer.—Upon the transfer of an insurance business the transferees agreed to take into their service the transferors' manager at a fixed salary, with liberty to commute the same by payment to him of a gross sum to be calculated upon life tables. The transferees retained the manager's services for a short time & then paid him a gross sum in commutation of his salary. They claimed to deduct that sum in estimating their profits for income tax:—*Held*: the agreement to pay the commutation money was in fact part of the consideration for the transfer of the business, the payment was therefore a “sum employed as capital” & could not be deducted.—*ROYAL INSURANCE CO. v. WATSON*, [1897] A. C. 1; 66 L. J. Q. B. 1; 75 L. T. 334; 61 J. P. 404; 13 T. L. R. 37; 3 Tax Cas. 500, H. L.

Annotations:—Distd. Hancock v. General Reversionary & Investment Co., [1919] 1 K. B. 25. *Reid. Rhymney Iron Co. v. Fowler*, [1896] 2 Q. B. 79; *Strong of Romsey v. Woodfield* (1905), 93 L. T. 361; *Vallambrosa Rubber Co. v. Farmer* (1910), 5 Tax Cas. 529.

250. Loss of loans to subsidiary company.—Appls. carried on the business of zinc smelting, for which they required large quantities of blende, sulphide of zinc. To supplement their own supply they formed a new co. for acquiring & working in the interests of applts. certain mines reported to contain blende. They owned practically the whole of the shares of the new co. & from time to time they advanced to the new co. money by way of loan at interest for the working of the mines, the later advances being reported as being made against blende, to be delivered. Some blende was delivered, but, after deducting its value, a large balance remained due to applts. The new co. went into liquidation & applts. lost the whole of this balance, no part of which had been made up of advances against specific parcels of ore. In estimating their yearly profits & gains from their business for assessment to income tax under Income Tax Act, 1842 (c. 35), Sched. D. they claimed to deduct this balance as a bad debt:—*Held*: these advances were an investment in a separate concern & a capital expenditure, & not money laid out exclusively for the purpose of the trade or advanced against specific parcels of goods to be delivered, & applts. were not entitled to the deduction.—*ENGLISH CROWN SPELTER CO., LTD. v. BAKER* (1908), 99 L. T. 353; 5 Tax Cas. 327.

Annotation:—Apld. Stott v. Hoddinott (1916), 7 Tax Cas. 85.

251. Shipbuilders—Expense of dredging for channel as outlet to works.—*Resps.* shipbuilding

k. Sum set aside for insurance fund.—A shipping co. partially insured one of its ships with underwriters & partially took upon itself the risk of the loss of the ship, transferring annually from its revenue account to its “insurance fund” a sum equivalent to the sum which would have been payable to an underwriter for taking the risk which the co. thus took on itself. No deduction from the annual profits of the co. in calculating income tax was allowed on the sums thus transferred from the co.'s revenue account to its “insurance fund.”—*INLAND REVENUE v. WESTERN S.S. CO.*, [1907] S. C. 1005.—*SCOT*.

l. Expenses of promoting Bills in Parliament.—In consequence of the unsatisfactory nature of the facilities given by a railway co., a firm of coal masters joined with other traders in promoting two Bills in Parliament for the construction of a railway line,

& engineering works at Barrow-in-Furness were approached by a channel which was open to all shipping & which it was the duty of the harbour authority to maintain. Subsequent to resps. commencing business there in 1896 the harbour authority so neglected the maintenance of the channel that it began to silt up, & by gradual accretions it became much narrower & shallower so that it was no longer possible for vessels which could with safety get from & into resps. works in 1896 to continue to do so. A complete restoration of the channel to its original condition would have cost about £300,000, which sum the harbour authority found it impossible to provide in order to perform their admitted obligation, whereupon resps. & the harbour authority agreed to complete a lesser & cheaper scheme which would make the channel sufficiently navigable. This involved the dredging of the channel to a depth of 2 feet 6 inches instead of the 9 feet at low water at which it was in 1896, & to make this practicable a deep water berth was placed at some distance from the bar to enable vessels to rest there & cross the bar at high water on the following tide. This work, which was carried out in 1912, was paid for by resps. & the harbour authority, & the latter undertook its future maintenance. If this expenditure had not been incurred it would have been impossible for resps. to deliver a British battle cruiser then near completion at their works, & the expenditure enabled resps. to earn the profits upon which they were assessed to income tax. Resps. claimed to deduct the amount expended by them in respect of the dredging & the construction of the deep water berth from their gross profits before ascertaining their taxable profits for 1912 under Income Tax Acts:—*Held*: the expenditure was capital expenditure & therefore resps. were not entitled to deduct it from their gross profits before ascertaining their taxable profits.

It was said that expenditure might be income expenditure although the work on which it was incurred endured beyond the year in which it was made. I do not differ from that altogether, but it does seem to me that the question must always be one of fact whether a particular expenditure can be put against particular work, or whether it must be regarded as enduring expenditure & as serving the business as a whole (ROWLATT, J.).—OUNSWORTH v. VICKERS, LTD., [1915] 3 K. B. 267; 84 L. J. K. B. 2036; 113 L. T. 865; 31 T. L. R. 530; 6 Tax Cas. 671.

Annotations:—*Apld.* Hancock v. General Reversionary & Investment Co., [1919] 1 K. B. 25. *Consd.* Atherton v. British Insulated & Helsby Cables, [1925] 1 K. B. 421; Rowntree v. Curtis, [1925] 1 K. B. 328.

252. Shipbuilding contract—Payment on account of price—Further payment to be released from contract.—A limited co. had as its objects to purchase & manage a steamship, to acquire or manage any other ship, to carry on the trade or business of a steamship owner & carrier, & to employ each of its ships in carrying goods, passengers & other things; & in pursuance of these objects the co. purchased a steamship. By

an agreement made in Dec. 1919, between a firm of shipbuilders & the representatives of the co. the former undertook to build & sell & the latter to buy a steamship for £226,000, of which a first instalment of £30,000 was to be paid on the signing of the agreement, & the balance in the instalments therein mentioned. The co. paid the first instalment & the work was proceeded with, but before any substantial progress had been made the co. found that the cost of the vessel was so great that it could only be worked at a loss. In Jan. 1921, an agreement was therefore made between the co. & the shipbuilders, & was afterwards carried out, by which, in consideration of the co. paying the builders £60,000 to include the £30,000 already paid, the shipbuilding agreement was cancelled:—*Held*: in assessing the annual profits & gains of the co.'s business to income tax for the material year under the 1918 Act, no deduction should be allowed in respect of the payment of £60,000 or any part of it, inasmuch as that payment was a capital expenditure & not a business expenditure for the purpose of earning profits.—COUNTESS WARWICK S.S. Co. v. OGG, [1924] 2 K. B. 292; 93 L. J. K. B. 736; 131 L. T. 348; 8 Tax Cas. 652.

F. Bad Debts.

See Schedule D., Rules applicable to Cases I. & II., r. 3 (i).

253. Loss on advances to subsidiary company.]—ENGLISH CROWN SPELTER CO., LTD. v. BAKER, No. 250, *ante*.

254. Limited to trading debts—Whether debt of managing director to company included.]—Resp. co. was incorporated in June, 1891. Until his death on Feb. 4, 1919, the business of resp. co. was managed by J. who was managing director & in sole control of it. From the evidence before the General Comrs. it appeared that no minute book had been kept with records of board meetings or general meetings of the co. There were no auditors & an almost entire absence of balance sheets, & it appeared that J. was allowed great latitude in the management of the co. J. was until his death a large shareholder in resp. co. Since Nov. 10, 1919, the whole of the shares had been held by another co. After the death of J. accounts were prepared, from which it appeared that many cash payments had passed through the co.'s accounts, which did not refer to the co.'s business, but to the private affairs of J., while payments had been made into the co.'s account which appeared to belong not to it but to J. In the result, J. was brought out in debt to the co. as at Feb. 28, 1919, to the amount of £14,584. In the balance sheet of Feb. 28, 1919, there appeared as an asset the sum of £14,584 as a debt due to the co. by deceased J. When the accounts for the subsequent period were prepared it was found that this debt was valueless, & the account was properly written off as a bad debt. Resp. co. contended (a) that the amount in question was a trading debt; (b) that it was part of the business of the co. to lend money, & that by a course of

which was intended to give them the necessary facilities & to make them independent of the railway co. The Bills were ultimately dropped by agreement, whereby the railway co. undertook to grant the desired facilities:—*Held*: the expenditure incurred by the firm in the promotion of the two Bills constituted a capital outlay & was inadmissible as a deduction in computing the firm's liability to income tax.—MOORE (A. G.) & Co. v. HARE (1914), 6 Tax Cas. 572.—SCOT.

m. Redemption of debentures.]—During the years 1909–1911, resp. co. raised by the issue of debentures £83,705, which was used for the purpose of capital expenditure. In 1917 the directors paid over from the profits of the year the sum of £21,410, to the trustees of the debenture holders, for the redemption of debentures:—*Held*: such profits did not rank as capital expenditure for the redemption allowance provided by Income Tax Act 41, 1917, s. 23, & were subject to dividend tax under sect. 38 of the

Act.—INLAND REVENUE COMB. v. DUNDEE COAL CO., LTD., [1923] App. D. 331.—S. AF.

PART V. SECT. 2, SUB-SECT. 7.—F.

n. Found bad in year of assessment—Incurred in previous year.]—In assessing the annual profits or gains derived from a trading concern for the purposes of Income Tax Law, 1919, of Jamaica, the taxpayer is not entitled under sect. 10 to a deduction in respect of a debt found to be bad in the year

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conduct over a long period J. had borrowed the money from the co.; (c) that if the amount was regarded as a loan it was a commercial loan & not an investment; (d) that J. was an employee of the co. & that the amount should be treated as a defalcation & allowed as a deduction from the profits for income tax. The General Comrs. decided that the debt due by J. had arisen in the course of resp. co.'s trading & was a proper deduction for income tax purposes & they allowed resp. co.'s appeal against assessment:—*Held*: there was no evidence on which the Comrs. could so find. The debt in question was not a trading debt, & the Comrs. had to assess the profits not of resp. co. itself, but of its trade.—*CURTIS v. OLD-FIELD (J. & G.), LTD. (1925), 94 L. J. K. B. 655; 133 L. T. 229; 41 T. L. R. 373; 9 Tax Cas. 319.*

G. Annual Interest or Annuity or Annual Payment out of Profits.

See Schedule D., Rules applicable to Cases I., & II., r. 3 (e).

255. Debenture coupons payable abroad—Interest payable out of profits.]—An English co. carrying on their business in Alexandria where their gains & profits were earned were held to be properly assessed to the income tax in respect of the whole of the profits of the concern, without any deduction on account of the interest on the debenture bonds of the co. paid to the holders of such bonds in Alexandria; there being nothing in Income Tax Act, 1842 (c. 35), ss. 102, 159, to limit rule 4 in sect. 100, which states that "no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits or gains."—*ALEXANDRIA WATER CO. v. MUSGRAVE (1883), 11 Q. B. D. 174; 52 L. J. Q. B. 349; 49 L. T. 287; 32 W. R. 146; 1 Tax Cas. 521, C. A.*

Annotation:—*Distd. Gresham Life Assce. Soc. v. Styles, [1892] A. C. 309. Consd. Anglo-Continental Guano Works v. Bell (1894), 10 R. 161. Apld. Inverclyde's Trustees v. Millar, [1924] A. C. 580. Refd. Strong v. Woodfield, [1905] 2 K. B. 350; Farmer v. Scottish North American Trust, [1912] A. C. 118; Howe v. I. R. Comrs., [1919] 2 K. B. 336.*

256. Loan & deposit company—Interest payable out of profits.]—A co. allowing 5 per cent. *per annum* compound interest to depositors on the varying amounts standing to their credit at one or more week's notice of withdrawal, is not entitled to deduct such interest in making its return of profits.—*MERSEY LOAN & DISCOUNT CO. v. WOOTTON (1887), 4 T. L. R. 164; 2 Tax Cas. 316.*

Annotation:—*N.F. Gresham Life Assce. Soc. v. Styles, [1892] A. C. 309.*

257. Sinking fund—For redemption of debentures.]—By an agreement between the Govt. of the Nizam of Hyderabad & an English co. incorporated for the purpose of constructing a railway through his dominions, the Govt. agreed to pay for

twenty years to the co. in London an annuity equal to 5 per cent. *per annum* on the issued capital, the co. being bound by the agreement to apply the annuity in payment of interest at 5 per cent. *per annum* on the share capital paid up, & of interest at 4 per cent. *per annum* on the debentures of the co., & to pay over the balance, viz., 1 per cent., to trustees, to form a sinking fund for the redemption of the debenture capital. The co. duly received the annuity & paid over such balance accordingly. They claimed to deduct the balance from an assessment on them to the income tax under Income Tax Act, 1853 (c. 34), sched. D.:—*Held*: they were liable to be assessed to the income tax in respect of the whole amount of the annuity received by them, & were not entitled to any deduction in respect of the balance applied to the purposes of the sinking fund.—*NIZAM STATE RY. CO. v. WYATT (1890), 24 Q. B. D. 548; 59 L. J. Q. B. 430; 62 L. T. 765; 2 Tax Cas. 584, D. C.*

Annotations:—*Consd. Scoble v. Secretary of State in Council for India, [1903] 1 K. B. 494. Distd. Pretoria-Pietersburg Ry. v. Elgood (1908), 98 L. T. 741. Refd. East Indian Ry. v. Secretary of State in Council of India (1905), 92 L. T. 495; Surbiton U. D. C. v. Callender's Cable & Construction Co. (1910), 8 L. G. R. 244; Massy v. I. R. Comrs. (1915), [1919] 2 K. B. 354, n.*

See, also, No. 104, *ante*.

258. Interest on short loans from bankers—Loans to enable trader to purchase for cash.]—The London branch of a foreign co., in order to be able to pay cash for goods purchased, obtained advances from the central office at Hamburg, & also from bankers, paying interest thereon. It was admitted that the interest on the advances from the central office was not a deduction in ascertaining the profits of the London branch:—*Held*: the interest on the short loans from bankers was also not a deduction.—*ANGLO-CONTINENTAL GUANO WORKS v. BELL (1894), 70 L. T. 670; 58 J. P. 383; 38 Sol. Jo. 325; 10 R. 161; 3 Tax Cas. 239, D. C.*

Annotations:—*Fold. Texas Land & Mortgage Co. v. Holtham (1894), 3 Tax Cas. 255. Distd. Farmer v. Scottish North American Trust, [1912] A. C. 118.*

259. Interest on fluctuating overdraft & fixed loan—Trust & investment company.]—Resp. co. carried on an investment business & had under its memorandum of association power to borrow & raise money by way of loan, discount, cash, credit, overdraft, etc., & further to grant security for any sums of money so borrowed. In the course of its business the co. purchased in New York bonds, stocks, & other securities of American railroad & other cos. The value of the purchases exceeded the amount of resps.' available cash, & certain of the securities which were lying in New York they pledged to their bankers in New York in consideration of which the bankers allowed resps.' banking account in New York to be overdrawn. The amount of the overdraft fluctuated from time to time as resps. bought & sold securities & they were charged periodic interest at curren

of assessment but incurred in a previous year.—*GLENER CO., LTD. v. ASSESSMENT COMMITTEE, [1922] 2 A. C. 169.—S. AF.*

PART V. SECT. 2, SUB-SECT. 7.—G.

o. Interest on borrowed capital—& on deferred payment of purchase-money for stock-in-trade.]—A co., in arriving at its profits, is entitled to deduct from the gross profits interest paid by the co. upon capital borrowed for the purpose of carrying on & used in its business, & also interest paid by it for deferred payment of the purchase-money of its stock-in-trade.—*Re*

COME TAX ACTS (No. 2 OF 1907), [1907] V. L. R. 327.—AUS.

p. Interest on mortgage of business premises.]—In calculating for the purposes of income tax the profits of a trading co., the co. is entitled to deduct from its gross receipts the amount paid by it for interest on borrowed money secured by mtge. of land belonging to the co., & occupied & used by it for the purposes of its business.

—*COMB. v. GEAR MEAT PRE- & FREEZING CO. OF NEW LTD. (1893), 12 N. Z. L. R. —N.Z.*

r. Percentage of profits.]—Appl.

co. was entitled to a share of the bewaarplaats moneys received by the Govt. in respect of the co.'s bewaarplaats, which was with other property leased by the Govt. The Govt. mining engineer determined that the payment of the co.'s share should take the form of a percentage of the profit payable to the Govt. under the lease.—*Held*: the sum received by appl. was not a receipt of a capital nature & was not exempt from normal income tax.—*MODDERFONTEIN B. GOLD MINING CO., LTD. v. INLAND REVENUE COMR., [1923] App. D. 34.—S. AF.*

s. Price paid for controlling inter

rates from day to day. In 1906 they opened a loan account, in addition to the overdraft, with their bankers, on which the bankers granted a loan not exceeding \$200,000 for a period of six months at 6 per cent. When this loan fell due, it was renewed for a further period of six months, after which the loan account was terminated & the balance transferred to current account. The bank collected all the dividends & coupons upon the securities in their hands, paying the interest due to themselves out of the sums so collected, the difference or net amount being credited to resps. In the event of the dividends & coupons collected not equalling the amount of the interest payable in any month the interest was debited to the overdraft on the current account. Resps. in stating their profits for assessment for income tax deducted the amount of interest paid to the bankers, but this deduction was disallowed by the comrs. on the ground that the interest in question was interest on capital employed in the business of the co. & therefore could not properly be deducted from the profits of the business:—*Held*: the comrs. were wrong in their decision, for the money borrowed by resps. could not be treated as "capital" within Income Tax Acts; & the interest paid for the use of the money was an outgoing by means of which resps. procured the use of the thing by which they made a profit &, like any similar outgoing, should be deducted from the receipts to ascertain the taxable profits & gains which were earned by them.—*FARMER v. SCOTTISH NORTH AMERICAN TRUST, LTD.*, [1912] A. C. 118; 81 L. J. P. C. 81; 105 L. T. 833; 28 T. L. R. 142; *sub nom.* SCOTTISH NORTH AMERICAN TRUST, LTD. *v.* FARMER, 5 Tax Cas. 693, H. L.

Annotations:—*Reid*. Smith *v.* Moore, [1921] 2 A. C. 13; I. R. Comrs. *v.* Hay (1924), 8 Tax Cas. 636.

260. Annuities granted by company in course of business—Deemed to be paid out of income of investments—Deduction of annuities less retained income tax.—(1) The business of a co. included the purchase of reversions, the lending of money on the security of reversions, & the sale of annuities. The annuities were payable out of the co.'s general assets. The co. when paying the annuities deducted income tax & retained it for their own use. Their revenue was derived in part from investments from which they received dividends less income tax. In order to arrive at their assessable profits they deducted the full untaxed amount of the annuities from their gross receipts. From the balance so arrived at they deducted the dividends

on their investments. They then deducted certain expenses of management, & contended that the final balance represented their assessable profits:—*Held*: the co. must be taken to have paid the annuities out of the income they received from investments, &, apart from expenses of management, they could deduct from their profits not the full amount of their dividends but only that amount less the amount of the annuities.

(2) As part of their expenses of management during a certain year the co. had deducted from their profits the cost of an annuity to an amount equal to the retiring allowance of one of their officers, describing the sum deducted as capital cost of retiring allowance. The retiring allowance had always been treated as an admissible deduction:—*Held*: the sum expended in purchasing the annuity was an equally admissible deduction.—*HANCOCK v. GENERAL REVERSIONARY & INVESTMENT CO., LTD.*, [1919] 1 K. B. 25; 88 L. J. K. B. 248; 119 L. T. 737; 35 T. L. R. 11; *sub nom.* HANCOCK *v.* GENERAL REVERSIONARY & INVESTMENT CO., LTD., *GENERAL REVERSIONARY & INVESTMENT CO., LTD. v. HANCOCK*, 7 Tax Cas. 358.

Annotations:—*As to* (2) *Distd.* Atherton *v.* British Insulated & Helsby Cables, [1925] 1 K. B. 421; Rowntree *v.* Curtis, [1925] 1 K. B. 328.

H. Royalties on Patents.

See Schedule D., Rules applicable to Cases I., & II., r. 3 (m); Rules applicable to all Schedules, r. 19 (2).

261. Cesser of royalties during three years average—Method of computation.—Previously to Jan. 1, 1907, applts. had paid royalties for the use of certain patents which in consequence of arrangements made between applts. & the owners of the patents ceased to be payable after that date. The question was how the trade profits of applts. during the year 1907 to 1908 ought to be estimated, having regard to Finance Act, 1907 (c. 13), s. 25 (1):—*Held*: the operation of the first part of the sub-sect. was dependent upon that of the latter part, & that, inasmuch as the latter part could have no operation under the circumstances, the applts. were in the same position as before the enactment, & were therefore entitled to deduct the royalties paid by them during the three years of average for the purpose of estimating their profits during the year of assessment.—*LANSTON MONOTYPE CORPN., LTD. v. ANDERSON*, [1911]

in another concern.—A. co. made an agreement with B. co. carrying on a similar business, whereby it obtained, in return for an undertaking to make up the yearly profits of B. co. to a certain amount, a commanding interest in its management. A. co. claimed to deduct, in computing its yearly profits for income tax purposes, a payment made to B. co. under the terms of this agreement. The district comrs. of taxes found that the payment was made by A. co. for the purpose of its trade & that it might sell its goods at a better price & allowed the deduction:—*Held*: the question was one of fact rather than of law & the deduction had rightly been allowed.—*MOORE v. STEWARTS & LLOYDS, LTD.* (1906), 6 Tax Cas. 501.—*SCOT.*

of wagons with option of hire.—Under a hire-purchase agreement, between a coal co. & a co., the latter agreed to let on the former a number of wagons a fixed period of years in return for

an annual payment, an option being conferred on the coal co. to purchase the wagons at the end of the period at a nominal price:—*Held*: the portion of the annual payments which represented the hire of wagons, but not the portion which represented the price of the option to purchase, fell to be allowed as a deduction in arriving at the assessable profits of the coal co. for the purpose of income tax.—*DARNGAVIL COAL CO., LTD. v. INLAND REVENUE*, [1913] S. C. 602.—*SCOT.*

PART V. SECT. 2, SUB-SECT. 7.—H.

a. Cesser of royalties after three years of average—Method of computation.—Appls. were assessable to income tax for the year ended Apr. 5, 1918, on the average amount of their business profits for the three years ended on Dec. 31, 1916. During each of the calendar years 1914, 1915 & 1916 applts. had paid a fixed royalty of £400 in respect of the user of a patent. The royalty ceased to be payable after the year 1916 & the payment in respect

of that year was made on Jan. 1, 1916. No deduction had been allowed on account of the patent royalty paid in the respective years 1914, 1915 & 1916 in arriving at the amount of applts.' business profits liable to assessment to income tax for the year ended Apr. 5, 1918. Appls. contended that, inasmuch as the royalty had ceased to be payable after the year 1916, they were not able thereafter to recover by deduction from the royalty owner the income tax applicable to the royalty, & that the actual sums paid as royalty in the years 1914, 1915 & 1916 should be deducted before arriving at the average profit upon which the assessment to income tax for the year ended Apr. 5, 1918, was based:—*Held*: applts. had been correctly assessed to income tax for the year ended Apr. 5, 1918, & no deduction in respect of the £400 paid annually as royalty in the three years, 1914, 1915 & 1916 was admissible in computing applts.' profits for the purposes of the assessment.—*BOYD (JAMES) & SONS v. HAVELOCK* (1918), 7 Tax Cas. 321.—*SCOT.*

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2 K. B. 1019; 80 L. J. K. B. 1351; 105 L. T. 398; 5 Tax Cas. 675, C. A.

Annotation:—Expld. Boyd v. Havelock (1918), 7 Tax Cas. 321.

I. Contributions to Employees' Pension and Invalidity or Superannuation Funds, etc.

See Schedule D., Rules applicable to Cases I., & II., rr. 3 (a), (f).

262. Retiring gratuity.]—Resps., the Incorporated Council of Law Reporting for England & Wales, were a limited co. incorporated under Cos. Act, 1867 (c. 131), s. 23, with no power to pay any portion of their earnings to their members by way of profits. In 1911 resps. gave a gratuity of £1,500 to one of their reporting staff on his retirement after long service. The payment was not made under any contract between resps. & the reporter, but it was within the powers conferred by resp.'s memorandum & articles of association, & it was the habit of resps. to give gratuities to reporters on retirement after long service. The £1,500 was included in resps. trading accounts for 1911 as an item of expenditure, & an additional assessment to income tax under Schedule D. was in consequence made on resps. of £500, i.e., one-third of £1,500, in respect of their profits for that year. On appeal by resps. to the comrs., they held that the £1,500 was allowable to resps. as a business expense in calculating the profits of the year for income tax purposes. On a case stated by the comrs.:—*Held*: the question whether the £1,500 could be deducted from resps.' profits as being "money wholly & exclusively laid out or expended for the purposes" of resps.' business, within rule 1 applying to first & second cases in Schedule D., was a question of fact for the comrs., & as there was evidence to support their finding of fact, their decision was final.—**SMITH v. INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND & WALES**, [1914] 3 K. B. 674; 83 L. J. K. B. 1721; 111 L. T. 848; 30 T. L. R. 588; 6 Tax Cas. 477.

Annotations:—Consd. Currie v. I. R. Comrs., [1921] 2 K. B. 332; *British Insulated & Helsby Cables v. Atherton* (1925), 42 T. L. R. 187. *Refd. Hancock v. General Reversionary & Investment Co.*, [1919] 1 K. B. 25; *Rowntree v. Curtis*, [1925] 1 K. B. 328.

263. Pension—Purchase of annuity in lieu.]—**HANCOCK v. GENERAL REVERSIONARY & INVESTMENT CO., LTD.**, No. 260, *ante*.

264. — Initial donation to contributory fund — For benefit of existing employees.]—Appls. inaugurated for their employees a pension scheme to which both applts. & their employees were to contribute a percentage of the wages, & for the purpose of providing the capital sum necessary in order that past years of service of the then existing staff should rank for pension, applts. in addition contributed a sum of £31,784 to form a nucleus:—*Held*: in calculating the profits of the applts. under 1918 Act, Sched. D., applts. were not

entitled to deduct this sum of £31,784 in the year in which the contribution was made.—**BRITISH INSULATED & HELSBY CABLES v. ATHERTON**, [1926] A. C. 205; 95 L. J. K. B. 336; 134 L. T. 289; 42 T. L. R. 187, H. L.; *affg. S. C. sub nom. ATHERTON v. BRITISH INSULATED & HELSBY CABLES, LTD.*, [1925] 1 K. B. 421, C. A.

265. Invalidity fund—Initial donation.]—A firm of manufacturers, having made large profits in a certain year, decided to devote a portion of them to an employees' invalidity fund, & transferred the sum of £50,000 represented by shares in the co. to trustees to hold upon the trusts of a deed to which the co. & the trustees were parties for the purposes of a charitable fund for the benefit of the existing & future employees of the co. suffering from any disability, to be administered by a committee in accordance with rules contained in a schedule to the deed. The co. having claimed that the £50,000 ought to be deducted from the profits of the year for the purpose of computing the firm's assessment to income tax:—*Held*: the fund so created not being money wholly & exclusively laid out or expended for the purposes of the co.'s trade or business, but being money withdrawn from the business & devoted to charitable purposes could not be deducted from the co.'s profits, for the purpose of ascertaining the income tax payable.—**ROWNTREE & CO. v. CURTIS**, [1925] 1 K. B. 328; 93 L. J. K. B. 570; 131 L. T. 41; 40 T. L. R. 363; 8 Tax Cas. 678, C. A.

Annotation:—Consd. British Insulated & Helsby Cables v. Atherton (1925), 42 T. L. R. 187.

Whether expenditure capital or income generally, see Sub-sect. 7, E. (b), *ante*.

Superannuation funds.]—See 1921 Act, s. 32.

J. Depreciation, Wear and Tear of Plant, etc.

See Schedule D., Rules applicable to Cases I., & II., rr. 3 (d) & (f), 6.

266. Whether allowed—Annual sum set aside for depreciation.]—A co. carrying on business as ironfounders set apart, in accordance with their articles of association, a sum of money from their net profits for depreciation of buildings, fixed plant, & machinery, & claimed, in making a return under Schedule D. of their annual profits or gains, to deduct this amount:—*Held*: such a deduction was contrary to Income Tax Act, 1842 (c. 35), s. 100, Rules applicable to Case I., r. 1, as the amount set aside was in effect an addition to capital.—**FORDER v. HANDYSIDE** (1876), 1 Ex. D. 233; 45 L. J. Q. B. 809; 35 L. T. 62; 40 J. P. 599; 24 W. R. 764; 1 Tax Cas. 65.

Annotations:—Distd. Knowles v. McAdam (1877), 3 Ex. D. 23. *Consd. Lawless v. Sullivan* (1881), 6 App. Cas. 373; *Gillatt & Watts v. Colquhoun* (1884), 33 W. R. 258. *Refd. Coltness Iron Co. v. Black* (1881), 6 App. Cas. 315; *Smith v. Westinghouse Brake Co.* (1888), 4 T. L. R. 649.

See, now, 1918 Act, Sched. D., Rules applicable to Cases I., & II., r. 6 (1).

Annual sum set aside for restoration—Property purchased in defective condition.]—See No. 246, *ante*.

PART V. SECT. 2, SUB-SECT. 7.—J.

b. "By reason of wear & tear"—*Removal of silt by dredging.]—*The expenditure by a harbour board of a sum on removing, by dredging, the silt which had accumulated in the harbour is not an expenditure for the purpose of making good "wear & tear of plant" & does not fall to be allowed as a deduction.—**DUMBARTON HARBOUR REVENUE**.

c. Amount of depreciation—How calculated—*Ships.]—*A co. owned a

fleet of passenger & cargo steamers. In assessing the co. to income tax, the comrs. for general purposes allowed a deduction of 5½ per cent. from the written down value of the whole fleet in the co.'s books, as representing the diminished value of the ships by reason of wear & tear during the year of assessment. The co. claimed a reduction of the assessment, on the ground of overcharge consequent upon insufficient allowance for depreciation:—*Held*: the appeal must be refused.—**LEITH, HULL, & HAMBURG STEAM PACKET CO. v. BAIN** (SURVEYOR OF TAXES) (1897), 3 Tax Cas. 560.—**SCOT**.

*Banking company—Comparison of market rates with book valuations of securities.]—*A banking concern was assessed to income tax on profits amounting to Rs. 1,254,130, but claimed to deduct therefrom a sum of Rs. 298,000 which represented depreciation on securities, arrived at by comparing the market rates with the valuations in the books of the bank:—*Held*: the deduction claimed could not be allowed.—**RE TATA INDUSTRIAL BANK, LTD.** (1921), 1 L. R. 46 Bom. 567.—**IND**.

e. Covered by amount allowed

267. "Plant"—Hulk used for coal storage.]—A firm of shipowners owned a fleet of vessels of the average age of thirty-one years. Prior to the year of assessment there had been allowed yearly from the gross profits assessed to Income Tax Act, 1842 (c. 35), Sched. D. an amount by way of deduction for diminished value by reason of wear & tear, & sums amounting in the aggregate to 96 per cent. on the first or prime cost of the vessels, including such sums as had been expended upon them by way of addition or repairs other than ordinary annual repairs, had been allowed: the existing, or breaking-up, value of the vessels during the year of assessment was more than 4 per cent. of the first or prime cost. There was no agreement between the shipowners & the comrs. that the allowance for depreciation should be calculated on the basis of its being an allowance which would at the end of a period of years, taking into account the breaking-up value of the vessels, replace the shipowners' capital, & that after that date no further allowance should be made:—*Held*: (1) the comrs. were bound under Customs & Inland Revenue Act, 1878 (c. 15), s. 12 to consider to what extent there had been a diminution of value by reason of wear & tear during the year of assessment & to decide what was a just & reasonable allowance to make in respect of such depreciation, & they were not entitled to take into account the allowances made in previous years; (2) a hulk, which had formerly been a sailing-ship, but which had been dismantled & had had its rudder removed & was used as a floating warehouse for coal, was "plant" within the meaning of the section.—*HALL (JOHN) JUNIOR & Co. v. RICKMAN*, [1906] 1 K. B. 311; 75 L. J. K. B. 178; 94 L. T. 224; 54 W. R. 380; 22 T. L. R. 131.

268. — Whether animal at a stud included—Stallion.]—Customs & Inland Revenue Act, 1878 (c. 15), s. 12, provides that in assessing the profits of a trade or concern in the nature of trade chargeable under Income Tax Act, 1842 (c. 35), Sched. D. comrs. shall allow a reasonable deduction as representing the diminished value by reason of wear & tear during the year of any machinery or plant used for the purposes of the concern:—*Held*: a stallion which earns fees for its owner, the proprietor of the business of a stud farm, by serving mares belonging to other persons is not "plant" within sect. 12, nor is the annual decrease in the value of the stallion due solely to the effluxion of time, a diminution in its value by reason of wear & tear within that sect.—*DERBY (EARL) v. AYLMEER*, [1915] 3 K. B. 374; 84 L. J. K. B. 2160; 113 L. T. 1005; 31 T. L. R. 528; 6 Tax Cas. 665.

Annotation:—*Reid. Malcolm v. Lockhart* (1919), 7 Tax Cas. 99.

269. "By reason of wear & tear"—Whether diminution in value solely by effluxion of time included—Stallion.]—*DERBY (EARL) v. AYLMEER*, No. 268, *ante*.

*for repairs & removals—No further allowance made.]—*Where the sums allowed for repairs & renewals of plant & machinery are sufficient to meet the loss by wear & tear, no further allowance can be granted.—*CALEDONIAN RY. CO. v. BANKS (SURVEYOR OF TAXES)* (1880), 1 Tax Cas. 487.—*SCOT*.

1. — Loss of earning power of obsolete ship.]—A steamship co. claimed an allowance not only in respect of depreciation of its ship by wear & tear, but also in respect of (a) loss of earning power owing to the ship having become more or less obsolete, & diminution in market value apart

from that caused by wear & tear:—*Held*: the district comrs. rightly rejected the claims under (a) & (b).—*BURNLEY S.S. CO. v. AIKIN* (1894), 3 Tax Cas. 275.—*SCOT*.

g. — Diminution in value apart from that caused by wear & tear.]—*BURNLEY S.S. CO. v. AIKIN* (1894), 3 Tax Cas. 275.—*SCOT*.

h. — No deduction on account of interest earned on sums allowed.]—A co. owned a fleet of passenger & cargo steamers, & was assessed to income tax on the profit earned less a deduction for diminished value through wear & tear. In fixing the

270. "Used for the purposes of the trade"—Plant leased to subsidiary company.]—A British co. transferred the foreign cold storage businesses carried on by it directly or through subsidiary cos. to an American co. for a term of years in consideration of certain annual payments to the subsidiary cos., whose shares it continued to own, receiving dividends therefrom, & of a guarantee of any sum necessary to meet its fixed charges & maintain its dividends. The premises, machinery & plant of the foreign businesses remained the property of the British co., but they were placed under the sole control of, & were used by, the American co. for the purpose of carrying on the businesses as it thought fit. The ownership of the premises, plant & machinery remained in applt. co., the American co. being under no obligation to insure the premises against loss by fire or to provide for wear & tear or depreciation of plant or machinery.

The British co. claimed that, in the computation of its profits for assessment to income tax under Schedule D. deductions should be allowed for the fire insurance premiums paid by it in respect of the premises, & for wear & tear of the machinery & plant, of the transferred businesses:—*Held*: the fire insurance premiums did not represent money wholly & exclusively laid out or expended for the purposes of the trade of applt. co.; the machinery & plant in question was not used for those purposes, & the deductions claimed were accordingly inadmissible.—*UNION COLD STORAGE CO., LTD. v. JONES* (1923), 129 L. T. 512; 8 Tax Cas. 725.

271. Amount of depreciation—Question of fact for commissioners.]—Under Customs & Inland Revenue Act, 1878 (c. 15), s. 12, the comrs. allowed to applt. co., in respect of the diminished value of their fleet of ships by reason of wear & tear, a deduction which was less than that to which the co. claimed to be entitled. Upon a case stated the Q. B. Div. dismissed the appeal of the co. Upon a further statement made by the comrs., pursuant to a direction of the Ct. of Appeal, the appeal was dismissed upon the ground that no question of law arose.—*PENINSULAR & ORIENTAL STEAM NAVIGATION CO. v. LESLIE* (1900), 82 L. T. 137; 4 Tax Cas. 177, C. A.; *affg. S. C. sub nom. PENINSULAR & ORIENTAL STEAM NAVIGATION CO. v. LEE* (1898), 79 L. T. 118, D. C.

Annotations:—*Reid. Leith, Hull & Hamburg Steam Packet Co. v. Musgrave* (1899), 4 Tax Cas. 80. *Mentd. British India Steam Navigation Co. v. Leslie* (1900), 4 Tax Cas. 257.

272. — — —.]—A steamship co. objected to the amount allowed for depreciation on the ground that the amount was calculated on the basis of 6 per cent. on the written down value of each ship, & that such allowances when aggregated over the whole life of the ships would be insufficient to replace the prime cost, & further, that interest had been taken into account in calculating the amount to be allowed. The comrs. stated that the amount was not calculated on the basis alleged, & that interest had not been taken into account.

deduction, the comrs. took into account that the sum annually allowed might be so invested as to produce interest at 3 per cent. *per annum*:—*Held*: the comrs. were not entitled to make any deduction from the sum representing the wear & tear on account of any interest that might be earned on the sums allowed.—*LEITH, HULL, & HAMBURG STEAM PACKET CO. v. MUSGRAVE (SURVEYOR OF TAXES)* (1899), 4 Tax Cas. 80.—*SCOT*.

k. When claims may be carried forward—Unexhausted deductions.]—A new co. having purchased as a going concern the business of an old co. was assessed for income tax on the average

Sect. 2.—Case I.—Trades: Sub-sect. 7, J., K., L. M.]

They decided that the allowance was sufficient, & that the question was entirely one of fact:—*Held*: no question of law was involved, the comrs. not having based their decision on any principle to which objection had been taken.—**BRITISH INDIA STEAM NAVIGATION CO., LTD. v. LESLIE** (1900), 17 T. L. R. 104; 4 Tax Cas. 257, D. C.

273. — How calculated—Whether on three years average.]—The Comrs. of income tax, when estimating the deductions to be allowed from the profits of a trade under Customs & Inland Revenue Act, 1878 (c. 15), s. 12, as representing the diminished value by reason of wear & tear during the year of any machinery or plant used for the purposes of the concern, are not bound to take an average of the depreciation during the three preceding years, but may adopt as their estimate the amount of the depreciation during the year immediately preceding that of assessment.—**CUNARD S.S. CO. v. COULSON**, [1899] 1 Q. B. 865; 68 L. J. Q. B. 554; 80 L. T. 326; 15 T. L. R. 285; 4 Tax Cas. 63, D. C.

274. — Ships—Allowance insufficient to cover prime cost.]—**BRITISH INDIA STEAM NAVIGATION CO., LTD. v. LESLIE**, No. 272, *ante*.

275. — For year of assessment only—Without reference to allowance in previous years.]—**HALL (JOHN) JUNIOR & CO. v. RICKMAN**, No. 267, *ante*.

276. — Tramway—Renewed & reconstructed before worn out.]—Applts. purchased horse tramways, & both before & after the acquisition of the horse tramways by applts. it had been the practice in arriving at the amount of their assessment for the purposes of income tax, to make a deduction from the profits of the tramways of the sums actually expended in each year in renewing the worn out tramways & cars in lieu of making a deduction for diminished value of the tramways & cars by reason of wear & tear under Customs & Inland Revenue Act, 1878 (c. 15), s. 12. Applts., during the year of assessment, reconstructed thirty-eight miles of tramways for working by electric traction. Of this, five miles were quite worn out, the remainder having on an average a life of eight years unexhausted at the date of reconstruction. On the reconstruction three hundred & twenty-two cars, suitable only for horse traction, were discarded, but were not worn out. The comrs., in assessing the profits for the year of assessment, following the previous practice, allowed a deduction in respect of the five miles of tramway which were worn out, but refused to allow any deduction in respect of the other portion of the tramway reconstructed or of the cars which were not worn out:—*Held*: the

profits of the old co. for the three years preceding the purchase. The amount of deductions for wear & tear to which the old co. was entitled during these three years had not been given effect to in full, owing to the fact that they exceeded the amount of the taxable income of the old co. during that time:—*Held*: the new co. was entitled to deduct from its taxable income the balance of the deductions allowable to the old co.—**SCOTTISH SHIRE LINE, LTD. v. INLAND REVENUE**, [1912] S. C. 1108.—**SCOT.**

PART V. SECT. 2, SUB-SECT. 7.—K.

1. Company incorporated in England—With branches in India.]—A co. incorporated in England with branches in India & elsewhere cannot, in calculating the total profits for the pur-

poses of this rule, claim deduction of the excess profits duty & the income tax payable by it in England & elsewhere.—**INCOME TAX CHIEF COMR. (MADRAS) v. EASTERN EXTENSION AUSTRALASIA & CHINA TELEGRAPH CO., LTD.** (1921), 1 L. R. 44 Mad. 489.—**IND.**

PART V. SECT. 2, SUB-SECT. 7.—L.

m. General rules—Limited to losses in trade—Chargeable under Schedule D.]—A person who carried on business as a seedsman & occupied a farm in connection with that business for producing seeds, claimed to set his losses on the farm against his profits on the seedsman's business, & to be assessed for income tax on the balance only: *Held*: he was not entitled to do so, the assessment on the farm being,

practice adopted in order to arrive at the deductions was one to which there was no objection, & was merely a mode of dealing with what was a question of fact for the comrs.; the comrs. had not gone wrong on a question of law; & the appeal only raised a question of fact.—**LONDON COUNTY COUNCIL v. EDWARDS** (1909), 100 L. T. 444; 73 J. P. 213; 25 T. L. R. 319; 7 L. G. R. 659; 5 Tax Cas. 383.

K. Taxes imposed Abroad.

Schedule D., Rules applicable to Case I., r. 1; Rules applicable to Cases I., & II., r. 3.

277. Method of computation—Three years average.]—*Resps.*, a co. incorporated & registered in England, worked gold mines in the Transvaal. They were assessed to income tax under Income Tax Act, 1853 (c. 34), sched. D., on the average profits for the three years ending Dec. 1902. In 1902 an imperial tax called the profits tax, was imposed upon them for that year in the form of a 10 per cent. tax yearly upon the net produce of the individual year:—*Held*: in arriving at their assessment under Schedule D. the amount of the profits tax could only be allowed as an outgoing spread as an average over the three years & not as a deduction from the ascertained profits of the individual year.—**STEVENS v. DURBAN-ROODEPORT GOLD MINING CO.** (1909), 100 L. T. 481; 25 T. L. R. 316; 5 Tax Cas. 402.

Allowance in respect of dominion taxes.]—See Part VII., Sect. 3, *post*.

L. Losses in Two or More Distinct Trades.

See Schedule D., Rules applicable to Cases I., & II., rr. 13, 16.

278. General rules—Limited to losses in trade.]—The Y.M.C.A. is a philanthropic assocn. having classes, gymnasium, & publication department. Its expenses are defrayed by charitable subscriptions, donations, & fees, the latter of which are not sufficient to cover the expenditure. It also carries on a restaurant on the usual commercial principles, which is open to the public:—*Held*: the losses of the assocn. on its other branches could not be set off against the profits of the restaurant.

The law seems to be that if you carry on a trade you are not to take off the losses connected with something else that you do, however philanthropic & however desirable, from the profits which you make in the trade (**RIDLEY, J.**).—**GROVE v. YOUNG MEN'S CHRISTIAN ASSOCN.** (1903), 88 L. T. 696; 67 J. P. 279; 19 T. L. R. 491; 47 Sol. Jo. 535; 4 Tax Cas. 613.

Annotations:—**Consd. Coman v. Rotunda Hospital, Dublin**, [1921] 1 A. C. 1; **Brighton College v. Marriott**, [1925] 1 K. B. 312. **Refd. I. R. Comrs. v. Westleigh Estates Co., Same v. South Behar Ry., Same v. Eccentric Club**, [1924] 1 K. B. 390.

according to the rules of Schedule B., on the rent, while the assessment on the profits of his business was regulated by Schedule D.—**BROWN v. WATT** (1886), 13 R. (Ct. of Sess.) 590; 23 Sc. L. R. 403.—**SCOT.**

.]—A founded for the diffusion of religious literature, sold Bibles, etc., at a depository or shop in Edinburgh, & sent out colporteurs, whose duties were to sell Bibles, etc., & to act as cottage missionaries. The sales at the Edinburgh shop resulted in a profit, but the colportage was carried on at a loss. The net result of the whole operations was an annual loss, which was met by subscriptions:—*Held*: the colportage was not a trade & the loss on it could not, for the purpose of the income tax, be set against the profits from the

PART V.—SCHEDULE D.

279. Chargeable under Schedule D.—Effect of Revenue Act, 1866 (c. 36), s. 8.]—A rural district council under the powers conferred by Public Health Act, 1875 (c. 55), supplied water to a number of contributory places. To some of these places the water was supplied at a profit, & to others at a loss, to the council. In assessing the council under Income Tax Act, 1842 (c. 36), s. 60, Sched. A., No. III., in respect of the annual value or profits of waterworks, the surveyor of taxes took into account only those dealings which showed a profit, on the ground that the undertaking of supplying water was in respect of each contributory place a separate undertaking or concern:—*Held*: (1) on the facts, the undertaking of supplying water was in respect of each contributory place a separate concern, & the council must pay the tax in respect of each contributory place which made a profit; (2) Revenue Act, 1866 (c. 36), s. 8, does not constitute persons engaged in the concerns described in Schedule A., No. III., “persons carrying on concerns in the nature of trade the profits whereof are made chargeable under the rules of Schedule D.” within Income Tax Act, 1842 (c. 35), s. 101, so as to entitle them under that sect. to set against the profits acquired in one or more of those concerns the excess of the loss sustained in any of the other concerns over & above the profits thereof.—**WAKEFIELD RURAL COUNCIL v. HALL**, [1912] 3 K. B. 328; 81 L. J. K. B. 1201; 107 L. T. 138; 76 J. P. 437; 28 T. L. R. 589; 10 L. G. R. 1002; 6 Tax Cas. 181, C. A.

See, now, Schedule A., No. III., r. 8.

280. What may be set off—Losses of municipal corporation in utilisation of sewage.]—A corpn. claimed to set off against its profits from markets, losses which it sustained in the utilisation of sewage, in industrial schools, & in baths & parks. Set off not allowed.—*Re BIRMINGHAM CORPN.* (1875), 1 Tax Cas. 26.

281. — Interest on loans by & to municipal corporation—London County Council.]—(1) The London County Council, under powers given them by various statutes, borrowed large sums of money & created stock on which they paid interest to the stockholders, income tax being deducted by

the Bank of England on behalf of the Comrs. of income tax before such payment. The London County Council also, under powers given them by various statutes, advanced sums of money by way of loan to certain public bodies from whom they received interest in full without deduction of income tax. The London County Council were held liable by the surveyor of taxes to pay income tax on such last aforesaid interest, & he assessed them under Income Tax Act, 1853 (c. 34), sched. D. On appeal to the Comrs., & subsequently to the Div. Ct., but not when before the surveyor, the London County Council contended that if they were so liable they were entitled to certain deductions in respect of income tax paid by them in other transactions:—*Held*: the London County Council were properly assessed & they were liable to pay income tax on the sums received by them in full without deduction of income tax by way of interest on loans made by them.

(2) This was the only question before the surveyor, & therefore the only question the ct. had jurisdiction to deal with, & any other transactions by the London County Council could not be taken into consideration.—**LONDON COUNTY COUNCIL v. GROVE** (1896), 61 J. P. 52; 45 W. R. 279; 13 T. L. R. 70; 41 Sol. Jo. 95; 3 Tax Cas. 508, C. A.

Annotation:—**Consd. Leeds Permanent Benefit Bldg. Soc. v. Mallandaine** (1897), 3 Tax Cas. 577.

282. — Losses in philanthropic work.]—**GROVE v. YOUNG MEN'S CHRISTIAN ASSOCN.**, No. 278, *ante*.

M. Management Expenses.

1918 Act, s. 33; Schedule D., Rules applicable to Cases I. & II., r. 3 (a).

283. Loss on currency exchange—On interest paid abroad—Investment company.]—An English co., the business of which was confined to holding shares in certain other cos. & financial operations connected therewith, issued bonds payable at bearer's option in London in sterling or abroad at certain rates of exchange. Through fluctuations in rates of exchange the co. in providing currency to satisfy encashments abroad suffered a heavy loss on exchange:—*Held*: such loss was not an

bookseller's business carried on at the shop.—**RELIGIOUS TRACT & BOOK SOCIETY OF SCOTLAND v. FORBES (SURVEYOR OF TAXES)** (1896), 60 J. P. 393; 3 Tax Cas. 415.—**SCOT.**

282 i. What may be set off—Losses in philanthropic work.]—**RELIGIOUS TRACT & BOOK SOCIETY OF SCOTLAND v. FORBES (SURVEYOR OF TAXES)** (1896), 60 J. P. 393; 3 Tax Cas. 415.—**SCOT.**

o. — Losses as partner in separate concern.]—A., who traded on his own account, held as part of his business a share in a firm consisting of himself & B., whose business was to deal in similar goods, & was subsidiary to A.'s. In a certain year A. made a profit in his own business, but sustained a loss as a partner:—*Held*: in arriving at the taxable income of year his loss as a partner set off against his claims in own business.—**BOARD OF REVENUE v. MUNISWAMI CHETTI & SONS** (1923), 1 L. R. 47 Mad. 653.—**IND.**

p. — —.]—Where a person carries on two quite different trades, one individually & the other as a member of an unregistered firm, he is entitled to set off, for purposes of income tax, the loss incurred by him in the partnership trade profit made by him in trade.—**INCOME TAX ARUNCHILAM CHETTIAR** R. 47 Mad. 660.—

PART V. SECT. 2, SUB-SECT. 7.—M.

q. Management of trust.]—Trustees in Scotland received remittances from trust property abroad, & distributed the net income of the trust among the beneficiaries:—*Held*: the full amount received in the United Kingdom was chargeable with income tax without any deduction in respect of expenses incurred in this country in managing the trust.—**AIKIN (SURVEYOR OF TAXES) v. MACDONALD TRUSTEES** (1894), 3 Tax Cas. 306.—**SCOT.**

r. Insurance company.]—An assocn. of civil servants, formed in 1890 for the purpose of enabling members to effect life insurances on advantageous terms, obtained from N. Insurance Co. an offer which provided for an allowance of a discount of 15 per cent. from the co.'s ordinary table of premiums. Subsequently, on May 8, 1895, a formal agreement was entered into between the insurance co. & the Civil Service Insurance Society, which had been established to mature & carry into effect the scheme initiated by the earlier assocn. which had only partially represented the Civil Service. The agreement contained a provision that the rate of premium for all insurances effected through the instrumentality of the society should be those contained in the insurance co.'s table of rates of

Sept. 15, 1890, less a discount of 15 per cent. The society on its part agreed to promote the business of the insurance co. & to make certain arrangements to facilitate the payment & collection of the premiums. The premium appearing on the face of the policies effected under the terms of the agreement had always been the gross premium & the endorsement on the back of the policy had shown the tabular premium, the amount of the discount & the net amount payable. In the insurance co.'s accounts the amount of the gross premium had been credited as a receipt & the discount had been treated as part of the insurance co.'s expenses, one half having been allocated to commission & the remainder to general expenses:—*Held*: the discount of 15 per cent. was not a sum disbursed by the insurance co. as “expenses of management (including commissions)” within Finance Act, 1915 (c. 62), s. 14 (1), & the co. was therefore not entitled to relief from income tax under that sect. in respect of the amount of the discount in question.—**NORTH BRITISH & MERCANTILE INSURANCE CO. v. KASSON** (1919), 7 Tax Cas. 463.—**SCOT.**

t. Investment company.]—A co., carrying on a business which consisted mainly in the making of investments, & deriving its income principally from rents of lands & houses, was charged

**Sect. 2.—Case I.—Trades: Sub-sect. 7, M. & N.
(a) & (b): sub-sect. 8.]**

"expense of management" within 1918 Act, s. 33.—**BENNET v. UNDERGROUND ELECTRIC RYS. Co.**, [1923] 2 K. B. 535; 92 L. J. K. B. 909; 129 L. T. 701; 39 T. L. R. 560; 67 Sol. Jo. 769; 8 Tax Cas. 475.

Insurance company with head office abroad.]—
See No. 307, *post*.

N. In Particular Trades.

(a) Brewery Companies.

See Schedule D., Rules applicable to Cases I. & II., r. 3 (a).

284. Premiums on leases of tied houses.]—

Appls., for the purpose of increasing their trade as brewers, were in the habit of buying the leases for terms of years of licensed public-houses, & letting such houses to publicans, who covenanted to buy of applts. all the beer sold therein; & to obtain these leases, applts. were obliged to pay large premiums & to covenant to pay fixed rents for the several terms of years respectively. In returning the year's profits of their trade for assessment to the income tax, applts. claimed an allowance, in respect of such premiums, equal to the proportion of them which had been exhausted by reason of one year of the several terms having run out; & they claimed to deduct that amount from the balance of their profits as capital exhausted in the trade:—*Held*: applts. were not entitled to the deduction, which was a claim, not in respect of expenses incurred in the production of the beer but, of money expended in order to promote its sale after its production.—**WATNEY v. MUSGRAVE** (1880), 5 Ex. D. 241; 49 L. J. Q. B. 493; 42 L. T. 690; 44 J. P. 268; 28 W. R. 491; 1 Tax Cas. 272.

Annotations:—**Expld.** *Reid's Brewery Co. v. Male*, [1891] 2 Q. B. 1. **Consd.** *Smith v. Lion Brewery Co.*, [1909] 2 K. B. 912; *Guest, Keen & Nettlefolds v. Fowler*, [1910] 1 K. B. 713. **Refd.** *Rhymney Iron Co. v. Fowler*, [1896] 2 Q. B. 79; *Brickwood v. Reynolds*, [1898] 1 Q. B. 95; *Southwell v. Savill* (1901), 4 Tax Cas. 430; *Strong of Romsey v. Woodfield* (1905), 93 L. T. 361; *Vallambrosa Rubber Co. v. Farmer* (1910), 5 Tax Cas. 529.

285. Banking & money lending business combined with brewery—Losses on loans to brewery customers.]—Appls. carried on the business of brewers, & also, as a branch or adjunct of their brewery business, the business of bankers & money lenders, & in the course of such business lent money to their customers on security, & received money on deposit from their customers, who were allowed to draw bankers' cheques or orders on applts. In no case was any loan or advance made by way of permanent investment, but the same was taken only in connection with the current dealings & transactions of the customer with applts., & in the event of such current dealings or transactions terminating, the loan or advance was required to be paid off, & the account closed. The profits of the brewery were largely increased by the addition of the banking & money lending business, & the loans were necessary to enable applts. to realise profits. They claimed to deduct

from an assessment to the income tax on profits from trade, bad debts in respect of loans to customers:—*Held*: on the facts above stated, applts. must be taken to have carried on one business only, the money advanced to customers was used in the business, & not capital invested, & applts. were entitled to the deduction claimed.—**REID'S BREWERY CO. v. MALE**, [1891] 2 Q. B. 1; 60 L. J. Q. B. 340; 64 L. T. 294; 55 J. P. 216; 39 W. R. 459; 7 T. L. R. 278; 3 Tax Cas. 279, D. C.

Annotations:—**Consd.** *Brickwood v. Reynolds* (1897), 77 L. T. 31. **Refd.** *Southwell v. Savill* (1901), 65 J. P. 649; *Strong of Romsey v. Woodfield* (1905), 93 L. T. 361.

286. Expenses incurred for the purposes of trade—Repairs to tied houses.]—**BRICKWOOD & Co. v. REYNOLDS**, No. 231, *ante*.

287. ———.]—Where money is paid by a landlord, being a brewer, or allowed by him to the tenant of a tied house, as a necessary incident of the profitable working of the brewery business, the landlord is not prevented from deducting that money, in his estimate of the balance of profits of his brewery business for the purposes of assessment to income tax, by reason of the fact that it enures also for the benefit of the tenant's separate trade in the tied house. A brewery co., as a necessary incident of the profitable working of their brewery business, acquired & owned licensed houses which they let to tied tenants, who, in consideration of the tie, paid a rent less than the full annual value. The tenants were under an agreement to repair & to pay rates & taxes, but the co. in fact did the repairs & paid the rates & taxes in order to avoid loss of tenants. The co. also in respect of these houses paid premiums on insurance against fire & loss of licenses & incurred legal expenses in connection with the renewal of the licenses & otherwise. All these sums were solely & exclusively expended or allowed by the brewery co. for the purposes of their business:—*Held*: in estimating the balance of the profits of their business for the purposes of assessment to income tax, the brewery co. were entitled to deduct all these sums as expenses necessarily incurred for the purpose of earning the profits.

The third rule under Case I., . . . goes to the *quantum* only. It assumes that money spent in repairs or for the other purposes mentioned would be a proper item of deduction, but provides that where the property on which the money is expended is occupied or employed for the purposes of the trade the amount allowed is to be calculated on an average, leaving the question as to what may properly be allowed where the property is not so occupied or employed entirely untouched (**LORD PARKER OF WADDINGTON**).

If part of the trade consisted in letting houses or implements to be occupied or used otherwise than for the purposes of the trade, & it were necessary for the purposes of the trade to keep such houses or implements in repair, a deduction in respect of the money spent in repairs would be both proper & necessary in order to ascertain a balance of profits & gains, & such deduction, not

for income tax on its whole income, except interests from bank deposits, under Schedule A. The co. claimed relief under Finance Act, 1915 (c. 62), s. 14 (1), in respect of sums disbursed by it as expenses of management. The relief claimed would have made the tax paid by the co. less than the tax which it would have paid if it had been charged in accordance with the rules of Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Case I.:—*Held*: the co. was alternatively chargeable for income

tax on the profits of its business, including the rents, under Schedule D., & the claim was excluded by proviso (a) of sect. 14 (1).—**ROSYTH BUILDING & ESTATE CO., LTD. v. INLAND REVENUE**, [1921] S. C. 372.—**SCOT**.

PART V. SECT. 2, SUB-SECT. 7.—
N. (a).

a. Ownership & mortgaging of hotels combined with brewery—Expenses incurred in hotel business.]—Resp. co.

carried on the business of a brewer, & also, as an adjunct of its brewery business, the business of owner & mtgee of hotels. Both businesses were carried on under the same management & by the same general staff. The comr. of taxes, in assessing the income of the co. for the purposes of the income tax, disallowed the sum of £286 from the amount of £1,586 deducted by the co. as its general expenditure in the production of its income, on the ground that it was the

being expressly prohibited, ought therefore to be allowed (LORD PARKER OF WADDINGTON).—**USHER'S WILTSHIRE BREWERY, LTD. v. BRUCE**, [1915] A. C. 433; 84 L. J. K. B. 417; 112 L. T. 651; 31 T. L. R. 104; 6 Tax Cas. 399, H. L.; *reversg.*, [1914] 2 K. B. 891, C. A.

Annotations:—**Apld.** *Stevens v. Boustead*, [1916] 2 K. B. 560. **Distd.** *Union Cold Storage Co. v. Jones* (1923), 129 L. T. 512; *Atherton v. British Insulated & Helsby Cables*, [1925] 1 K. B. 421. **Consd.** *Rowntree v. Curtis*, [1925] 1 K. B. 328. **Refd.** *Smith v. Incorporated Council of Law Reporting for England & Wales*, [1914] 3 K. B. 674; *Hancock v. General Reversionary & Investment Co.*, [1919] 1 K. B. 25; *Weller v. I. R. Comrs.*, [1919] 2 K. B. 407. **Mentd.** *Re Sawyer & Withall*, [1919] 2 Ch. 333; *Currie v. I. R. Comrs.*, [1921] 2 K. B. 332.

288. — Expenses of applications for licenses.]

—**Resps.**, a firm of brewers, submitted accounts showing a certain sum for profits. In arriving at the amount they had deducted sums expended in connection with unsuccessful applications made by them to the licensing justices for new licenses to houses owned & leased by them, & also to houses not owned by them, but for which they conducted the application, for the purpose of increasing their trade:—**Held**: *resps.* were not entitled to make the deductions, as the expenses were not money wholly & exclusively laid out or expended for the purposes of their trade, but were a capital expenditure within Income Tax Act, 1842 (c. 35), sched. D.—**SOUTHWELL v. SAVILL BROTHERS, LTD.**, [1901] 2 K. B. 349; 70 L. J. K. B. 815; 85 L. T. 167; 65 J. P. 649; 49 W. R. 682; 17 T. L. R. 513; 45 Sol. Jo. 521; 4 Tax Cas. 430, D. C.

289. — — — — —.]—**USHER'S WILTSHIRE BREWERY, LTD. v. BRUCE**, No. 287, *ante*.

290. — Damages paid to guest at inn—Inn owned by company & run by manager—Negligence of company's servants.]—(1) A brewery co. owned an inn which was carried on by a manager as part of their business. A customer sleeping in the inn was injured by the fall of a chimney, & recovered damages & costs against the co. for the injury, which was owing to the negligence of the co.'s servants:—**Held**: the damages & costs could not be deducted in estimating the balance of profits for the purpose of the income tax, the loss not being connected with or arising out of the trade, & not being money wholly & exclusively laid out or expended for the purposes of the trade.

(2) It does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction, for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with the trade in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration, losses sustained by a railway co. in compensating passengers for accidents in travelling might be deducted (LORD LOREBURN, C.).—**STRONG & CO., LTD. v. WOODFIELD**, [1906] A. C. 448; 75 L. J. K. B. 864; 95 L. T. 241; 22 T. L. R. 754; 50 Sol. Jo. 666; 5 Tax Cas. 215, H. L.

Annotations:—*As to* (1) **Consd.** *Smith v. Lion Brewery Co.*, [1909] 2 K. B. 912. **Refd.** *Usher's Wiltshire Brewery v.*

Bruce, [1914] 1 K. B. 357. *As to* (2) **Apld.** *I. Warnes*, [1919] 2 K. B. 444. **Consd.** *I. R. Comrs. v. Glehn*, [1920] 2 K. B. 553. **Refd.** *Williams v. Singer*, *Pool v. Royal Exchange Assce.*, [1921] 1 A. C. 65; *Addie's Collieries v. I. R. Comrs.* (1924), 8 Tax Cas. 671.

291. — Compensation levy imposed on tenants.]—A brewery co. as an essential part of their business acquired & held licensed houses which they let to tenants who covenanted to buy all their beer from the co. The sole purpose of the co. in thus acting was to increase the profits of their trade in manufacturing & selling beer wholesale. If any house lost its license the co. got rid of that house as soon as possible. The annual compensation levy imposed by Licensing Act, 1904 (c. 23), s. 3, was paid as to the co.'s share of the levy by the tenant paying that share & deducting it from his rent as provided by the Act. In estimating for income tax purposes the yearly profits of their trade, which were increased by their ownership of the houses, the co. claimed to make a deduction in respect of the sum which they were compelled to pay for the levy, & contended that the sum was wholly & exclusively laid out or expended for the purposes of their trade within Income Tax Act, 1842 (c. 35), s. 100, sched. D., Rules applicable to Cases I., & II., r. 1.:—**Held**: upon the facts as stated by the income tax Comrs. a deduction was allowed by Income Tax Act, 1842 (c. 35).—**SMITH v. LION BREWERY CO., LTD.**, [1911] A. C. 150; 80 L. J. K. B. 566; 104 L. T. 321; 27 T. L. R. 261; 55 Sol. Jo. 269; 5 Tax Cas. 568; 75 J. P. Jo. 87, H. L.

Annotations:—**Apld.** *Usher's Wiltshire Brewery v. Bruce*, [1915] A. C. 433. **Distd.** *Union Cold Storage Co. v. Jones* (1923), 129 L. T. 512. **Refd.** *Stevens v. Boustead*, [1916] 2 K. B. 560.

292. — Rates, taxes & insurance on tied houses.]—**USHER'S WILTSHIRE BREWERY, LTD. v. BRUCE**, No. 287, *ante*.

(b) Insurance Companies.

See Sub-sect. 8, *post*.

SUB-SECT. 8.—SPECIAL POINTS ARISING IN CONNECTION WITH ASSESSMENT OF INSURANCE COMPANIES.

See 1918 Act, s. 33; 1923 Act, s. 16; Schedule D., Rules applicable to Cases I., & II., rr. 1, 3, 15.

293. Fire insurance company—Claim for deduction in respect of unearned premiums or unexpired risks—Method of computation.]—In making a return of their profits for assessment to income tax under Income Tax Act, 1842 (c. 35), sched. D., a fire insurance co. is not permitted by the Act to credit themselves with, or to claim a deduction for, a portion, calculated by them at 33 per cent., or one-third of the amount of premiums received during the given year, as the unearned or unexhausted portion of such premiums, although in respect of such portion the co. remain liable to losses which may occur in the ensuing year. The fair & proper mode of ascertaining the amount of net profits for the purposes of the Act, it being impossible to ascertain it with such strictly mathematical accuracy as to do perfect & absolute justice, is to take on the one side the whole receipts

proportion of the general expenditure estimated by him as incurred in connection with the ownership & mortgaging of hotels:—**Held**: any expenditure which could be shown to have been reasonably incurred in dealing with the mortgages & ownership of land was not deductible.—**TAXES**

COMR. v. CROWN BREWERY CO., LTD. (1906), 26 N. Z. L. R. 121.—N.Z.

PART V. SECT. 2, SUB-SECT. 8.

293 i. Fire insurance company—Claim for deduction in respect of unearned premiums or unexpired risks—

Method of computation.]—As fire insurance policies are contracts for one year only, the premiums received for the year of assessment, or on an average of three years, deducting losses by fire during the same period & ordinary expenses may be fairly taken as the profits & gains of the co. without

Sect. 2.—Case I.—Trades: Sub-sect. 8.]

& on the other the whole expenditure & disbursements for the given year, the balance remaining being, for the time at least, net profits on which the tax should be assessed. This being done year by year, there is an absolute balancing of accounts; & if any wrong be done by losses afterwards occurring in respect of premiums on which, as profits, income tax has been assessed & paid, that will be taken into consideration in the ensuing year.—**IMPERIAL FIRE INSURANCE CO. v. WILSON** (1876), 35 L. T. 271; 41 J. P. 9; 1 Tax Cas. 71.

Annotations:—Expld. & Apld. General Accident, Fire & Life Assce. Corp'n. v. McGowan, [1908] A. C. 207. **Consd.** Sun Insce. Office v. Clark, [1912] A. C. 443. **Refd.** Last v. London Assce. Corp'n. (1885), 2 Tax Cas. 100.

294. ————.—A co. carrying on the business of fire, sickness, accident, & guarantee insurance, as distinguished from life insurance, is not entitled, in estimating the balance of its profits chargeable with income tax, to deduct or make any allowance for estimated risks unexpired at the end of the year.

I think the particular correction sought by appls. in this case is indefensible upon the materials before us, & further, that the method adopted by the Comrs. is a good working rule in the present instance & generally. If in any particular case an insurance co. can show it works hardship, no doubt the rule ought to be modified so that the real gains & profits may be ascertained as near as may be (**LORD LOREBURN, C.**).—**GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPN., LTD. v. MCGOWAN**, [1908] A. C. 207; 77 L. J. P. C. 38; 98 L. T. 734; 24 T. L. R. 533; 52 Sol. Jo. 455; 5 Tax Cas. 308, H. L.

Annotation:—Expld. & Distd. Sun Insce. Office v. Clark, [1912] A. C. 443.

295. ————.—There is no rule of law that in assessing a fire insurance co. to income tax the total premium receipts for the year, after deducting the losses & disbursements for the same period, are to be taken as the profits of the co., without making any allowance for unexpired risks on policies outstanding at the end of the year; but where it becomes necessary to have recourse to some form of estimate, that method will be adopted which approximates most nearly to the truth. Where, therefore, it was proved, on an appeal by a fire insurance co. against an assessment, that it was the practice of the co., in making up its annual accounts for the purpose of ascertaining the profits for distribution amongst its shareholders, to carry forward to the succeeding year a certain percentage of its premium receipts as an allowance to meet unexpired risks on outstanding policies, & that this percentage was a fair & reasonable allowance for that purpose, & the figures, on the triennial average prescribed by Income Tax Acts, showed a large increase in the amount of such allowance for the year of assessment:—**Held:** in the circumstances it was competent to the co. to make an allowance in respect of unexpired risks, & the increase in the allowance formed no part of the profits or gains of the year.—**SUN INSURANCE OFFICE v. CLARK**, [1912] A. C.

making any allowance for the balance of annual risks unexpired at the end of the financial year.—**SCOTTISH UNION & NATIONAL INSURANCE CO. v. INLAND REVENUE** (1889), 16 R. (Ct. of Sess.) 461; 26 Sc. L. R. 330.—**SCOT.**

b. Life insurance company—Interest on investments.]—Held: pliffs., a life insurance co., were liable to be assessed upon the interest arising upon

investments of their reserve fund, although such interest was always added to the reserve fund & reinvested as part of it.—**CONFEDERATION LIFE ASSOCN. v. TORONTO CORPN.** (1895), 22 A. R. 166; 24 O. R. 643.—**CAN.**

c. ————.—The net interest & dividends received by the Canada Life Assurance Co. from investments of their reserve fund form part of their

443; 81 L. J. K. B. 488; 106 L. T. 438; 28 T. L. R. 303; 56 Sol. Jo. 378; 6 Tax Cas. 59, H. L.; *revsq.* S. C. *sub nom.* **CLARK v. SUN INSURANCE OFFICE** (1911), 104 L. T. 520, C. A.

Annotation:—**Consd.** London Cemetery Co. v. Barnes, [1917] 2 K. B. 496.

296. Life insurance company—Premiums—Whether annual profits or gains.]—An insurance co. having one body of shareholders carried on three branches of business, viz., marine, fire, & life insurance business. The liabilities of the co. were discharged partly out of premiums, partly out of incomes arising from large invested funds, which in the management of the business were allocated to the marine, fire & life branches respectively, & styled the marine, fire, & life funds; but the results of the business in all the branches were thrown together into one account called the "profit & loss account" & dividends were declared out of the balance of this account & not out of the profits of the particular branches:—**Held:** (1) for the purposes of income tax the three branches must be treated as one business & the profits calculated on the results of that business taken as a whole; (2) additions made to the life fund of the co. out of receipts of the year were not subject to income tax as profits.

(3) Life insurance premiums are not in the nature of annual profits, & therefore the annual profits or gains of life insurance for the purposes of income tax cannot be arrived at by taking the excess of premiums received during the year over the payments on policies falling due & business expenses during the same period.—**LAST v. LONDON ASSURANCE CORPN.** (1884), 12 Q. B. D. 389; 53 L. J. Q. B. 325; 50 L. T. 534; 32 W. R. 702, D. C.; *affd.* 14 Q. B. D. 239, C. A.; *varied* on other grounds (1885), 10 App. Cas. 438, H. L.

Annotations:—*As to* (1) **Refd.** Liverpool & London & Globe Insce. v. Bonnett, Brice v. Northern Assce., Brice v. Ocean Accident & Guarantee Corp'n., [1912] 2 K. B. 41. *As to* (3) **Consd.** New York Life Insce. v. Styles (1889), 14 App. Cas. 381; Equitable Life Assce. Soc. of United States v. Bishop, [1900] 1 Q. B. 177; Ashton Gas Co. v. A.-G., [1906] A. C. 10. **Refd.** Broughton Coal Co. v. Kirkpatrick (1884), 14 Q. B. D. 491; Carlisle & Silloth Golf Club v. Smith, [1913] 3 K. B. 75; Liverpool & London & Globe Insce. v. Bennett, [1913] A. C. 610; I. R. Comrs. v. Cornish Mutual Assce. (1924), 94 L. J. K. B. 237. **Generally, Mentd.** Clerical, Medical & General Life Assce. Soc. v. Carter (1888), 21 Q. B. D. 339; I. R. Comrs. v. Somers (1924), 131 L. T. 830; I. R. Comrs. v. Westleigh Estates Co., I. R. Comrs. v. South Behar Ry., I. R. Comrs. v. Eccentric Club, [1924] 1 K. B. 390;

297. Additions to life fund out of receipts—Whether profits subject to tax.]—A life insurance co. issued "participating policies" at an increased premium, according to the terms of which at the end of each quinquennial period "the gross profits" of such policies were thus dealt with: two-thirds were returned by way of bonus or abatement of premiums to the holders of such policies then in force; the remaining third went to the co. who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division among the shareholders:—**Held:** the two-thirds returned to the policy holders were "annual profits or gains" & assessable to income tax.—**LAST v. LONDON ASSURANCE CORPN.** (1885),

taxable income, though to the extent of ninety per cent. thereof divisible, pursuant to the terms of the co.'s special Act, as profits among participating policy holders & not subject to the control or disposition of the co.—**Re CANADA LIFE ASSURANCE CO. & HAMILTON CITY** (1898), 25 A. R. 312.—**CAN.**

d. ————.—Where the surrender value or part of the surrender

App. Cas. 438; 55 L. J. Q. B. 92; 53 L. T. 634; 50 J. P. 116; 34 W. R. 233; 1 T. L. R. 617; 2 Tax Cas. 100, H. L.; *varying* (1884), 14 Q. B. D. 239, C. A.

Broughton Coal Co. v. Kirkpatrick (1884), 14 Q. B. D. 491. *Distd. New York Life Insce. v. Styles*, (1889) 14 App. Cas. 381. *Consd. Equitable Life Assce. Soc. of United States v. Bishop*, [1900] 1 Q. B. 177; *Ashton Gas Co. v. A.-G.*, [1906] A. C. 10; I. R. Comrs. v. *Cornish Mutual Assce.* (1924), 94 L. J. K. B. 237. *Reid. Clerical, Medical & General Life Assce. Soc. v. Carter* (1888), 21 Q. B. D. 339; *Carlisle & Silloth Golf Club v. Smith*, [1913] 3 K. B. 75; *Liverpool & London & Globe Insce. v. Bennett*, [1913] A. C. 610; I. R. Comrs. v. *Somers* (1924), 131 L. T. 830. *Mentd. I. R. Comrs. v. Westleigh Estates Co., I. R. Comrs. v. South Behar Ry., I. R. Comrs. v. Eccentric Club*, [1924] 1 K. B. 390.

298. — **Participating policies.]** — *LAST v. LONDON ASSURANCE CORPN.*, No. 297, *ante*.

299. — **Policy-holders distinct from company.]**—A life insurance co. had a capital divided into shares, the dividends on which were limited by the articles of association to 7 per cent. The powers of the co. were vested in a board of directors elected by the shareholders; the board appointed the officers of the co., & by the officers determined the rates of premium & the terms of insurance, & generally managed the affairs of the co. The co. issued participating policies, & by the articles the insurance business was to be conducted on the mutual plan. The earnings & receipts over & above the dividends, losses, & expenses were accumulated from year to year, & every five years a balance was struck & the net surplus in the hands of the co., after deducting an amount sufficient to cover all outstanding risks & obligations, was, in compliance with the articles of association, divided among the holders of participating policies, each policy holder being credited with an equitable share of such surplus:—*Held*: the surplus returned or credited to the policy holders was "annual profits or gains," & was assessable to income tax.—*EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES v. BISHOP*, [1900] 1 Q. B. 177; 69 L. J. Q. B. 252; 81 L. T. 693; 48 W. R. 341; 16 T. L. R. 74; 44 Sol. Jo. 100; 4 Tax Cas. 147, C. A.

300. — **Mutual society without shareholders.]**—A life insurance co. had no shares or shareholders. The only members were the holders of participating policies, each of whom was entitled to a share of the assets & liable to all losses. A calculation was made by the co. of the probable death rate among the members & of the probable expenses & other liabilities, & the amount claimed for premiums from members was commensurate therewith. An account was annually taken, & the greater part of the surplus of such premiums over expenditure referable to these policies was returned to the policy holders as bonuses, either by addition to the sums insured or in reduction of future premiums. The remainder of the surplus was carried forward as funds in hand to the credit of the general body of the members. It being admitted that the income derived by the co. from investments, & from all transactions with persons not members, was assessable to income tax:—*Held*: no part of

the premium income received under participating policies was liable to be assessed to income tax as profits or gains under Income Tax Act, 1853 (c. 34), sched. D.; & *Last v. London Assurance Corpn.*, No. 297, *ante*, was distinguishable, the income in that case being derived from transactions with persons not members & not, as in the present case, from mutual insurance between members only.—*NEW YORK LIFE INSURANCE CO. v. STYLES* (1889), 14 App. Cas. 381; 59 L. J. Q. B. 291; 61 L. T. 201; 5 T. L. R. 621; *sub nom. STYLES v. NEW YORK LIFE INSURANCE CO.*, 2 Tax Cas. 460, H. L.

Annotations:—*Consd. Equitable Life Assce. Soc. of United States v. Bishop*, [1900] 1 Q. B. 177; *Scottish Widows' Fund & Life Assce. Soc. v. Allan*, *Scottish Equitable Life Assce. Soc. v. Allan*, *Scottish Provident Institution v. Allan* (1900), 4 Tax Cas. 369. *Expld. Carlisle & Silloth Golf Club v. Smith*, [1913] 3 K. B. 75. *Consd. I. R. Comrs. v. Cornish Mutual Assce.* (1924), 94 L. J. K. B. 237; I. R. Comrs. v. *Westleigh Estates Co., Same v. South Behar Ry., Same v. Eccentric Club*, [1924] 1 K. B. 390; *New York Life Insce. v. Public Trustee* (1924), 93 L. J. Ch. 449. *Reid. I. R. Comrs. v. Somers* (1924), 131 L. T. 830.

301. — **Interest on investments—Tax deducted at source—Investments for purposes of business.]**—The interest arising from investments made by a life insurance co. for the purposes of their business, income tax on which had been deducted at its source, exceeded the amount of the profits of the co. for the year of assessment. The co. had also during the year received interest on investments from which there had been no deduction for income tax:—*Held*: the co. were liable to assessment to income tax in respect of such last mentioned interest.—*CLERICAL, MEDICAL & GENERAL LIFE ASSURANCE SOCIETY v. CARTER* (1889), 22 Q. B. D. 444; 58 L. J. Q. B. 224; 53 J. P. 276; 37 W. R. 346; 5 T. L. R. 291; 2 Tax Cas. 437, C. A.

Annotations:—*Consd. Plymouth, Stonehouse & Devonport Tram Co. v. General Tolls Co.* (1896), 75 L. T. 467; *Leeds Permanent Benefit Bldg. Soc. v. Mallandaine*, [1897] 2 Q. B. 402. *Reid. L. C. C. v. Grove* (1896), 61 J. P. 52; *Scottish Widows' Fund & Life Assce. Soc. v. Allan*, *Scottish Equitable Life Assce. Soc. v. Allan*, *Scottish Provident Institution v. Allan* (1900), 4 Tax Cas. 369; *Revell v. Edinburgh Life Insce.* (1906), 5 Tax Cas. 221; *Matthews v. Cork County Council* (1910), 5 Tax Cas. 545.

See, now, Schedule D., Rules applicable to Cases I., & II., r. 15 (2).

302. — **Annuities—Granted in return for single payment.]**—A life assurance society as part of its business sold or granted annuities in consideration of a lump sum or premium paid down in the case of an immediate annuity & of a similar payment or of periodical premiums in the case of deferred or contingent annuity. In making up the balance sheet showing the amount of its profits & gains for the purpose of assessment to income tax, under Income Tax Act, 1842 (c. 35), sched. D. the society deducted from its gross income the sum paid in discharge of its annuity contracts. Upon the assessment for the year 1885–6, & before the coming into operation of Customs & Inland Revenue Act, 1888 (c. 8), s. 24 (3):—*Held*: the society was not liable to be assessed in respect of the amount paid by it for annuities.—*GRESHAM LIFE ASSURANCE SOCIETY*

value of a policy is applied by a life assurance co. in payment of overdue premiums, & the moneys so applied, with interest thereon, become a charge on the money payable under the policy & the surrender value thereof, the interest so charged is income from an investment on which income tax is payable by the life assurance co.—*TAXES COMR. v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY* (1902), 22 N. Z. L. R. 445.—N.Z.

—In a question as

to the assessment of income tax as the profits or gains of a co. carrying on the business both of fire & life insurance:—*Held*: in estimating profits & gains there fell to be taken into account interest on investments which had not suffered deduction of income tax at its source.—*SCOTTISH UNION & NATIONAL INSURANCE CO. v. INLAND REVENUE* (1889), 16 R. (Ct. of Sess.) 461; 26 Sc. L. R. 330.—SCOT.

f. — — —.]—Applt. co. carried on insurance business with strangers

for gain to the co. as a whole, but had not its principal office in Victoria:—*Held*: the co. was liable to income tax on the proceeds from money lent on the security of land in Victoria.—*ENGLAND v. WEBB*, [1898] A. C. 758.—AUS.

g. — — —.]—Applt. was a mutual insurance co. which did not insure or otherwise trade in the colony, but only invested certain funds there:—*Held*: applt. co. was not within Victoria Income Tax Act, 1895, s. 10,

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v. STYLES, [1892] A. C. 309; 62 L. J. Q. B. 41; 67 L. T. 479; 56 J. P. 709; 41 W. R. 270; 8 T. L. R. 618; 3 Tax Cas. 185, H. L.

Annotations:—*Consd.* Anglo-Continental Guano Works *v.* Bell (1894), 70 L. T. 670. *Expld.* Edinburgh Life Assce. *v.* Lord Advocate, [1910] A. C. 143; *Farmer v. Scottish North American Trust*, [1912] A. C. 118. *Consd.* Sun Insce. Office *v.* Clark, [1912] A. C. 443. *Refd.* Reid's Brewery Co. *v.* Male (1891), 64 L. T. 294; L. C. C. *v.* Grove (1896), 44 W. R. 599; *Watson v. Royal Insce.*, [1896] 1 Q. B. 41; *Herbert v. McQuade* (1901), 84 L. T. 661; *Delage v. Nugget Polish Co.* (1905), 92 L. T. 682; *Strong v. Woodfield*, [1905] 2 K. B. 350; *Smith v. Lion Brewery Co.* (1910), 5 Tax Cas. 568; *Glensloy S.S. Co. v. Lethem* (1914), 6 Tax Cas. 453; *Usher's Wiltshire Brewery v. Bruce*, [1915] A. C. 433; *Howe v. I. R. Comrs.*, [1919] 2 K. B. 336; *I. R. Comrs. v. Von Glehn*, [1920] 2 K. B. 553; *Hall v. I. R. Comrs.*, [1921] 3 K. B. 152; *Bruce v. Hatton*, [1922] 2 K. B. 206. *Mentd.* *Inverclyde's Trustees v. Millar*, [1924] A. C. 580.

303. — Foreign investments—Income received by foreign branch—Not remitted to United Kingdom.]—An insurance co. having its head office in England had branch offices in England & in some foreign countries, the business of which was conducted by managers appointed by & acting under the board of directors at the head office. The co. sought to have exempted from assessment to income tax (a) a sum of £5,502, being dividends upon various foreign securities, representing part of the profits made abroad, which, instead of being specifically remitted to this country, were re-invested in American securities for the purpose of forming a reserve fund for the business of the co. there, as required by the law of the United States; (b) a sum of £12,841, as being profits made at some of the foreign branches, which profits were not specifically brought or remitted to this country, but were retained abroad to effect reserves. The co. contended, as to both sums, that, as no part of the same had been actually remitted to or received in this country, they were not liable to assessment:—*Held*: both sums were part of the profits & gains of the business & were liable to assessment as such.—*NORWICH UNION FIRE INSURANCE CO. v. MAGEE* (1896), 73 L. T. 733; 44 W. R. 384; 12 T. L. R. 137; 40 Sol. Jo. 227; 3 Tax Cas. 457, D. C.

Annotations:—*Foldd.* Universal Life Assce. Soc. *v.* Bishop (1899), 68 L. J. Q. B. 962. *Apprvd.* Liverpool & London & Globe Insce. *v.* Bennett, *Brice v. Northern Assce.*, *Brice v. Ocean Accident & Guarantee Corpn.*, [1912] 2 K. B. 41. *Refd.* *Bradbury v. English Sewing Cotton Co.* (1923), 8 Tax Cas. 481.

304. — — — — —.]—A fire & life insurance co., which, in addition to its business done at home, carried on a fire insurance business abroad, was registered in this country under Cos.

& its income derived from its Victorian investments was taxable income under sect. 5 in the mode applicable to taxpayers generally.—*SCOTTISH PROVIDENT INSTITUTION v. TAXES COMR.*, [1901] A. C. 340.—*AUS.*

h. — — — — —.]—A life insurance co. derived the bulk of its gross income from taxed sources. The amount of this taxed income exceeded the co.'s net profits. The co. received in addition certain interest from which tax was not deducted:—*Held*: this interest was property assessable under Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Cases III. & IV.—*REVELL v. EDINBURGH LIFE INSURANCE CO.* (1906), 5 Tax Cas. 221.—*SCOT.*

303 i. — Foreign investments—Income received by foreign branch—Not remitted to United Kingdom.]—A Scottish mutual life assurance society lent out sums of money in Australia on interest. The interest accruing was not remitted to the United Kingdom

in forma specifica, but was retained abroad & invested. It was, however, entered in the revenue account of the society as received:—*Held*: interest not received in the United Kingdom was not assessable to Income Tax, & the facts in these cases did not amount to constructive remittance.—*FORBES (SURVEYOR OF TAXES) v. SCOTTISH PROVIDENT INSTITUTION; FORBES (SURVEYOR OF TAXES) v. SCOTTISH WIDOWS' FUND & LIFE ASSURANCE SOCIETY* (1895), 3 Tax Cas. 443.—*SCOT.*

303 ii. Where interest derived from the foreign & colonial investments of a proprietary insurance co. was not remitted home, but was retained in the countries where it was earned & was invested or otherwise applied there:—*Held*: by being entered in the co.'s accounts & taken into account in estimating the amount of profit to be divided by way of bonus, dividend, or

Acts & had its head office here. One of the objects stated in its memorandum of assocn. was to invest money not immediately required in such manner as might from time to time be determined. By the laws of certain of the foreign States in which it carried on business an insurance co. was required, as a condition precedent to carrying on business there, to deposit with the Govts. of those countries certain sums of money & to invest those sums in accordance with the local laws. In pursuance of those requirements the co. invested certain sums in those States. It also voluntarily invested there other sums representing accumulated profits of the business. Both classes of investments yielded interest which was received by the co. abroad but was not remitted to the United Kingdom. This interest was included in the balance sheets of the co.:—*Held*: the income of the foreign investments formed part of the profits or gains of the co.'s business & was properly taxed under Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Case I.—*LIVERPOOL & LONDON & GLOBE INSURANCE CO. v. BENNETT*, [1913] A. C. 610; 82 L. J. K. B. 1221; 109 L. T. 483; 29 T. L. R. 757; 57 Sol. Jo. 739; 20 Mans. 295; 6 Tax Cas. 327, H. L.; *affg.* S. C. *sub nom.* *LIVERPOOL & LONDON & GLOBE INSURANCE CO. v. BENNETT*, *BRICE v. NORTHERN ASSURANCE CO.*, *BRICE v. OCEAN ACCIDENT & GUARANTEE CORPN.*, [1912] 2 K. B. 41, C. A.

Annotations:—*Consd.* Egyptian Hotels *v.* Mitchell (1915), 6 Tax Cas. 542; *I. R. Comrs. v. Westleigh Estates Co.*, *Same v. South Bohar Ry.*, *Same v. Eccentric Club*, [1924] 1 K. B. 390. *Refd.* *Gresham Life Assce. Soc. v. A.-G.*, [1916] 1 Ch. 228.

— — — — — **Assessment under Case IV.]**
—*See* No. 422, *post*.

305. — Method of assessment—At option of Crown—Whether under Case I. or Case IV.]—Where a receipt comes within more than one case in Schedule D., the Crown has an option under which Case it will assess the tax subject to the restriction that it must not tax it twice over.

The question is whether applt. co. in the first appeal can be charged under Case I. in Sched. D. in respect of the income of certain American & Canadian investments, or whether they can only be charged under Case IV. in respect of such moneys as are actually received in Great Britain. The general principle has been laid down in the Ct. of Session by Lord Dunedin in *Revell v. Edinburgh Life Insurance Co.* (1906), 5 Tax Cas. 221, . . . I feel no doubt that the Crown has an option to tax under Case I. or under Case IV., in any state of circumstances falling within that case (*COZENS-HARDY, M.R.*). — *LIVERPOOL &*

otherwise, it was not constructively received in this country so as to be chargeable with duty.—*STANDARD LIFE ASSURANCE CO. v. ALLAN* (1901), 3 F. (Ct. of Sess.) 805; 38 Sc. L. R. 628; 9 S. L. T. 69.—*SCOT.*

303 iii. — — — — —.]—Where the interest derived from the American investments of a Scottish insurance society was not remitted home but was reinvested in America in bearer bonds & mtges. on real property, & the bonds & mtges. with coupons attached were sent to this country:—*Held*: the interest had not been "received in Great Britain" so as to be chargeable with duty.—*SCOTTISH WIDOWS' FUND v. INLAND REVENUE*, [1909] S. C. 1372; 46 Sc. L. R. 993; 2 S. L. T. 255.—*SCOT.*

k. — Land occupied & used for business.]—A life insurance co. cannot make a deduction from the income on which income tax is payable by it in respect of land occupied & used by it

LONDON & GLOBE INSURANCE CO. v. BENNETT, BRICE v. NORTHERN ASSURANCE CO., BRICE v. OCEAN ACCIDENT & GUARANTEE CORPN., [1912] 2 K. B. 41; 81 L. J. K. B. 639; 106 L. T. 323; 28 T. L. R. 279; 6 Tax Cas. 327, C. A.; *affd. sub nom.* LIVERPOOL & LONDON & GLOBE INSURANCE CO. v. BENNETT, [1913] A. C. 610, H. L.

Annotations:—*Reid*, Egyptian Hotels v. Mitchell (1915), 6 Tax Cas. 542; I. R. Comrs. v. Westleigh Estates Co., Same v. South Behar Ry., Same v. Eccentric Club, [1924] 1 K. B. 390. *Mentd.* Gresham Life Assce. Soc. v. A.-G., [1916] 1 Ch. 228.

306. ——— Whether under Case I. or Cases IV. & V.]—A life assurance society, having been assessed for income tax on an income basis for the financial year 1914–15, brought an action against the A.-G. & the Board of Inland Revenue, alleging that by an agreement of 1912 the surveyor of taxes, acting on behalf of the Board, had agreed to assess them for the five years, 1911–12 to 1915–16, on a profit basis & at an agreed figure of profit based on the previous quinquennial valuation, & asking for a declaration that the agreement was binding, & an injunction to restrain the Board from enforcing the recent assessment:—*Held*: if the agreement had borne the construction alleged by the society, which the ct. did not accept, it would have been invalid, as the income tax was an annual tax imposed & assessed year by year, & neither the surveyor nor the Board could bind the Crown as to the basis or amount of assessment in future years. *Qu.*: (1) whether, having regard to the society's right of appeal to the General Comrs. under Taxes Management Act, 1880 (c. 19), s. 57, it would have been right to make a declaratory order against the A.-G.; (2) whether, having regard to their functions under Inland Revenue Regulation Act, 1890 (c. 21), s. 1, the Board were competent parties to an action of this nature.

Under Income Tax Act, 1842 (c. 35), the taxing authorities in assessing a life assurance society have an option to tax it under sect. 100, Sched. D., Case I., or Cases IV. & V., of that Act or both, providing that the co. is not taxed twice over in respect of the same income or the same moneys.—GRESHAM LIFE ASSURANCE SOCIETY v. A.-G., [1916] 1 Ch. 228; 85 L. J. Ch. 201; 114 L. T. 399; 32 T. L. R. 264; 7 Tax Cas. 36.

307. ——— Foreign company—Relief in respect of expenses of management.]—Applt. co. was a foreign co. carrying on a life insurance business in the United Kingdom, & was assessed to income tax for the year ended Apr. 5, 1919, in accordance with Finance Act, 1915 (c. 62), s. 15 (1), in respect of the proportion of its income from the investments of its life assurance fund. It made a claim for relief in respect of a proportion of its expenses of management for the same year under Finance Act, 1915 (c. 62), s. 15 (3). This claim was opposed by the Crown, who contended that the claim should be restricted in accordance with proviso (a) to sect. 14 (1) of Finance Act, 1915 (c. 62), which provides that relief shall not be

given under this sect. so as to make the income tax paid by the co. less than the tax which would have been paid if the profits of the co. had been charged in accordance with Income Tax Act, 1842 (c. 35), Sched. D., Rules applicable to Case I. It was contended on behalf of applt. co. that Finance Act, 1915 (c. 62), s. 15, prescribed a new & definite method of taxation for foreign life assurance cos., & that when that method was followed the proviso to sect. 14 (1) had no application:—*Held*: the proviso applied & applt. co. was not entitled to such relief in respect of expenses of management as would make the income tax paid by it less than would have been payable if the profits had been charged in accordance with Schedule D., Rules applicable to Case I.—EQUITABLE LIFE ASSURANCE SOCIETY OF UNITED STATES v. HILLS (1924), 131 L. T. 480; 8 Tax Cas. 657.

308. Company engaged in several branches of insurance—One body of shareholders—Assessment as one business.]—LAST v. LONDON ASSURANCE CORPN., No. 296, *ante*.

See, now, Schedule D., Rules applicable to Cases I. & II., r. 15.

309. Appropriations to reserve fund out of receipts—Reserve fund required by foreign law—No actual remittance to United Kingdom.]—NORWICH UNION FIRE INSURANCE CO. v. MAGEE, No. 303, *ante*.

See, also, No. 296, *ante*.

SECT. 3.—CASE II.—PROFESSIONS OR VOCATIONS.

See, now, Schedule D., Case II.; 1920 Act, s. 31; 1921 Act, s. 31; 1925 Act, s. 16.

310. Vocation—Systematic betting.]—Persons receiving profits from betting systematically carried on by them throughout the year are chargeable with income tax on such profits in respect of a "vocation" under Income Tax Act, 1842 (c. 35), sched. D.

The case states that applts. are partners & attend races & carry on the business of betting. I think the comrs. were right in holding that this is a "vocation." I think it even comes within the meaning of "employment." But "vocation" is a still larger word & is equivalent to "calling." These men systematically bet & make money thereby. Does it lie in their mouths to say that they are not liable to income tax, because they cannot bring an action on the bets they win? That would be putting a construction on these Acts which we ought not to put. I go so far as to say this, that, in my opinion, if a man carried on a systematic business of receiving stolen goods & made by it £2,000 a year, the Income Tax Comrs. would be right in assessing him thereon. I am clear that the facts of the present case come within the meaning of "vocation" (DENMAN, J.).

for business purposes, as an ordinary taxpayer may.—TAXES COMR. v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY (1901), 20 N. Z. L. R. 255.—N.Z.

1. ——— How profits ascertained.]—In a question as to the assessment of income tax on the profits & gains of a co. carrying on the business both of fire & life insurance:—*Held*: the profits or gains upon the life business could be ascertained by actuarial calculation only, & this actuarial calculation might be obtained by taking the result of the quinquennial investigation prescribed by statute or by an

investigation covering the three years prescribed by Schedule D. of the Income Tax Acts.—SCOTTISH UNION & NATIONAL INSURANCE CO. v. INLAND REVENUE (1889), 16 R. (Ct. of Sess.) 461, 475; 26 Sc. L. R. 330.—SCOT.

308 i. Company engaged in several branches of insurance—One body of shareholders—Assessment as one business.]—A co. carried on the business of fire insurance & life insurance:—*Held*: the net profits of the two branches were assessable as one undivided income.—SCOTTISH UNION & NATIONAL INSURANCE CO. v. SMILES

(SURVEYOR OF TAXES) (1889), 2 Tax Cas. 551.—SCOT.

PART V. SECT. 3.

m. Annual profit or gain—Negotiation fees—Claim for deduction for loss of employment.]—An agent assessed to income tax Schedule D. in respect of fees payable for successful negotiations of sales of estates in Ireland, claimed that a portion only of the fees, viz. a sum equal to $\frac{1}{4}$ per cent. of the purchase money, was payment for work done as negotiator, & that any amount received in excess of this sum was

Sect. 3.—Case II.—Professions or vocations. Sect. 4.—Case III.: Sub-sect. 1.]

—**PARTRIDGE v. MALLANDAINE** (1886), 18 Q. B. D. 276; 56 L. J. Q. B. 251; 56 L. T. 203; 35 W. R. 276; 3 T. L. R. 192; 2 Tax Cas. 179, D. C.

Annotations:—*Consd.* I. R. Comrs. v. Von Glehn, [1920] 2 K. B. 553. *Reid.* Herbert v. McQuade (1902), 4 Tax Cas. 489. *Mentd.* Jeffrey v. Bamford, [1921] 2 K. B. 351; Henshall v. Porter, [1923] 2 K. B. 193.

311. — Sole means of livelihood.]—**GRAHAM v. GREEN**, No. 116, *ante*.

312. — Whether one or more—Question of fact.]—Resp. was employed during the day by a bank as a French correspondent at a salary in respect of which he was assessed to income tax under Schedule E. but, by concession, on a three years' average. During the year of assessment he commenced evening work, in addition, in a similar capacity for a private firm, & was remunerated by commission in respect of which he was assessed under Schedule D. on the amount of his actual earnings for the year as from a new employment. On appeal to the General Comrs. against the latter assessment he contended that his earnings from the bank & the firm were derived from the single vocation of French correspondent & the three years' average basis should be applied in assessing his total remuneration for the year in question. In view of *Great Western Ry. Co. v. Bate*, No. 486, *post*, the inspector of taxes did not find any argument on the circumstance that one of the assessments had in fact been made under Schedule E. & the General Comrs. upheld resp.'s claim to average his earnings from the two sources:—*Held*: (1) while profits assessable under Schedule D. could not be commingled with profits assessable under Schedule E. for the purpose of average, & employments under Schedule D., if separate, must be separately assessed, the question whether in any case there are two employments or vocations or merely two activities of one employment or vocation is one of fact; (2) the determination of the Comrs. in the present case was one of fact, & there was no evidence upon which it could be questioned.—**ELLIOTT v. GUASTAVINO** (1924), 8 Tax Cas. 632.

Employment—Transfer to Schedule E.]—*See* 1922 Act, s. 18 (1).

313. Annual profit or gain—Grant by Curates Aid Augmentation Fund—Paid in several successive years—Grantee to obtain donations to fund.]—The council of the Curates Augmentation Fund made a grant of £50 to a curate in recognition of faithful service for more than fifteen years. The grant was renewable at the discretion of the council, & such renewal was upon the condition that the curate obtained donations to the fund to half the amount of the grant:—*Held*: the curate was not assessable to the income tax in respect of the sum granted, either under Income Tax Act,

compensation for loss of employment as agent to the estates resulting from the sale in question & should be excluded from assessment:—*Held*: the whole of the fees was paid as commission incident to services performed in relation to the carrying out of a contract for sale, & was part of the annual gains & profits of the agent for the purposes of assessment to income tax.—**HUMPHREY v. PEARE** (1913), 6 Tax Cas. 201.—*IR.*

n. — Grant to minister from church fund—On resignation.]—A minister of the Church of Scotland, on retiring through ill-health, was granted an annuity from a fund of the church on condition that he completely resigned the parish. The income derived from the investments of the fund was

exempt from income tax as being applied to charitable purposes:—*Held*: the annuity was chargeable with income tax & was assessable under Schedule D., not Schedule E.—**DUNCAN'S EXECUTORS v. FARMER** (SUBVEYOR OF TAXES) (1909), 5 Tax Cas. 417.—*SCOT.*

PART V. SECT. 4, SUB-SECT. 1.

o. Interest of money—Loan to partnership.]—Applt. had lent a sum of money at interest to a partnership of which he was a member. During the year upon this income of which the assessment of applt.'s income tax for the year 1916–1917 was based, applt. was credited by his bankers, who were also the bankers of the firm,

1842 (c. 35) sched. E. or 16 & 17 Vict. c. 34, sched. D.

This is not an annual profit or gain arising or accruing to him from a profession, trade, employment or vocation. It is not an annual profit at all (**LORD COLERIDGE, C.J.**).—**TURNER v. CUXON** (1888), 22 Q. B. D. 150; 58 L. J. Q. B. 131; 60 L. T. 332; 53 J. P. 148; 37 W. R. 254; 5 T. L. R. 133; 2 Tax Cas. 422, D. C.

Annotations:—*Distd.* Herbert v. McQuade, [1902] 2 K. B. 631. *Folld.* Poynting v. Faulkner (1905), 92 L. T. 383. *Consd.* Cooper v. Blakiston, [1907] 2 K. B. 688. *Distd.* Duncan's Exors. v. Farmer (1909), 5 Tax Cas. 417. *Reid.* Cowan v. Seymour (1919), 7 Tax Cas. 372; Smith v. Smith (1923), 130 L. T. 8.

314. Assessment—Tax paid by employer—Included as part of income.]—**HARTLAND v. DIGGINES**, No. 506, *post*.

315. — Two vocations—Assessments under Schedule D. & Schedule E.—Application of three years' average.]—**ELLIOTT v. GUASTAVINO**, No. 312, *ante*.

SECT. 4.—CASE III.—PROFITS OF UNCERTAIN VALUE, INTEREST ON MONEY YEARLY OR OTHERWISE; ANNUITIES, DISCOUNTS, ETC.

SUB-SECT. 1.—CHARGE BY ASSESSMENT ON PERSONS RECEIVING THE INCOME.

See, now, Schedule D., Case III., Rules 1 & 2; 1922 Act, s. 17.

316. Liability generally—Whether receipt of profits during year of assessment condition precedent.]—The Income Tax Act, 1842 (c. 35), sched. D., Case III., comprises "the duty to be charged in respect of profits of an uncertain value not charged in Sched. A.," & by the first rule of that Case the duty to be charged in respect thereof shall be computed at a sum not less than the full amount of the profits or gains arising therefrom within the preceding year. By the second rule "the profits . . . on all discounts . . . shall be charged according to the preceding rule in this Case":—*Held*: (1) transactions in Treasury bills were transactions in discounts within the meaning of Sched. D., Case III., rule 2, & were liable to income tax in respect of the profits arising therefrom; (2) the whole of the difference between the amount paid for a Treasury bill & the amount received on sale or maturity was a profit on a discount & must be taken into computation; (3) where no profits had been derived from transactions in Treasury bills in the year of assessment the taxpayer was not assessable to income tax by reason of the fact that he had made a profit in Treasury bill transactions in the preceding year, inasmuch as the principle of assessment laid down in the first rule of Case III. assumed as a requisite of chargeability the continued existence of the

with the amount of interest payable for that year, & during the same year the firm made a loss, applt.'s share of which included his share of the interest so credited:—*Held*: the whole of the interest so credited to applt. was properly included in the assessment of applt. for the year 1916–1917.—**LEONARD v. FEDERAL COMR. OF TAXATION** (1919), 26 O. L. R. 175.—*AUS.*

p. —.]—By Local Government (Ireland) Act, 1898 (c. 40), s. 51 (1), the money required to meet the expenses of a rural district council or of a board of guardians is to be supplied by the county council on demand by the district council or board; & the county council is to pay the money so demanded out of the county fund. If, after money has

same source of profits in the year of charge.—**BROWN v. NATIONAL PROVIDENT INSTITUTION, OGSTON v. PROVIDENT MUTUAL LIFE ASSOCN.**, [1921] 2 A. C. 222; 90 L. J. K. B. 1009; 125 L. T. 417; 37 T. L. R. 804; *sub nom.* NATIONAL PROVIDENT INSTITUTION v. BROWN, **BROWN v. NATIONAL PROVIDENT INSTITUTION, PROVIDENT MUTUAL LIFE ASSURANCE ASSOCN. v. OGSTON, OGSTON v. PROVIDENT MUTUAL LIFE ASSURANCE ASSOCN.**, 8 Tax Cas. 57, H. L.

Annotations:—*As to* (1) **Reid. Davis v. I. R. Comrs.** (1922), 92 L. J. K. B. 252. *As to* (3) **Appld. Grainger v. Maxwell** (1925), 70 Sol. Jo. 247; **Whelan v. Henning** [1925] 1 K. B. 387. **Distd. Wigmore v. Summerson, I. R. Comrs. v. Oakley** (1925), 94 L. J. K. B. 836.

317. — Separate sources of income—Exchequer Bonds & War Loan.—**Resps.' testatrix** in the year ending Apr. 5, 1920, held & was in receipt of income from Exchequer Bonds, War Loan, & National War Bonds. The Exchequer Bonds were redeemed in Feb. 1920, but she continued to hold, & was in receipt of income from, the War Loan & the National War Bonds during the year ending Apr. 5, 1921:—**Held**: testatrix was not liable to be assessed to income tax under Schedule D., Case III., for the year ending Apr. 5, 1921, in respect of interest on the Exchequer Bonds, since the income had ceased before the beginning of the income tax year 1920–21, & since, although during 1920–21 she had received income from War Loan & from National War Bonds, yet for the purpose of Schedule D., Case III., r. 1 (f), the Exchequer Bonds & the other securities in question were to be treated as separate sources of income.—**GRAINGER v. MAXWELL'S EXECUTORS** (1925), 95 L. J. K. B. 245; 134 L. T. 337; 42 T. L. R. 177; 70 Sol. Jo. 247, C. A.

See, now, 1922 Act, s. 17.

318. Interest of money—Whether limited to annual interest—Repayment of loan by fixed weekly instalments—Varying proportion of principal & interest.—**LEEDS BENEFIT BUILDING SOCIETY v. MALLANDAINE**, No. 14, *ante*.

See, also, No. 372, *post*.

See, now, 1918 Act, Schedule D., Case III., Rules applicable to Case III., r. 1.

319. — Deposit at bank—Compensation fund under Licensing Act, 1904 (c. 23).—Quarter sessions, as the compensation authority under above Act, are assessable to income tax in respect of the interest payable upon so much of the compensation fund as is placed upon deposit in a bank.

Customs & Inland Revenue Act, 1888 (c. 8), s. 24 (3), which provides that upon payment of any interest of money charged with income tax under Income Tax Act, 1842 (c. 35), sched. D., & not payable out of profits or gains brought into

charge to such tax, the person paying the interest shall deduct thereout the rate of income tax in force, & shall render an account to the Comrs. of Inland Revenue of the amount so deducted, & such amount shall be a debt from such person to the Crown, does not relieve the person to whom the interest is paid from liability to pay the income tax where the tax has not been deducted by the person who pays the interest, but merely gives an additional remedy to the Crown against the latter person.—**GLAMORGAN QUARTER SESSIONS v. WILSON**, [1910] 1 K. B. 725; 79 L. J. K. B. 454; 102 L. T. 500; 74 J. P. 299; 26 T. L. R. 351; 5 Tax Cas. 537.

320. — Fund of college or hall in university—Claim for adjustment in respect of loss.—**COLLEGE OF PRECEPTORS v. JENKINS**, No. 55, *ante*.

See, now, 1918 Act, s. 34.

321. Sale of War Stock “cum interest” — Whether part of price chargeable as income.—A co. sold a holding of 5 per cent. War Stock (1929–1947) on Apr. 10, 1923. The sale was with interest rights, such stock not being dealt in “ex interest” until May 1, 1923. An assessment to income tax was made upon the vending co. for the year 1923–24 in respect of the amount of interest deemed to have accrued on the stock in the period between the last payment of interest & the sale of the stock, it being contended that the price received by the co. on sale of the stock included this interest. The General Comrs. on appeal, decided that the vending co. was not chargeable in respect of such accrued interest:—**Held**: the co. was not assessable in respect of the interest accrued at the date of sale of the stock.—**WIGMORE v. SUMMERSON (THOMAS) & SONS, LTD., INLAND REVENUE COMRS. v. OAKLEY**, [1926] 1 K. B. 131; 94 L. J. K. B. 836; 134 L. T. 408; 41 T. L. R. 568; 69 Sol. Jo. 679; 9 Tax Cas. 577.

322. Annual payments—Purchase price payable by instalments—Instalments variable.—**TAYLOR v. EVANS**, No. 335, *post*.

323. — Percentage of profits on sale of patent—Whether capital or income.—**BRITISH DYESTUFFS CORPN. (BLACKLEY), LTD. v. INLAND REVENUE COMRS.**, No. 96, *ante*.

324. — To inventor by way of royalty.—By an agreement dated June 14, 1918, between an inventor & a co. formed to develop his inventions, the co. guaranteed to him from May 1, 1918, a sum of not less than £12,000 *per annum*, payable in monthly instalments of £1,000, in respect of the royalties payable to him under earlier agreements. The guaranteed monthly payments were duly made to him from May, 1918, to Oct. 1919, when

been raised by a county council to meet such demands, & while it remains in the hands of their treasurer, interest accrues to them thereon, their liability to income tax is to be determined solely by the amount of such interest, & no account can be taken of the interest paid by the rural district councils or by the boards of guardians upon money borrowed by them for purposes within the administrative county.—**PHILLIPS (INSPECTOR OF TAXES) v. COUNTY OF LIMERICK COUNTY COUNCIL**, [1926] 2 I. R. 139.—**IR.**

q. — Jus relictae.—**Appl.**, a trustee on the estate of A., raised an action against the representatives of C. to recover from the latter an asset of the trust estate which, owing to the negligence of C., who was at the time a trustee of A., had not been ingathered. Under the decree of the ct. the representatives of C. were

ordered to repay the sum involved, together with interest thereon at the rate of 3½ per cent. *per annum*, from the date at which the sum should have belonged to the estate of A. This interest, together with certain interest on taxed costs, was paid to applt., as trustee, without deduction of income tax:—**Held**: applt. was rightly assessed under Schedule D. in respect of the interest.—**SCHULZE v. BENSTED (SURVEYOR OF TAXES)** (1915), 7 Tax Cas. 30.—**SCOT.**

r. — — ——**Resp.** had raised an action in Jan. 1914, against the trustees of her deceased husband's estate for payment of her *jus relictae*, & a decree was pronounced by the ct. in her favour in July 1917, for the balance of the capital thereof remaining due to her & for interest on the various balances of the *jus relictae* outstanding from time to time since the date of her husband's death, less such

amount of income tax applicable to the interest as the trustees were legally entitled to deduct & retain. The interest was paid by the trustees in Aug. 1917, without deduction of income tax & an assessment to income tax in respect thereof was made upon resp. for the year ended Apr. 5, 1919:—**Held**: the interest on the *jus relictae* was “interest of money,” & resp. was properly chargeable to income tax in respect thereof.—**SWEET v. MACDIARMID (OR HENDERSON)** (1920), 7 Tax Cas. 640.—**SCOT.**

t. — Sum added in name of interest — In arbitration award.—A claim for “additional costs, loss, & damage incurred” by a firm of contractors against a railway co. was referred to arbn. on March 1, 1916. On Jan. 14, 1921, the arbiter awarded the firm a certain sum, mainly as damages, together with interest thereon at 5 per

Sect. 4.—Case III.—Profits of uncertain value, interest on money yearly or otherwise; annuities, discounts, etc.: Sub-sects. 1 & 2, A. & B.]

the agreement was terminated in accordance with its provisions, & he was assessed to income tax in respect of the £18,000 so received, no tax having been deducted therefrom on payment. He contended, on appeal to the Special Comrs., that the payments amounting to £18,000 were not income but capital receipts, &, alternatively, if they were income, that they were not royalties for the user of a patent, but annual payments made by virtue of a contract out of the profits of the paying co. within Rules applicable to all Schedules, r. 19 (1), & that he could not be assessed in respect of such payments. The Special Comrs. decided that the payments were income in his hands, but that they were annual payments within Rule 19 (1), & discharged the assessments:—*Held*: the payments under the guarantee were not annual payments within the Rules applicable to all Schedules, r. 19 (1), & he was assessable in respect of such payments.—*WILD v. IONIDES* (1925), 9 Tax Cas. 392.

Compare Part XII., Sect. 3, sub-sect. 2, B., *post*.

325. Discounts—Dealings in Treasury bills—Method of assessment.]—*BROWN v. NATIONAL PROVIDENT INSTITUTION, OGSTON v. PROVIDENT MUTUAL LIFE ASSOCN.*, No. 316, *ante*.

See, now, 1922 Act, s. 17.

326. Deductions—Guaranteed interest on capital of company—Part applied to sinking fund.]—A co. undertook to construct a railway in Brazil under a govt. guarantee of 7 per cent. It raised capital by debentures at 5½ per cent. & devoted the 7 per cent. to payment of debenture interest & to the formation of a sinking fund to pay off the debentures:—*Held*: the whole of the sum paid under the guarantee during construction was liable as interest.—*BLAKE v. IMPERIAL BRAZILIAN & NOVA CRUZ RY. CO.* (1884), 1 T. L. R. 68; 2 Tax Cas. 58, C. A.

Annotations:—*Folld. Nizam State Ry. v. Wyatt* (1890), 24 Q. B. D. 548. *Reid. Pretoria-Pietersburg Ry. v. Elgood* (1908), 98 L. T. 741; *Surbiton U. D. C. v. Callender's Cable & Construction Co.* (1910), 8 L. G. R. 244.

327. ———.]—*NIZAM STATE RY. CO. v. WYATT*, No. 257, *ante*.

328. ——— Interest on estate duty.]—In the tax year 1920–1921 testamentary trustees received a sum of £72,231 as untaxed interest. In returning the trust income for assessment to income tax for the succeeding tax year the trustees deducted from this sum a sum of £21,847, which they had paid for interest on unpaid estate duty on their testator's estate:—*Held*: for the purpose of assessment to income tax under 1918 Act, sched. D., Case III., the trustees were not entitled to deduct the sum paid for interest on estate duty, inasmuch as it did not fall within any of the deductions allowed by the Act, &, further, they were not entitled to exemption from income tax on the sum so paid for interest to the Crown, either on the ground that income tax was included therein, or on the ground that that sum was received by the trustees, not on their behalf, but on behalf of the Crown.—

cent. *per annum*, from Nov. 4, 1918 (the date of lodgment of an amended claim), until payment. Long before the award was made, the firm had assigned any sums they might recover from the railway co., with any interest accruing thereon, to a bank as security for advances, but, notwithstanding notice of this assignment, the railway co. paid the amount awarded, including £678 "interest" (without

deduction of income tax), to the solrs. of the judicial factor of the estate of the sole partner in the firm. The judicial factor gave the co. a receipt for the payment, & his solrs. paid over the amount, less expenses, to the bank. The judicial factor was assessed to income tax in respect of the sum of £678 calculated as interest under the award, but the special comrs. decided that, while that sum was taxable as

interest, it was not income of the judicial factor:—*Held*: as the award was substantially one of damages, the sum added in the name of interest was merely part of the damages, & was not "interest of money" chargeable to income tax & the question whether it was income of the judicial factor did not therefore arise.—*INLAND REVENUE COMRS. v. BALLANTINE* (1924), 8 Tax Cas. 595.—*SCOT*.

INVERCLYDE'S (LORD) TRUSTEES v. MILLAR, [1924] A. C. 580; 9 Tax Cas. 14; *sub nom. INVERCLYDE'S (LORD) TRUSTEES v. INLAND REVENUE COMRS.*, 93 L. J. P. C. 266; 131 L. T. 739, H. L.

SUB-SECT. 2.—CHARGE BY DEDUCTION BY PERSONS PAYING THE INCOME.

A. Interest on Unpaid Purchase-Money.

See Schedule D., Case III., Rules applicable to Case III., r. 1 (a); Rules applicable to all Schedules, rr. 19, 21, 23.

329. Purchase-money & interest paid into court.]—Where purchase-money & interest are to be paid into ct., no deduction is to be made on account of income tax.—*DAWSON v. DAWSON* (1847), 11 Jur. 984.

Annotation:—*Reid. Duval v. Mount* (1847), 10 L. T. O. S. 243.

330. ———.]—*Qu.*: where purchase-money & interest are to be paid into ct., no deduction need be made on account of income tax.—*DUVAL v. MOUNT* (1847), 10 L. T. O. S. 243.

Annotation:—*Reid. Bebb v. Bunny* (1854), 1 K. & J. 216.

331. ———.]—According to the practice, a purchaser ought to pay his purchase-money & interest thereon into ct., without any deduction from the interest in respect of income tax.—*HOLROYD v. WYATT* (1847), 1 De G. & Sm. 125; 16 L. J. Ch. 174; 9 L. T. O. S. 4; 11 Jur. 261; 63 E. R. 1000.

332. ———.]—A purchaser paying his purchase-money, with interest, into ct., is not to deduct the income tax payable on the interest.—*HUMBLE v. HUMBLE* (1849), 12 Beav. 43; 50 E. R. 976.

333. ———.]—A purchaser paying his purchase-money into ct., is not, under the late Income Tax Act (Income Tax Act, 1853 (c. 34)), entitled to deduct the amount of income tax; there being no difference in that respect between the late Act & the former Act (Income Tax Act, 1843 (c. 35)).—*FLIGHT v. CAMAC* (1854), 2 Eq. Rep. 1134; 2 W. R. 437.

334. Purchaser's right to deduct.]—Where a purchase was to have been completed, according to the contract, on Mar. 1, 1853, with interest from Dec. 25, 1852, but the contract was not actually completed, nor the purchase-money paid, till May 15, 1854, the purchaser was allowed to deduct income tax from the interest on the purchase-money from Dec. 25, 1852, to the time when the payment was actually made.—*BEBB v. BUNNY* (1854), 1 K. & J. 216; 1 Jur. N. S. 203; 69 E. R. 436.

Annotations:—*Appld. Crane v. Kilpin* (1868), 37 L. J. Ch. 913. *Distd. Goslings & Sharpe v. Blake* (1889), 23 Q. B. D. 324. *Appld. Re Craven's Mortgage, Davies v. Craven*, [1907] 2 Ch. 448. *Consd. Re Cooper, Cooper v. Cooper* (1918), 88 L. J. Ch. 105; *Re Janes' Settlement, Wasmuth v. Janes*, [1918] 2 Ch. 54. *Reid. Gateshead Corpn. v. Lumsden*, [1914] 2 K. B. 883.

B. Purchase-Money Payable by Instalments.

See Schedule D., Case III., Rules applicable to Case III., r. 1 (a); Rules applicable to all Schedules, rr. 19, 21, 23.

335. Instalments variable.]—By indenture pltf. in consideration of £1,380 to be paid by instalments, granted & sold to deft. a mine of coal for a term of fifty years; & deft. covenanted with pltf. to pay him £150 on the execution of the indenture, & £150 per year after that time, whether a quantity of coal equal to that amount, at & after the rate of £100 per Lancashire acre, should be got out of the mine in the same year or not; & when in any year so many coals should be got out of the mine as would, at the rate of £100 for every Lancashire acre of coals, amount to more than £150 per year, then that deft. would pay for every Lancashire acre of coal the sum of £100 & so in proportion for every greater or less quantity than an acre until the sum of £1,380 should be paid: it being the intent of the parties that pltf. should not, until the £1,380 was paid, receive less than £150 per year, the same yearly rents to be paid half-yearly on June 24 & Dec. 24 in each year. Deft., who had never worked the mine, claimed to deduct from a half-yearly instalment a sum paid by him for income tax:—*Held*: the instalment of £150 per year was not "rent" within Income Tax Act, 1842 (c. 35), s. 60, & assuming it to be "an annual payment" within s. 102, pltf., & not deft. was liable to be assessed to the income tax.—*TAYLOR v. EVANS* (1856), 1 H. & N. 101; 25 L. J. Ex. 269; 27 L. T. O. S. 110; 20 J. P. 711; 156 E. R. 1134.

Annotation:—*Reid*. *Foley v. Fletcher* (1858), 3 H. & N. 769.

336. Instalments not including interest.]—It was agreed upon a contract for the sale of an estate for £99,000 that the purchaser should pay £6,770 upon the execution of the deed of assignment; & the residue of £92,230 in equal instalments of £768 11s. 8d. on every 24th day of June & 24th day of December, in every year after 1854, until the 24th day of December, 1884:—*Held*: the payments made under a covenant to this effect were not liable to income tax, & therefore the person making the payments had no right to make any deduction under the income tax Acts.—*FOLEY (LADY) v. FLETCHER* (1858), 3 H. & N. 769; 28 L. J. Ex. 100; 33 L. T. O. S. 11; 22 J. P. 819; 5 Jur. N. S. 342; 7 W. R. 141; 157 E. R. 678.

Annotations:—*Appld.* *Scoble v. Secretary of State in Council for India*, [1903] 1 K. B. 494. *Distd.* *Chadwick v. Pearl Life Insce.*, [1905] 2 K. B. 507; *Delage v. Nugget Polish Co.* (1905), 92 L. T. 682. *Consd.* *East Indian Ry. v. Secretary of State in Council of India* (1905), 92 L. T. 495; *Jones v. I. R. Comrs.*, [1920] 1 K. B. 711. *Reid*. *City of London Contract Corp. v. Styles* (1887), 2 Tax Cas. 239; *Clerical, Medical & General Life Assce. Soc. v. Carter* (1888), 21 Q. B. D. 339; *Secretary of State in Council of India v. Scobel*, [1903] A. C. 299; *Surbiton U. D. C. v. Callender's Cable & Construction Co.* (1910), 8 L. G. R. 244; *Massy v. I. R. Comrs.* (1915), [1919] 2 K. B. 354, n.; *Howe v. I. R. Comrs.*, [1919] 2 K. B. 336. *Mentd.* *Horton v. Sayer* (1859), 29 L. J. Ex. 28; *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), 2 App. Cas. 394; *Psalm & Hymns (Baptist) Trustees v. Whitwell* (1890), 7 T. L. R. 164; *R. v. Income Tax Special Comrs., Ex p. Shaftesbury Homes & Arethusa Training Ship*, [1922] 2 K. B. 729.

337. Instalments including interest—Deduction from part representing interest.]—The purchase-money for a railway was paid off by an annuity for a term of years, each instalment of the annuity being in fact a payment on account of the principal of the purchase-money due & the balance in respect of interest on the amount of the principal money for the time being unpaid:—*Held*: income tax was only payable upon that part of the instalments which represented interest, & not upon that part which consisted of an instrument of the purchase-money.—*SECRETARY OF STATE IN COUNCIL OF INDIA v. SCOBLE*, [1903] A. C. 299; 72 L. J. K. B. 617; 89 L. T. 1; 51 W. R. 675; 19

T. L. R. 550; *sub nom.* *SCOBLE v. SECRETARY OF STATE FOR INDIA*, 4 Tax Cas. 618, H. L.

Annotations:—*Distd.* *Chadwick v. Pearl Life Insce.*, [1905] 2 K. B. 507; *Delage v. Nugget Polish Co.* (1905), 92 L. T. 682. *Appld.* *East Indian Ry. v. Secretary of State in Council of India*, [1905] 2 K. B. 413. *Consd.* *Collins v. Firth Brearley Stainless Steel Syndicate* (1925), 133 L. T. 616. *Reid*. *Smith v. Law Guarantee & Trust Soc.* (1904), 73 L. J. Ch. 233; *Stevens v. Hudsons Bay Co.* (1909), 101 L. T. 96; *Surbiton U. D. C. v. Callender's Cable & Construction Co.* (1910), 8 L. G. R. 244; *Massy v. I. R. Comrs.* (1915), [1919] 2 K. B. 354, n.; *Jones v. I. R. Comrs.*, [1920] 1 K. B. 711; *O'Kane v. I. R. Comrs.* (1922), 126 L. T. 707; *Gloucester Railway, Carriage & Wagon Co. v. I. R. Comrs.* (1924), 131 L. T. 595.

338. ——— How proportions ascertained.]—The East India Co. were, under contracts made between them & pltf. co., entitled to purchase three railways belonging to pltf. co. at certain dates respectively for gross sums to be ascertained as therein provided, the East India Co. having an option, instead of paying the gross sum, of paying for the railway by means of what was described as an "annuity" to be paid to pltf. co. for a term of years. The rights of the East India Co. under these contracts subsequently became vested in deft. When deft.'s right of purchase accrued as regards two of the railways, but before it accrued as regards the third railway, an arrangement was made between pltf. co. & deft. for the purchase by deft. of three railways simultaneously, in consideration of an annuity for a term of years calculated at the rate of £5 12s. 6d. *per annum* for every £100 of pltf. co.'s stock commuted at £125. This amount of £6 12s. 6d. was stated in an Act of Parliament confirming the arrangement to have been arrived at on the basis of £5 7s. 6d., part thereof being interest at the rate of £4 6s. per cent. *per annum* on the said amount of £125, & of a sum of 5s., other part thereof, being the amount required to be set aside & invested half-yearly in every year at a like rate of interest in order to produce by means of a sinking fund the capital sum of £125 or thereabouts at the end of the term for which the annuity was payable. On payment of the annuity income tax had been deducted by deft. in respect of the whole of the annual payment. Pltfs. contended that the deduction should only have been of income tax in respect of so much of the payment as represented interest on unpaid capital in accordance with the decision in *Secretary of State in Council of India v. Scoble*, No. 337, *ante*:—*Held*: (1) the fact that the purchase of the railways had been carried out by agreement, before the date at which deft.'s right of purchase accrued as regards one of the railways, did not constitute a valid legal distinction between the present case & *Secretary of State in Council of India v. Scoble*, No. 337, *ante*, & pltf.'s contention was correct; (2) it was not correct to treat the before-mentioned statement in the Act of Parliament as indicating what proportions of the annual sum were respectively payable in respect of capital & interest on unpaid capital.—*EAST INDIAN RY. CO. v. SECRETARY OF STATE IN COUNCIL OF INDIA*, [1905] 2 K. B. 413; 74 L. J. K. B. 779; 93 L. T. 220; 54 W. R. 4; 21 T. L. R. 606, O. A.

Annotations:—*As to* (1) *Distd.* *Chadwick v. Pearl Life Insce.*, [1905] 2 K. B. 507; *East Indian Ry. v. Secretary of State in Council of India* (1924), 40 T. L. R. 241. *Reid*. *Delage v. Nugget Polish Co.* (1905), 92 L. T. 682.

Purchase-money payable in form of annuity.]—*See* No. 347, *post*.

— **Annuity consisting wholly of income.]—***See* No. 350, *post*.

339. "Annual payments"—Out of profits already chargeable—Annual payment to inventor by way of royalty.]—*WILD v. IONIDES*, No. 324, *See, also*, No. 341, *post*.

Sect. 4.—Case III.—Profits of uncertain value, interest on money yearly or otherwise; annuities, discounts, etc.: Sub-sect. 2, C. & D.]

C. Annuities.

See Schedule D, Case III., Rules applicable to Case III., r. 1 (a); Rules applicable to all Schedules, rr. 19, 21, 23.

340. Annual payment.]—Where deft. enjoyed an annuity charged upon real property, which was to be paid "free & clear of all taxes & assessments," & refused to allow the owner to deduct the income tax charged in respect of the property:—*Held*: notwithstanding the provision in the deed, deft. was liable upon an information for penalties, imposed by the Income Tax Acts for refusing to allow deductions of income tax, authorised by those Acts, from "rents or annual payments."—*A.-G. v. SHIELD* (1858), 3 H. & N. 834; 28 L. J. Ex. 49; 31 L. T. O. S. 220; 23 J. P. 216; 157 E. R. 705.

Annotations:—Consd. Festing v. Taylor (1862), 3 B. & S. 218. *Refd. Brooke v. Price*, [1916] 2 Ch. 345.

341. — Proportion of gross receipts—From working secret process.]—By an agreement between pltf. & defts., defts. had the exclusive right of selling & manufacturing articles by a secret process, & defts. were to pay to pltf. for forty years 8 per cent. on the gross receipts of such sale. Pltf. resided abroad & were foreigners, & before paying the amount payable to them under the agreement, defts. deducted income tax payable in respect of the amount due under the agreement:—*Held*: the income tax was rightly deducted.—*DELAGE v. NUGGET POLISH CO., LTD.* (1905), 92 L. T. 682; 21 T. L. R. 454.

Annotations:—Folld. Chadwick v. Pearl Life Insco., [1905] 2 K. B. 507. *Refd. Port of London Authority v. I. R. Comrs.*, [1920] 2 K. B. 612.

See, also, No. 324, *ante*.

342. — Fixed sum payable monthly—For life of payee.]—(1) The payment of a sum of £50 "in each & every calendar month" by testator's trustees to his wife during her life may be the payment of an annuity within Income Tax Act, 1853 (c. 34), & in any event is the payment of an annual sum within the meaning of that Act, although it is payable with reference to an aliquot part of the said year, & is accordingly an annual payment in respect of which income tax ought to have been deducted.

There can be a gift of an annuity although there is no reference to a year.

(2) "Interest" means "yearly interest" although it may be payable in a lump sum at an uncertain date.—*Re COOPER, COOPER v. COOPER* (1917), 88 L. J. Ch. 105; 119 L. T. 303; 62 Sol. Jo. 230.

Annotations:—As to (1) Apld. Re Janes' Settlement, Wasmuth v. Janes, [1918] 2 Ch. 54. *Apprvd. Smith v. Smith*, [1923] P. 191. *Refd. Bayley v. Bayley*, [1922] 2 K. B. 227.

343. — Fixed sum payable weekly—For period possibly exceeding a year.]—A sum payable weekly under a covenant in a separation deed so long as the husband & wife live apart is an "annual payment" within Income Tax Act, 1853 (c. 34), s. 40.—*Re JANES' SETTLEMENT, WASMUTH v. JANES*, [1918] 2 Ch. 54; 87 L. J. Ch. 454; 119 L. T. 114; 62 Sol. Jo. 520.

Annotations:—Apprvd. Smith v. Smith, [1923] P. 191. *Refd. Bayley v. Bayley*, [1922] 2 K. B. 227.

344. — Funds insufficient to produce annuity on account—Subsequent payment of—*Re WOOLDRIDGE, WOOLDRIDGE v. COE*, N. 78.

See, now, 1918 Act, Sched. D., Rule 1 (a).

345.

—]—*SMITH v. SMITH*, No.

361,

346. Annuity not payable out of any fund in England—Annuitant resident abroad.]—(1) The Bengal Civil Service Annuity Fund is a fund formed in India, under the sanction of the East India Co., by the subscriptions of their civil servants upon the Bengal establishment, augmented by contributions from the co. & a civil servant who has regularly subscribed to the fund, & retires after the regular period of service, becomes entitled to receive thereout an annuity of 10,000 rupees. The fund is invested in India, & managed there by a committee of nine, four of whom are officially connected with the govt. By an arrangement with the co., the annuitants have the option of receiving their annuity in India, from the managers of the fund or of being paid at the East India House in London, at the rate of 2s. per sicca rupee, the co. being in that case provided out of the fund with moneys for the purpose of making the payments. Pltf., a retired civil servant, entitled to a pension of £1,000 a year, whose permanent residence was in France, elected to receive his annuity in London:—*Held*: the annuity was not subject to income-tax, under Income Tax Act, 1843 (c. 35), not being payable out of any fund in England; & he might maintain an action for money had & received against the co., to recover sums deducted & retained by them in respect of such tax, & paid over to the comrs.

(2) The ct. allowed a special case to be set down, upon the signature of pltf. & defts.' counsel, the former intimating his intention to argue the case himself.—*UDNEY v. EAST INDIA CO.* (1853), 13 C. B. 733; 22 L. J. C. P. 211; 21 L. T. O. S. 141, 186; 138 E. R. 1388; *sub nom. UDNY v. EAST INDIA CO.*, 22 L. J. C. P. 260; 17 Jur. 1078.

347. Annuity in lieu of rent—Price of purchase of leasehold interest.]—Pltf. the owner of a leasehold interest expiring in 1912 in certain property which was sublet at a gross rental of £1,925, but subject to the payment of a ground rent of £300 to the superior landlord, contracted with defts. for the sale to them of his interest, the transaction being carried out by two deeds of even date. By the first deed pltf. conveyed & assigned the property to defts. for the residue of the term, subject to the payment of the £300 ground-rent to the superior landlord, which defts. covenanted to pay, the consideration for the assignment being expressed to be the payment by defts. of the sum of £1,000 to pltf. & execution by defts. of a deed of even date. By the latter deed defts. covenanted with pltf. to pay him until the last day of the term the sum of £1,625 *per annum* by quarterly payments; no sum was fixed as the total amount to be paid. Defts. in making the quarterly payments deducted income tax at the current rate under Income Tax Act, 1853 (c. 34), & Customs & Inland Revenue Act, 1888 (c. 8), s. 24. Pltf. sought to recover amount deducted:—*Held*: the intention was for pltf. to receive an Income to the end of the term of the same net amount as he previously received as rent, & the payments were payments of an annuity within Income Tax Act, 1853 (c. 34), s. 40, & not payment of a fixed amount by instalments. Deductions therefore were properly made.—*CHADWICK v. PEARL LIFE INSURANCE CO.*, [1905] 2 K. B. 507; 74 L. J. K. B. 671; 93 L. T. 25; 54 W. R. 78; 21 T. L. R. 456.

Annotations:—Consd. Surbiton U. D. C. v. Callender's Cable & Construction Co. (1916), 8 L. G. R. 244. *Refd. Jones v. I. R. Comrs.*, [1920] 1 K. B. 711.

348. Annuity payable out of income of trust fund—Trusts for accumulation of balance—Income of entire fund taxed at source.]—S. by will gave his real & personal estate to trustees upon trust to convert & invest, to pay certain annuities out of the income & accumulate the residue of the income until the capital became divisible, or for twenty-one years, & subject thereto to hold capital & income in trust for his grandchildren in equal shares. The trustees invested the funds in such manner that the income tax was always deducted before the income was paid to them. The successive trustees for over twenty years paid all the annuities in full without deducting income tax. Some of the trustees were also annuitants:—*Held*: the trustees were liable to make good to the trust estate the amounts of income tax so overpaid to the annuitants.—*Re SHARP, RICKETT v. RICKETT*, [1906] 1 Ch. 793; 75 L. J. Ch. 458; 95 L. T. 522; 22 T. L. R. 368; 50 Sol. Jo. 390.

349. ———.]—By a settlement shares in a trading co. to the nominal value of £100,000, bearing interest at 4 per cent., were settled upon trust to pay the dividends & annual income arising therefrom to C. for his life, & after his death, if he should leave two or more children surviving him, to pay the income to the extent of but not exceeding, £2,000 *per annum* to his widow during her life or widowhood, provided that she should provide for, educate & bring up the children during minority. The settlement also provided that any unapplied balance of the income should be accumulated & held upon trust to divide the same equally among the children C. died on Nov. 4, 1905, leaving a widow & two children him surviving. The trustees received the dividends on the shares less income tax, which was deducted by the co. before payment, & in paying the annual sum of £2,000 to the widow the trustees deducted income tax therefrom:—*Held*: the trustees had acted on a right principle, & the widow's annuity of £2,000 was properly subject to the deduction of income tax.

It makes no difference whether the annuity is paid as a part of a fund, or whether it is paid as a charge on the fund, it is an annuity which the trustees are liable to pay. They are paying it out of a fund from which deduction has been made, & under the express direction of Income Tax Act, 1842 (c. 35), s. 102, in such a case as that, they are entitled to deduct the proportionate part of the tax they have so paid from the person ultimately entitled to receive that annual payment

(WARRINGTON, L.J.).—*Re CAIN'S SETTLEMENT, CAIN v. CAIN*, [1919], 2 Ch. 364; 88 L. J. Ch. 513; 121 L. T. 496.

350. Purchase-money payable in form of annuity—Deferred annuities not comprising capital.]—In 1879 under a private Act the Secretary of State for India purchased the East Indian Railway for a sum payable by an annuity calculated to repay the whole of the capital of the railway co. by 1953 together with interest on the capital from time to time remaining unpaid. The contract provided that as to one-fifth of the capital the Secretary of State might agree with the co that shareholders, described as deferred annuitants, should receive 4 per cent. interest plus one-fifth of the net profits of the railway, but the Secretary of State had power to terminate this arrangement, in which event the deferred annuitants were to receive the same annuity as the other annuitants. The arrangement having been made, the Secretary of State, before paying the deferred annuities, deducted the whole of the income tax upon them on the ground that, although it had been held in *East Indian Ry. Co. v. Secretary of State in Council of India*, No. 338, *ante*, that so much of the ordinary annuities as represented the repayment of capital was not subject to income tax, yet no part of the deferred annuities represented the repayment of capital. In an action by the co. against the Secretary of State:—*Held*: no repayment of capital was included in the deferred annuities & the Secretary of State was entitled to deduct the whole of the income tax upon them.—*EAST INDIAN RY. CO. v. SECRETARY OF STATE IN COUNCIL OF INDIA* (1924), 40 T. L. R. 241; 68 Sol. Jo. 366.

D. Alimony and Similar Payments.

See Schedule D., Case III., Rules applicable to Case III., r. 1 (a); Rules applicable to all Schedules, rr. 19, 21, 23.

351. Payment under order of court.]—In payments on account of alimony, the party paying may deduct the income tax.—*PEMBERTON v. PEMBERTON* (1842), 2 Notes of Cases. 17.

Annotations:—*Reid. Frankfort de Montmorency v. Frankfort de Montmorency* (1845), 4 Notes of Cases 280; *Re Barry's Trusts, Barry v. Smart*, [1906] 1 Ch. 768.

352. ———.]—*Re SHAW, SMITH v. SHAW*, No. 413, *post*.

353. ——— Tax taken into account in calculating amount.]—Where an allotment of permanent alimony had been made to a wife upon a calculation of the husband's income, in which calculation the income & property tax had been

PART V. SECT. 4, SUB-SECT. 2.—C.

348 i. Annuity payable out of income of trust fund—Trust for accumulation of balance—Income of entire fund taxed at source.]—Testator by his trust disposition & settlement directed his trustees to hold, invest, & manage his residuary estate in their own names, & from "the free income & proceeds thereof" to pay to his brother & sister during their respective lives the sum of £250 *per annum* each with power to increase or diminish the amounts according to the income received & so long as his said brother & sister should be alive, to divide & pay any surplus income or revenue to & among certain beneficiaries, or to retain & accumulate it or any part thereof, & testator declared that all legacies & bequests excepting bequests of residue or of or from income should be paid free of Govt. duties, which should be paid out of the residue of his estate:—*Held*: the terms of the deed did not take the case out of the general rule that a person who gets a benefit under

a deed such as the foregoing must pay the tax which is exigible in respect of that benefit, & accordingly the trustees were bound to deduct income tax from the annual payments to testator's brother & sister.—*HUDSON'S TRUSTEES v. M'INTOSH*, [1920] 57 Sc. L. R. 571.—SCOT.

a. Annuity payable in respect of land or fund.]—An annuitant is not liable to have a proportion of the land & income tax payable in respect of the land or fund out of which the annuity arises deducted from the annuity.—*Re GUNN* (1898), 18 N. Z. L. R. 476.—N.Z.

b. Annuity payable under separation deed.]—Under a deed of separation a husband bound himself to make payment of a free yearly allowance of £1,000 to his wife. The husband's whole income consisted of an annuity of £3,000 paid to him by his father, in terms of the son's marriage contract, & sums voluntarily paid to him by his father. The husband having deducted income tax from his wife's annuity,

she challenged his right to do so on the ground that her annuity had been taxed at its source, the father having paid the tax on his own income, but deducted nothing therefor from the sums paid by him to his son, & the Crown having made no claim on the son for income tax:—*Held*: the wife's annuity being payable as a personal debt or obligation in virtue of a contract, the husband was entitled to deduct the income tax therefrom.—*DAIRYMPLE v. DAIRYMPLE* (1902), 4 F. (Ct. of Sess.) 545.—SCOT.

c. Annuity payable out of charitable fund.]—A charitable fund which paid annuities to aged & infirm ministers received repayment as a charitable institution of the income deducted from the revenues of its funds:—*Held*: an annuity paid by it to an infirm minister was assessable for income tax under Schedule D., the annuity not being paid out of funds already brought into charge.—*CAIN'S TRUSTEES v. INLAND RE* [1909] S. C. 1212.—SCOT.

Sect. 4.—Case III.—Profits of uncertain value, interest on money yearly or otherwise; annuities, discounts, etc.: Sub-sect. 2, D. & E.]

deducted, the husband was not allowed under Income Tax Act, 1842 (c. 35), ss. 102, 103, to deduct the tax from his payments of alimony to the wife.—**FRANKFORT DE MONTMORENCY (Viscount) v. FRANKFORT DE MONTMORENCY (Viscountess)** (1845), 4 Notes of Cases, 280.

Annotations:—Distd. *Re Barry's Trusts*, *Barry v. Smart*, [1906] 1 Ch. 768. **Consd.** *Blount v. Blount*, [1916] 1 K. B. 230. **Apld.** *Brooke v. Price*, [1916] 2 Ch. 345. **Refd.** *Shrewsbury v. Shrewsbury* (1906), 22 T. L. R. 598; *Re Shaw, Smith v. Shaw* (1917), 118 L. T. 334; *Smith v. Smith*, [1923] P. 191.

See, also, No. 409, *post*.

354. ———.]—In estimating the income of a divorced husband in order to ascertain the permanent maintenance to be paid to the wife, the husband's income must be regarded as the disposable amount which remains in his hands after paying the expenses of earning it. Those expenses include his liabilities for income tax, super tax & excess profits duty. Therefore all these must be deducted to arrive at the income, one-third of which is to be allowed for the wife's maintenance. The sum so allowed must be paid to the wife free of income tax & super tax, if the latter is payable.—**DAYRELL-STEYNING v. DAYRELL-STEYNING**, [1922] P. 280; 91 L. J. P. 210; 127 L. T. 846; 38 T. L. R. 898.

Annotation:—Consd. *Smith v. Smith*, [1923] P. 191.

355. ——— Subsequent deed of covenant.]—Where the ct. has ordered a husband to pay & secure to his wife, who has obtained a decree absolute for the dissolution of the marriage, an annuity for her life, & that order has been carried into effect by a deed, the trustees of the deed, in the absence of any special words to the contrary, may deduct income tax:—**Held**: the trustees' right was limited to deducting the income tax in the future, & they could not, because they had made a mistake, deduct the past income tax.—**WARREN v. WARREN** (1895), 72 L. T. 628; 43 W. R. 490; 11 T. L. R. 355; 13 R. 485.

Annotations:—Folld. *Re Barry's Trusts*, *Barry v. Smart*, [1906] 1 Ch. 768; *Shrewsbury v. Shrewsbury* (1906), 22 T. L. R. 598. **Consd.** *Blount v. Blount*, [1916] 1 K. B. 230. **Distd.** *Brooke v. Price*, [1916] 2 Ch. 345. **Folld.** *Re Hatch, Hatch v. Hatch*, [1919] 1 Ch. 351.

356. ——— Covenant to pay free of tax.]—By an order made by consent by the President of the Divorce Div. after a decree absolute for the dissolution of pltf.'s marriage with deft., deft. was ordered to pay to pltf. permanent maintenance at the rate of £62 10s. per quarter "free of income tax:" & by a deed of the same date, which recited the order, deft. covenanted to pay to pltf. "during her life the quarterly sum of £62 10s. free of income tax." Pltf. sued deft., to recover the amount of the income tax on one quarter's payment which deft. had deducted:—**Held**: the covenant to pay the quarterly sum "free of income tax" was void under Income Tax Act, 1842 (c. 35), s. 103, & deft. was therefore entitled to make the deduction.—**BLOUNT v. BLOUNT**, [1916] 1 K. B. 230; 85 L. J. K. B. 230; 114 L. T. 176.

Annotations:—Distd. *Brooke v. Price*, [1916] 2 Ch. 345; *Re Shaw, Smith v. Shaw*, [1918] P. 47. **Folld.** *Re Peck's Settlement*, *Peck v. Hamilton*, [1921] 2 Ch. 237; *Burroughes v. Abbott*, [1922] 1 Ch. 86. **Distd.** *Booth v. Booth*, [1922] 1 K. B. 86. **Apld.** *Re Gretton's Indenture*, *Re Ratcliff & Brinckman's Trusts*, *Hood v. Byron*, [1923] 1 Ch. 77. **Consd.** *Smith v. Smith*, [1923] P. 191.

357. ——— Covenant to make good deficiency.]—**Re PECK'S SETTLEMENT**, *PECK v. HAMILTON*, No. 410, *post*.

358. ——— Rectification of deed.]—A deed entered into in pursuance of an order of the Divorce

Ct. that a husband should secure by deed to be drawn by conveyancing counsel of the ct. an annual sum to his wife, & that all payments thereunder should be free of income tax, by which the husband settles property upon trust that the trustees should pay that annual sum to the wife free from all deductions whatsoever, including income tax contravenes the prohibitions of the Income Tax Acts & is void so far as it relates to the tax; but the ct. will rectify the provision as to the payment of the annual sum free of income tax so that it will carry out the order of the Divorce Ct. & the intention of the parties to the deed, & give the wife the annual sum free of income tax without contravening the prohibitions of the Income Tax Acts.—**BURROUGHES v. ABBOTT**, [1922] 1 Ch. 86; 91 L. J. Ch. 157; 126 L. T. 354; 38 T. L. R. 167; 66 Sol. Jo. 141.

Annotations:—Consd. *Re Gordon's Settlement*, *Hunt v. Mortimer*, [1924] 1 Ch. 146. **Refd.** *Smith v. Smith*, [1923] P. 191.

359. ——— Variable amount—Proportion of net annual income with fixed minimum.]—**BROOKE v. PRICE**, No. 409, *post*.

360. ——— What amounts to order of court—Terms of agreement filed & made rule of court.]—**CROFT v. CROFT**, No. 414, *post*.

Compare No. 413, *post*.

361. ——— Order to secure fixed sum per week.]—By an order of the Divorce Div. a divorced husband was ordered to secure the payment to the wife for her life of a weekly sum of £3 by way of maintenance; & to pay her a further weekly sum of £2 during their joint lives. In compliance with the order the husband duly secured the £3 a week, but in paying both sums he deducted income tax therefrom. Upon an application by the wife for leave to issue execution in respect of the amount of tax so deducted, the judge dismissed the summons, & from his decision the wife appealed:—**Held**: (1) as to the weekly payment of £3, the order appealed from was right. There was no order on resp. to pay that sum, & no order on which execution could issue against him; (2) as to the weekly payment of £2, the payment was a taxable annual payment within Case III., Rules applicable to case III., r. 1 (a), of Sched. D to 1918 Act, & resp. was entitled under r. 19 of the General Rules relating to All Schedules, in making the payments, to deduct the tax.

[With regard to the £3 a week] the payments depending only on the terms of the contract for security they are subject to the provisions of the Income Tax Act, 1918, & under r. 19 of the Rules applicable to all Schedules the respondent paying the weekly sum is entitled to deduct the tax (**WARRINGTON, L.J.**).

The fact that the payment is to be made weekly does not prevent it from being annual provided the weekly payments may continue beyond the year (**WARRINGTON, L.J.**).—**SMITH v. SMITH**, [1923] P. 191; 92 L. J. P. 132; 130 L. T. 8; 39 T. L. R. 632; 67 Sol. Jo. 749, C. A.

362. ——— Allowance in lieu of alimony ordered by court.]—A husband covenanted with his wife to pay her an annuity during her life in substitution for alimony which he had been ordered to pay. After his death the trustees of his will paid the annuity to the widow without deducting the income tax thereon:—**Held**: income tax ought to have been deducted from the payments of the annuity, but that the trustees were not entitled to recoup to the estate of the husband the overpayments of the annuity by retaining the amount of the same either out of future payments of the annuity, or out of a share in her husband's estate

to which the annuitant had become beneficially entitled.—*Re HATCH, HATCH v. HATCH*, [1919] 1 Ch. 351; 88 L. J. Ch. 147; 120 L. T. 694; 63 Sol. Jo. 389.

Annotation:—*Distd. Re Woolridge, Woolridge v. Coe*, [1920] W. N. 78.

363. Payment under agreement—Separation deed—On stay of divorce proceedings.—By a separation deed staying divorce proceedings a husband covenanted with trustees to pay in annuity to his wife for her life by way of alimony:—*Held*: the husband might deduct income tax from the annuity, as it was payable under contract within Income Tax Act, 1843 (c. 35), s. 102, & Income Tax Act, 1853 (c. 34), s. 40.—*Re BARRY'S TRUSTS, BARRY v. SMART*, [1906] 2 Ch. 358; 75 L. J. Ch. 676; 95 L. T. 165; 54 W. R. 621; 50 Sol. Jo. 615, C. A.

Annotations:—*Follid. Shrewsbury v. Shrewsbury* (1906), 22 T. L. R. 598. *Distd. Brooke v. Price*, [1916] 2 Ch. 345. *Appld. Blount v. Blount*, [1916] 1 K. B. 230; *Re Hatch, Hatch v. Hatch*, [1919] 1 Ch. 351. *Consd. Bayley v. Bayley*, [1922] 2 K. B. 227. *Refd. Smith v. Smith*, [1923] P. 191.

364. ——— Covenant to pay clear of all deductions.—By an agreement for separation between husband & wife, the husband undertook to make his wife, during their joint lives, an annual allowance payable quarterly in advance "clear of all deductions" & to secure the annuity on his estates:—*Held*: the agreement came within Income Tax Act, 1842 (c. 35), ss. 102, 103, & the husband was entitled, & bound to make, & the wife bound to allow, a deduction of income tax in respect of each future instalment of the annuity.—*SHREWSBURY (COUNTESS) v. SHREWSBURY (EARL)* (1906), 22 T. L. R. 598; *subsequent proceedings*, 23 T. L. R. 100.

Annotation:—*Consd. Blount v. Blount*, [1916] 1 K. B. 230.

365. ——— Covenant to pay clear annual sum after deduction of tax.—A husband & wife entered into an agreement of separation by which the husband covenanted to pay to the wife "such weekly sum as will after deduction of income tax amount to £260 per annum." The husband in making the payments deducted income tax. The wife claimed to recover arrears of weekly instalments due under the agreement, & also a declaration that the husband was bound to pay the clear weekly sum of £5 without any deduction in respect of income tax:—*Held*: the covenant was a contract by the husband to pay his wife such a gross sum as would, after deduction of income tax on that sum, leave the wife a net sum of £260 per annum; it did not contravene the provisions of the Income Tax Acts & the husband was not entitled to deduct income tax from the weekly payments.—*BOOTH v. BOOTH*, [1922] 1 K. B. 66; 91 L. J. K. B. 127; 126 L. T. 342; 66 Sol. Jo. 251.

Annotations:—*Distd. Bayley v. Bayley*, [1922] 2 K. B. 227; *Re Gretton's Indenture, Re Ratcliff & Brinckman's Trusts, Hood v. Byron*, [1923] 1 Ch. 77. *Refd. Harper v. Hedges*, [1923] 2 K. B. 314.

— **Deed of covenant subsequent to order of court.**—*See Nos. 355, 356, 358, ante.*

— **Allowance in lieu of alimony ordered by court.**—*See No. 362, ante.*

— **Agreements for payment without deduction.**—*See, generally, Sect. 4, sub-sect. 4, A., post.*

366. Income of husband paid without deduction

of tax.—*Pltf.*, who was formerly the wife of *deft.*, an officer in the army, obtained a divorce from him in 1914. The amount of the permanent maintenance to be paid by *deft.* to *pltf.* was by agreement referred to an arbitrator who awarded a certain amount, which amount was to be increased according as *deft.*'s rate of pay increased. *Deft.*, who was a major in the army at the time of the award, subsequently became a lieutenant-colonel & commanded an infantry regiment. His rate of pay was largely increased & he received in addition to his regimental pay 10s. per day as "command pay" & also certain daily allowances in respect of fuel, light, rations, etc. Income tax was deducted from his regimental pay, but not from his command pay or allowances. *Pltf.* claimed to recover from *deft.* arrears of maintenance on the basis that both command pay & allowances were "pay" within the meaning of the award & that *deft.* was not entitled to deduct income tax in respect of command pay as he had not himself paid tax thereon:—*Held*: (1) the amount received by *deft.* in respect of allowances was not "pay" within the meaning of the award, but that "command pay" was "pay" within the meaning of the award & must therefore be brought into account by *deft.* in calculating the amount payable to *pltf.*; (2) as income tax was in strict law payable in respect of command pay *deft.* was entitled to deduct income tax from any sum which he might pay to *pltf.* in respect thereof, notwithstanding that he had not himself paid income tax thereon.—*BAYLEY v. BAYLEY*, [1922] 2 K. B. 227; 91 L. J. K. B. 886; 127 L. T. 657; 38 T. L. R. 522.

367. Deduction of super-tax.—*DAYRELL-STEYNING v. DAYRELL-STEYNING*, No. 354, *ante.*

E. Interest on Loans and Other Debts.

See Schedule D., Case III., Rules applicable to Case III., r. 1 (a); Rules applicable to all Schedules, rr. 19, 21, 23.

368. Payments in administration action—Interest on debt found payable.—In the course of the administration of the estate of testator, a debt in respect of a dishonoured bill of exchange, & nine years' interest on it, were found to be due from his estate to a creditor. It appeared that it was the practice in the masters' offices to deduct income tax in respect of the interest, & the *ct.* refused to disturb such practice.—*DINNING v. HENDERSON* (1850), 3 De G. & Sm. 702; 19 L. J. Ch. 273; 15 L. T. O. S. 43; 14 Jur. 1038; 64 E. R. 668.

Annotations:—*Dbtd. Goslings & Sharpe v. Blake* (1889), 23 Q. B. D. 324. I do not think it necessary to say that we definitely overrule *Dinning v. Henderson*, though I must say that if it is applied to bills of exchange which do not carry interest on the face of them I doubt the correctness of the decision (*LORD ESHER, M.R.*). *Refd. Bebb v. Bunny* (1854), 1 Jur. N. S. 203.

369. ———.—Where in the administration of the solvent estate of deceased person a creditor has established a debt due to him from deceased at the time of his death, & has therefore become entitled under Ord. 55, r. 63, to interest at the rate of 4 per cent. on the amount of the debt, the payment of interest is subject to the deduction of income tax thereon.—*Re MICHELHAM, MICHELHAM v. MICHELHAM*, [1921] 1 Ch. 705; 90 L. J. Ch. 432; 125 L. T. 223; 65 Sol. Jo. 568.

PART V. SECT. 4, SUB-SECT. 2.—E.

d. Interest on shares.—In an action at the instance of a ward for reduction of the sale of part of her estate which consisted in shares in a public co., the *ct.* found that on repayment by the pursuer of the price

received for the shares with interest at 5 per cent. the pursuer would be entitled to restitution of the shares with the dividends accruing thereon. The pursuer tendered payment of the price with 5 per cent. interest under deduction of income tax on the interest:—*Held*: as between pursuer

& defender income tax did not fall to be deducted by pursuer under Income Tax Act, 1853, s. 40, from the interest payable to her.—*DUNN v. CHAMBERS* (1898), 25 R. (Ct. of Sess.) 688; 35 L. R. 537; 5 S. L. T. 345.—*SCOT.*

e. Compensation paid to landowner

Sect. 4.—Case III.—Profits of uncertain value, interest on money yearly or otherwise; annuities, discounts, etc.: Sub-sect. 2, E.]

369a. — Assets insufficient for payment in full.]—*Re GREEN, BALL v. ELLIS*, [1904] W. N. 78.

369b. Payments on account to debenture-holders—Whether attributed to capital or interest—Security insufficient.]—A debenture trust deed executed by a co. provided that the trustees should appropriate the proceeds of the realisation of the securities in the first place towards payment of all arrears of interest on the debentures, & secondly, towards payment of the principal. The co. made default, & an action was brought on behalf of the debenture-holders to enforce their security. The judgment in the action ordered that the trusts of the deed should be carried into execution, & directed that the usual accounts & inquiries should be taken & made. The securities were gradually realised, & orders were from time to time made under which certain sums were paid to the debenture-holders on account of interest, after deducting income tax. When the order on further consideration was made there was evidence that the securities would prove insufficient, & that order directed that pl'tfs.' taxed costs as between solr. & client should be paid by the trustees out of the moneys in their hands. The subsequent orders for payment to the debenture-holders directed that the payments should be made on account generally of what was due for principal & interest. The securities having been practically all realised, the trustees had in their hands a sum of money which they proposed to pay to the debenture-holders. It was admitted that if the whole of the payments to the debenture-holders were attributed to principal they would be insufficient to discharge the full amount due. The Comrs. of Inland Revenue claimed that all the payments made on account generally ought to be attributed to interest in the first place, & that income tax should be deducted from them. Upon a summons taken out by the trustees of the deed to determine this question:—*Held*: upon the construction of the orders which directed payments on account generally, & having regard to the circumstances of the case, the ct. when making those orders had purposely left open for future determination the question how the payments were to be ultimately appropriated as between principal & interest, & it being now clearly for the benefit of the debenture-holders that those payments should be appropriated to principal, they ought to be so appropriated, without putting the debenture-holders to an election how the appropriation should be made, & consequently income tax ought not to be deducted.

But the order was made without prejudice to the question whether the payments, or any part or parts thereof, ought, in the hands of the persons to whom payments had been made, to be treated as principal or interest.—*SMITH v. LAW GUARANTEE & TRUST SOCIETY, LTD.*, [1904] 2 Ch. 569; 73 L. J. Ch. 733; 91 L. T. 545; 20 T. L. R. 789; 12 Mans. 66, C. A.

Annotation:—Consd. Re Calgary & Medicine Hat Land Co., Pigeon v. The Co., [1908] 2 Ch. 652.

370. Payment under composition deed — Pay-

ment of lump sum—*Claim to deduct tax in respect of unpaid arrears of interest.]—*A debtor who executes a deed under Bkpcy. Act, 1861 (c. 134), s. 142, providing for payment of a composition of eight shillings in the pound, cannot deduct from the balance due to a cash creditor, the income tax from year to year becoming payable upon the amount of interest due to such creditor, & which might have been deducted provided such interest had been regularly paid.—*Re TRUST DEED, Ex p. TURNER* (1864), 11 L. T. 352; *sub nom. Re LASCELLES, Ex p. TURNER*, 13 W. R. 104.

371. — Payment of fixed yearly sum—With interest until payment.]—Debtor assigned a fund to trustees, upon trust to pay a fixed sum yearly to his creditors, *pro rata*, with interest on their debts till payment:—*Held*: the trustees should have deducted income tax from the several payments of interest; & this not having been done, the debtor was entitled, in finally settling with his creditors, to be allowed for the deductions which should have been made.—*CRANE v. KILPIN* (1868), L. R. 6 Eq. 334; 37 L. J. Ch. 913; 18 L. T. 350.

372. Instalments due on building society mortgage—Instalments including interest.]—W. borrowed from a building society a sum of money on mtge. of certain property. The advance was repayable over a term of years by periodical instalments covering principal, interest, & charges for working expenses. W. regularly made the repayments in respect of his advance until his death, which occurred sometime prior to 1881. In that year the exors. of W. applied to the society for liberty to deduct income tax from such repayments. The directors of the society stated that they had nothing to do with the question of income tax as payable upon property upon which the society had made advances, & that the repayments must be paid in full in accordance with the society's rules. Shortly afterwards the society was ordered to be wound up. In 1885 the exors. of W. applied to the official liquidators of the society to allow them to deduct income tax from the repayment falling due that month, not only in respect of that repayment, but also of all repayments made since 1877. This was refused on the ground that, whatever might be the law on the subject of income tax that part which represented income tax due prior to the winding-up of the society could not be deducted, as any claim in respect of it must be proved in the ordinary way as a claim in the winding-up. In the result, the exors., under protest by the liquidators, deducted income tax in respect of repayments, made since 1877. No mention of income tax was contained in the society's rules, & the society, whilst a going concern, invariably refused to allow advanced shareholders to deduct anything from the repayments in respect of income tax.

A summons was taken out on behalf of the liquidators asking that the exors. of W. might be ordered to pay the sum which they had deducted for income tax:—*Held*: the exors. were entitled to deduct income tax in respect of the present repayment, & also from future repayments, but only upon so much thereof as represented interest; but that they could not be allowed to deduct anything for income tax in respect of past repayments.

1. Effect of omission to deduct—Whether right lost.]—If a debtor makes payment of interest without deducting

railway co. leases & that the co. should settle the tenants' claims, the landlord during that period paying the company 3 per cent. interest upon the compensation paid him to enable them to do so:—*Held*: the landowner was entitled to deduct income tax in paying the 3 per

cent. to the co.—*NORTH BRITISH RY. Co. v. ABERCORN (DUKE)* (1880), 7 R. (Ot. of Sess.) 419; 17 Sc. L. R. 270.—SCOT.

1. Effect of omission to deduct—Whether right lost.]—If a debtor makes payment of interest without deducting

—*Re* MIDDLESBROUGH, REDCAR, SALTBURN-BY-THE-SEA & OLEVELAND DISTRICT PERMANENT BENEFIT BUILDING SOCIETY, *Ex p.* WYTHES (1885), 53 L. T. 492.

See, also, No. 14, *ante*.

373. Damages awarded in misfeasance proceedings against company director.]—Where upon a misfeasance summons against a director of a co. for payment of dividends out of capital an order has been made for the payment by him of a certain sum with interest at a stated rate by way of damages, he is not entitled to deduct income tax from the amount of the interest payable.—*Re* NATIONAL BANK OF WALES, LTD., [1899] 2 Ch. 629; *sub nom.* *Re* NATIONAL BANK OF WALES, CORY'S CASE, 68 L. J. Ch. 634; 43 Sol. Jo. 368; 6 Mans. 119; *on appeal*, *sub nom.* DOVEY v. CORY, [1901] A. C. 477, H. L.

Annotations.—*Consd.* Schulze v. Bensted (1915), 7 Tax Cas. 30. *Mentd.* Merchants' Fire Office v. Armstrong (1901), 17 T. L. R. 709; Bond v. Barrow Haematite Steel Co., [1902] 1 Ch. 353; *Re* Crichton's Oil Co., [1902] 2 Ch. 86; Lucas v. Fitzgerald (1903), 20 T. L. R. 16; *Re* Welsbach Incandescent Gas Light Co., [1904] 1 Ch. 87; Exploring Land & Minerals Co. v. Kolckmann (1905), 94 L. T. 234; Prefontaine v. Grenier, [1907] A. C. 101; Ammonia Soda Co. v. Chamberlain, [1918] 1 Ch. 266; Atherton v. British Insulated & Helsby Cables, [1925] 1 K. B. 421; *Re* City Equitable Fire Insce., [1925] Ch. 407.

374. Judgment debt.]—A bkpcy. notice required payment of a certain sum claimed as being the amount due on a final judgment. In the margin of the notice particulars of the amount claimed were given, namely, debt so much, interest at 4 per cent. to date so much. Objection was taken that this notice was bad as it claimed interest in full without allowing for income tax which could or ought to have been deducted by the debtor:—*Held*: a judgment debt, though by law carrying interest from the date of the judgment, was not a transaction to which the language of the Income Tax Acts relating to "yearly interest of money" applied, & the notice was valid & the receiving order based upon it rightly made.—*Re* COOPER, [1911] 2 K. B. 550; 105 L. T. 273; *sub nom.* *Re* COOPER, *Ex p.* DEBTOR, 80 L. J. K. B. 990; 18 Mans. 211; *sub nom.* *Re* BOULTER, *Ex p.* MANCHESTER & LIVERPOOL DISTRICT BANKING CO., 55 Sol. Jo. 554, C. A.

Annotations.—*Appld.* Gateshead Corpn. v. Lumsden, [1914] 2 K. B. 883. *Consd.* North London & General Property Co. v. Moy, [1917] 2 K. B. 617.

375. Short loan by bank.]—Interest upon a loan by a banker to a customer for a period of less than a year is not within the words "any yearly interest of money or any annuity or other annual payment" in Income Tax Act, 1853 (c. 34), s. 40, & therefore the customer is not entitled to deduct income tax from such interest.—GOSLINGS & SHARPE v. BLAKE (1889), 23 Q. B. D. 324; 58 L. J. Q. B. 446; 61 L. T. 311; 37 W. R. 774; 5 T. L. R. 605; 2 Tax Cas. 450, C. A.

Annotations.—*Consd.* Lord Advocate v. Edinburgh Corpn. (1903), 4 Tax Cas. 627. *Expld. & Distd.* *Re* Craven's Mortgage, Davies v. Craven, [1907] 2 Ch. 448. *Consd.* *Re* Cooper, [1911] 2 K. B. 550. *Expld.* *Re* Cooper, Cooper v. Cooper (1917), 88 L. J. Ch. 105. *Consd.* *Re* Janes' Settlement, Wasmuth v. Janes, [1918] 2 Ch. 54. *Expld.* I. R. Comrs. v. Hay (1924), 8 Tax Cas. 636. *Reid.* Anglo-Continental Guano Works v. Bell (1894), 10 R. 161; Shrewsbury v. Shrewsbury (1906), 23 T. L. R. 100; De Peyer v. R. (1909), 100 L. T. 256; Farmer v. Scottish North American Trust, [1912] A. C. 118; Gateshead Corpn. v. Lumsden, [1914] 2 K. B. 883.

376. Apportioned expenses of street paving.]—Pltfs., as the urban authority of a borough, had

under Public Health Act, 1875 (c. 55), s. 150, & the local Act, 1867, some years before action brought paved & made up certain streets, & had from time to time apportioned the expenses thereof among the owners of the premises fronting thereon. Deft. was the owner of premises in these streets, & pltfs., under the power conferred upon them by s. 32 of the local Act, 1867, allowed him time for the repayment of the sums apportioned in respect of his premises, interest being payable thereon at the rate of 5 per cent. *per annum*. Deft. paid to pltfs. varying sums at irregular intervals in part payment of the amount due which pltfs. credited in the first place to the interest due & in the second place towards payment of the principal. There was no evidence to show that pltfs. made a regular practice of allowing these expenses to remain unpaid, bearing interest, as a mode of investing their funds. Deft. claimed, upon paying off the final amount due for principal & interest, to be entitled to deduct the income tax upon the amount due for interest as being "yearly interest of money" within Income Tax Act, 1853 (c. 34), s. 40:—*Held*: the interest did not come within the words "yearly interest of money" in s. 40, & therefore deft. was not entitled to deduct income tax therefrom.—GATESHEAD CORPN. v. LUMSDEN, [1914] 2 K. B. 883; 83 L. J. K. B. 1121; 111 L. T. 26; 78 J. P. 283; 58 Sol. Jo. 453; 12 L. G. R. 701, C. A.

Annotation.—*Consd.* I. R. Comrs. v. Hay (1924), 8 Tax Cas. 636.

377. Interest payable in lump sum—Calculated by the year—Simple interest.]—By a mtge. of June 1, 1888, the mtgor. covenanted that on his death or on his son's death, whichever event should first happen, he, his exors., administrators or assigns would pay to the mtgee. the principal sum secured together with simple interest thereon at the rate of 5 per cent. *per annum* reckoned from Aug. 10, 1887, up to the time of such death, & if the aggregate amount of such sum & interest or any part thereof should not then be paid, would pay interest on the unpaid part by equal half yearly payments the first of such payments to be made at the expiration of six calendar months from the death of the mtgor. or his son whichever event should first happen, & would make these payments without any deduction. The mtgor. predeceased his son & died in 1906. His exor. paid to the mtgee. interest on the aggregate sum consisting of principal & interest found due at the mtgor.'s death. He now proposed to pay off the aggregate amount due on the mtge. & he claimed the right in doing so to deduct income tax on so much of the aggregate sum as represented interest:—*Held*: (1) the interest had not been capitalised by the contract between the parties; (2) inasmuch as the interest was calculated by the year it was "yearly interest" within Income Tax, 1853 (c. 34), s. 40, although it was payable in a lump sum at an uncertain date; & the mtgor.'s exor. was entitled to deduct income tax.—*Re* CRAVEN'S MORTGAGE, DAVIES v. CRAVEN, [1907] 2 Ch. 448; 76 L. J. Ch. 651; 97 L. T. 475.

Annotations.—*As to* (1) *Appld.* *Re* Morris, Mayhew v. Halton, [1922] 1 Ch. 126. *As to* (2) *Apprvd. & Follid.* *Re* Morris, Mayhew v. Halton, [1922] 1 Ch. 126. *Co.* I. R. Comrs. v. Hay (1924), 8 Tax Cas. 636. *Reid.* v. Cooper (1918), 88 L. J. Ch. 105; Wasmuth v. Janes, [1918] 2 Ch.

the income tax, he loses the right to the deduction in respect of such interest.—GALASHIELS PROVIDENT BUILDING SOCIETY v. NEWLANDS (1893), 20 R. (Ct. of Sess.) 821.—SCOT.

.]—A lessee of a

colliery who has paid to the revenue income tax on royalties due by him to the proprietor & who has paid the royalties without deducting the income tax has right to recover it from the proprietor.—AGNEW v. FERGUSON

(1903), 5 F. (Ct. of Sess.) 879.—SCOT. & h. —.]—A municipal corpn. which was bound to deduct income tax from interest on loans failed to do so:—*Held*: the corpn. was liable in payment to the Comrs. of

Sect. 4.—Case III.—Profits of uncertain value, interest on money yearly or otherwise; annuities, discounts, etc.: Sub-sect. 2, E. & F.; sub-sect. 3.]

378. ——— Compound interest.]—By deed dated June 6, 1898, some of the then next of kin of a lunatic for valuable consideration conveyed by way of mtge. their expectancies in the estate of the lunatic to an insurance society subject to redemption on payment to the society of £40,000 at any time after the death of the lunatic with compound interest thereon at the rate of 4½ per cent. *per annum* with annual rests; & the deed provided that nothing therein contained should render the mtgors. or any of them personally liable for the principal & interest thereby secured, but the same should be exclusively charged upon & payable out of the mtged. premises.

On the death of the lunatic her estate was administered by the ct. & by the order on further consideration the £40,000 was paid to the society out of funds in ct. & sufficient funds were carried over to a separate account to answer the compound interest payable under the deed subject to income tax, if any. The society claimed payment of the compound interest without deduction of income tax on the ground that it had been capitalised:—*Held*: the compound interest had not been capitalised, & was "interest money" within r. 1 (a) of Rules applicable to Case III., in Schedule D. to 1918 Act, & the mtgors. under r. 19 (1) of the Rules applicable to all the Schedules to the Act were entitled on payment of the interest by way of deduction for income tax to so much of the funds carried over to the separate account as was equal to the income tax in each yearly instalment of interest as & when it became due.—*Re MORRIS, MAYHEW v. HALTON*, [1922] 1 Ch. 126; 91 L. J. Ch. 188; 126 L. T. 281; 38 T. L. R. 27; 66 Sol. Jo. (W. R.) 18, C. A.

379. Repayment of expenditure for interest & sinking-fund—Money borrowed by lender.]—A local authority, authorised to supply electricity by provisional order under Electric Lighting Acts, entered into an agreement with a co. by which the local authority were to purchase a site & erect buildings for the generative station, & the co. were to fit up the plant & apparatus & carry on the undertaking & receive the profits for their own benefit. It being contemplated that it would be necessary for the local authority to borrow money to enable the co. to construct & fit up apparatus, a clause of the agreement provided that the co. should pay half-yearly to the local authority sums equal to the sums paid by the local authority in the preceding half-year for interest & sinking fund on money borrowed:—*Held*: the sums payable half-yearly by the co. were an "annual payment" within Income Tax Act, 1853 (c. 34), s. 40, & the co. in making the payments were entitled to deduct income tax accordingly.—*SURBITON URBAN DISTRICT COUNCIL v. CALLENDER CABLE & CONSTRUCTION CO., LTD.* (1910), 8 L. G. R. 244; 74 J. P. Jo. 88.

Poole Corpn. v. Bournemouth Corpn. 828.

380. ———.]—A local authority purchased a tramway undertaking, having raised the purchase money by means of a loan, which was repayable by half-yearly instalments of principal & interest extending over a period of thirty years, & then

let the undertaking to another local authority under an agreement which provided that the rent should be such a sum as should enable the lessor authority to repay the principal & interest of the loan by half-yearly instalments within thirty years. The lessee authority claimed to be entitled to deduct income tax from the whole of the amount of the half-yearly rent paid by them under the agreement, while the lessor contended that the rent should be such a sum as would be sufficient, after deducting income tax, to pay the actual interest & instalment of the capital of the loan:—*Held*: upon the true construction of the agreement, & having regard to Income Tax Act, 1853 (c. 34), s. 40, the lessee authority was entitled to deduct the income tax from the rent.—*POOLE CORPN. v. BOURNEMOUTH CORPN.* (1910), 103 L. T. 828; 75 J. P. 13.

F. Right to Deduct in respect of Past Income.

See, now, Schedule D., Case III., Rules applicable to all Schedules, rr. 19, 21, 23.

381. Interest paid without deduction—Interest on legacy.]—Where the agent of an exor. paid interest on a legacy for seventeen years, without deducting the property tax:—*Held*: he could not afterwards deduct out of future interest due, the amount of the property tax on such precedent payments.—*CURRIE v. GOOLD* (1817), 2 Madd. 163; 56 E. R. 295.

Annotations:—*Apld. Re Lascelles, Ex p. Turner* (1864), 13 W. R. 104. *Consd. Re Hatch, Hatch v. Hatch* (1919), 88 L. J. Ch. 147.

382. ——— Composition deed—Rights of debtor on final settlement.]—*Re TRUST DEED, Ex p. TURNER*, No. 370, *ante*.

383. ——— Instalments on building society mortgage—Instalments partly principal, partly interest.]—*Re MIDDLESBROUGH, REDCAR, SALT-BURN-BY-THE-SEA & CLEVELAND DISTRICT PERMANENT BENEFIT BUILDING SOCIETY, Ex p. WYTHES*, No. 372, *ante*.

Interest on loan—Right to recover from Crown.]—*See* No. 468, *post*.

384. Annuity paid without deduction.]—*WARREN v. WARREN*, No. 355, *ante*.

385. ———.]—*Re HATCH, HATCH v. HATCH*, No. 362, *ante*.

386. ———.]—The [person paying] an annuity free from deductions is entitled to deduct income tax before paying the instalments; but, where he voluntarily pays the annuity without deducting the tax, the tax which he pays in respect of the annuity is not paid on behalf of the annuitant, or at his implied request. The tax which has not been deducted is money paid to the annuitant under a mistake of law, & is not recoverable.—*ORD v. ORD*, [1923] 2 K. B. 432; 92 L. J. K. B. 859; 129 L. T. 605; 39 T. L. R. 437, D. C.

387. ———.]—A husband & wife agreed to live separate, & the husband agreed to allow her £4,000 a year to be paid quarterly, clear of all deductions. Subsequently it was agreed that the allowance should be reduced to £3,000 a year. Disputes arose as to how long the reduced allowance was to continue, & the wife brought an action to recover arrears of the allowance, & a consent order was made that the wife was entitled to the £4,000 a year as from a year before the action was commenced. No income tax had been

Revenue of the amount that
has been deducted.—*LORD*
v. EDINBURGH CORPN.
[1903], 7 F. (Ct. of Sess.) 972; 42 Sc.
R. 691; 13 S. L. T. 241.—400T.

k. Loans for short periods—Duty to deduct & render account.]—A municipal corpn. is bound to deduct income tax from the interest paid by it on loans for periods less than a year,

& to render an account thereof to the Comrs. of Inland Revenue.—*LORD ADVOCATE v. EDINBURGH CORPN.* 1903, 6 F. (Ct. of Sess.) 1; 41 Sc. R. 1; 11 S. L. T.

deducted by the husband from any of the payments of the allowance. The husband claimed to deduct income tax in respect of all the payments made & from the arrears:—*Held*: the husband might deduct income tax from the arrears, but not from the payments already made.—*SHREWSBURY (COUNTESS) v. SHREWSBURY (EARL)* (1906), 23 T. L. R. 100; 51 Sol. Jo. 100; *subsequent proceedings* (1907), 23 T. L. R. 224, C. A.; 23 T. L. R. 277.

Annotation:—*Consd.* Bayley v. Bayley, [1922] 2 K. B. 227.

388. — Direction in will to pay “without deduction”—Mistake of construction distinguished from mistake of law.]—Testator gave certain annuities which he directed to be paid “without deduction.” The trustees mistakenly paid them for some time without deducting income tax:—*Held*: this was not in the ordinary sense a mistake of public law, but an honest & not unnatural mistake of construction & the trustees might recoup themselves by deducting the amounts so overpaid from future instalments.—*Re MUSGRAVE, MACHELL v. PARRY*, [1916] 2 Ch. 417; 85 L. J. Ch. 639; 115 L. T. 149; 60 Sol. Jo. 694.

Annotation:—*Appld.* *Re Wooldridge, Wooldridge v. Coe*, [1920] W. N. 78.

389. Payments on account of annuity without deduction—Right to deduct on payment of balance of arrears—“Annual payment.”—*Re WOOLDRIDGE, WOOLDRIDGE v. COE*, [1920] W. N. 78.

390. Unpaid arrears of annuity.]—*SHREWSBURY (COUNTESS) v. SHREWSBURY (EARL)*, No. 387, *ante*.

391. —.]—*Re WOOLDRIDGE, WOOLDRIDGE v. COE*, [1920] W. N. 78.

SUB-SECT. 3.—RIGHT OF PERSONS DEDUCTING TO RETAIN TAX.

See Rules applicable to all Schedules, r. 19.

392. Annual payments partly paid out of taxed income—Retention of proportion paid out of taxed income—Whether taxed under Schedule A. or Schedule D.]—In paying the dividends on their consolidated stock out of the Consolidated Loans Fund, the London County Council are bound under Customs & Inland Revenue Act, 1888 (c. 8), s. 24 (3), to account to the Crown for the income tax which they deduct from the dividends, so far, only as the dividends are not paid out of their income which has already been charged with income tax.

Where the dividends are paid partly out of rents & profits from their lands charged with income tax under Schedule A., partly out of interests on loans to local authorities charged with income tax under Schedule D. & where those receipts are insufficient, partly out of moneys raised by rates, the council are entitled to retain for their own benefit so much of the deduction for income tax which they make on the dividends as is equal to the income tax paid both under Schedule A. & Schedule D.—*LONDON COUNTY COUNCIL v. A.-G.*, [1901] A. C. 26; 70 L. J. Q. B. 77; 83 L. T. 605; 65 J. P. 227; 49 W. R. 686; 17 T. L. R. 131; 4 Tax Cas. 265, H. L.; *reversg.*

S. C. sub nom. *A.-G. v. LONDON COUNTY COUNCIL* [1900] 1 Q. B. 192, C. A.

Annotations:—*Consd.* *Edinburgh Life Assce. v. Lord Advocate*, [1910] A. C. 143. *Expld.* *Sugden v. Leeds Corp.*, [1914] A. C. 483. *Consd.* *I. R. Comrs. v. Hay* (1924), 8 Tax Cas. 636; *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315. *Reid.* *Chadwick v. Pearl Life Insce.*, [1905] 2 K. B. 507; *Delage v. Nugget Polish Co.* (1905), 92 L. T. 682; *Lanston Monotype Corp. v. Anderson* (1911), 5 Tax Cas. 675; *R. v. Income Tax Special Comrs., Ex p. Essex Hall*, [1911] 2 K. B. 434; *Brooke v. Price*, [1916] 2 Ch. 345; *Howe v. I. R. Comrs.*, [1919] 2 K. B. 336; *Malcolm v. Lockhart* (1919), 7 Tax Cas. 99; *Brown v. National Provident Institution, Ogston & Provident Mutual Life Assocn.*, [1921] 2 A. C. 222; *Coman v. Rotunda Hospital, Dublin*, [1921] 1 A. C. 1; *Bruce v. Hatton*, [1922] 2 K. B. 206; *North British Ry. v. Scott*, [1923] A. C. 37; *I. R. Comrs. v. Wemyss* (1924), 8 Tax Cas. 551. *Mentd.* *Hudson v. Gribble, Bell v. Gribble*, [1903] 1 K. B. 517; *Lord Advocate v. Edinburgh Corp.* (1903), 4 Tax Cas. 627; *Ystradyfodwg & Pontypridd Main Sewerage Board v. Bensted*, [1906] 1 K. B. 294; *Gould v. Curtis* (1913), 6 Tax Cas. 293; *Schulze v. Bensted* (1915), 7 Tax Cas. 30.

393. — No retention in respect of unproductive lands taxed under Schedule A.—Lands in own occupation.]—The London County Council is bound to pay income tax under Schedule A. upon the annual value of property occupied by the council, & cannot deduct it out of the amount of income tax which is payable in respect of their Consolidated Stock, for which the council is bound to account to the Crown.—*A.-G. v. LONDON COUNTY COUNCIL*, [1907] A. C. 131; 76 L. J. K. B. 454; 96 L. T. 481; 71 J. P. 217; 23 T. L. R. 390; 51 Sol. Jo. 372; 5 L. G. R. 465; 5 Tax Cas. 242, H. L.

Annotations:—*Expld.* *Sugden v. Leeds Corp.*, [1914] A. C. 483. *Reid.* *R. v. Income Tax Special Comrs., Ex p. Essex Hall*, [1911] 2 K. B. 434.

394. Annual payments wholly paid out of taxed income—What amounts to—No fund set apart for purpose.]—*Appld.* co. carried on the ordinary business of a life insurance co., including the granting of annuities. The co-partnership contract of the co. provided that every policy of insurance or other obligation should contain a clause declaring that the capital, stock, & funds of the co. should be the only fund answerable for any demand under such policy or other obligation. The co. had a very large annual income from interest, dividends, & rents, from which income tax was deducted at the source. The income from interest, dividends & rents was amply sufficient to pay the annuities in full. The co. also had an income from premiums, but if the income from interest, dividends, & rents had been deducted from the co.’s revenue the trading of the co. would have resulted in a quinquennium deficit. No formal appropriation of the income from interest, dividends, & rents was made in the books, nor was any particular fund specially charged with the payment of the annuities. In paying their annuities the co. deducted the amount of income tax due in respect thereof & retained the amount of the tax so deducted:—*Held*: the co. were entitled to retain for their own benefit the whole of the income tax deducted from the annuities, for where annuities are charged upon a tax-bearing fund from which the tax has been deducted at its source & which is amply sufficient to pay them in full, although not set apart for that purpose, they cannot be held to be not “payable” or not wholly “payable out of profits or gains

PART V. SECT. 4, SUB-SECT. 3.

1. Interest on loans charged in rates & assessments.]—The comrs. of supply of a county were assessed to income tax under Schedule A. upon the full value of the county buildings. For the erection of these buildings they had borrowed money under statutory

authority which was secured by mtge. not over the buildings but on the rates & assessments which the same statute authorised the comrs. to levy. An annual sum of £92 10s. was payable as interest on the sum so borrowed & secured. This sum was raised by a special rate which was not credited with the rents received from part of

the county buildings. These rents were placed to the credit of the county general assessment. The comrs. in paying the interest deducted the amount of income tax thereon. On the comrs. being assessed under Schedule D. for the income tax as the interest, they maintained that they were entitled to retain it on the ground

Sect. 4.—Case III.—Profits of uncertain value, interest on money yearly or otherwise; annuities, discounts, etc.: Sub-sects. 3 & 4, A.]

brought into charge" within Customs & Inland Revenue Act, 1888 (c. 8), s. 24 (3).—EDINBURGH LIFE ASSURANCE CO. v. LORD ADVOCATE, [1910] A. C. 143; 79 L. J. P. C. 41; 101 L. T. 826; 26 T. L. R. 146; 54 Sol. Jo. 133; 5 Tax Cas. 472, H. L.

Annotation:—Consd. Sugden v. Leeds Corpn., [1914] A. C. 483.

395. Annuities—Paid out of dividends taxed at the source.]—Re SHARP, RICKETT v. RICKETT, No. 348, ante.

396. ———.]—HANCOCK v. GENERAL REVERSIONARY & INVESTMENT CO., LTD., No. 260, ante.

397. ——— Interest on loans charged on corporation's undertakings—Separate loans on separate undertakings—Construction of local Acts.]—A person assessed to income tax can retain the tax which he has deducted from the interest paid to a creditor only if the interest is effectively charged upon & is lawfully payable out of the taxable income.

Resps. were a municipal corpn. under the Municipal Corporations Act, 1882 (c. 18), & in accordance with the provisions of that statute they provided a "borough fund" in aid of which they were empowered to make a "borough rate." They were also an urban sanitary authority, & their expenses as such were payable out of a "consolidated fund" maintained by a "consolidated rate" levied under statutory authority, but not upon the same basis as the borough rate. As a municipal corpn. they were the owners of certain undertakings in respect of which they had received loans, the interest on which was charged on the proceeds of the undertakings, which were paid into the borough fund, & they paid income tax on such receipts. As a sanitary authority they were the owners of other undertakings, the proceeds of which were paid into the consolidated fund in a similar manner. The proceeds of these latter undertakings were not sufficient to pay the interest due on the loans raised in respect of them, & resps. transferred a sum from the borough fund to meet the deficiency:—**Held:** as it was not lawful to pay such charges out of that fund, resps. were bound to account for the income tax which they had deducted from the interest or dividends so paid & their position was not affected by the provisions of the Leeds Corporation (General Powers) Act, 1901.—SUGDEN v. LEEDS CORPN., [1914] A. C. 483; 83 L. J. K. B. 840; 108 L. T. 578; 77 J. P. 225; 29 T. L. R. 402; 57 Sol. Jo. 425; 11 L. G. R. 662; 6 Tax Cas. 211, H. L.; *reversg.* S. O. *sub nom.* LEEDS CORPN. v. SUGDEN (1911), 105 L. T. 489, C. A.

Annotations:—Reid. Coman v. Rotunda Hospital, Dublin, [1921] 1 A. C. 1. **Mentd.** Wakefield R. D. C. v. Hall (1912), 6 Tax Cas. 181; Massy v. I. R. Comrs. (1915), [1919] 2 K. B. 354, n.

SUB-SECT. 4.—AGREEMENT OR DIRECTION TO PAY FREE OF TAX.

A. In Instruments inter vivos.

See Rules applicable to all Schedules, r. 23.

398. Direction or covenant for payment without deduction.]—A.-G. v. SHIELD, No. 340, ante.

that they had been assessed under Schedule A. for the full annual value of the subjects:—**Held:** the tax deducted by the comrs. from the interest was a tax on the lenders & there was no reason why the comrs. should retain it or receive an abate-

ment from the assessment under Schedule A.—ABERDEENSHIRE SUPPLY COMRS. v. RUSSELL (1890), 17 R. (Ct. of Sess.) 942.—SCOT.

PART V. SECT. 4, SUB-SECT. 4.—A. 402. Direction or covenant for pay-

399. ——— Extent of avoidance.]—A distinct covenant in a lease, whereby the tenant bound himself to pay the property tax, & all other taxes imposed on the premises, or on the landlord in respect thereof, though void & illegal by 46 Geo. 3, c. 65, s. 115, will not avoid a separate covenant in the lease for payment of rent clear of all Parliamentary taxes, etc., generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray.—GASKELL v. KING (1809), 11 East, 165; 108 E. R. 967.

Annotations:—Folld. Wigg v. Shuttleworth (1810), 13 East, 87; Fuller v. Abbott (1811), 4 Taunt. 105. **Mentd.** Pickering v. Ilfracombe Ry. (1868), L. R. 3 C. P. 235.

400. ——— Separate covenant to pay tax—Principal & interest.]—Deft. having covenanted in an indenture to pay pltf. £300 at the end of twelve months, & in the meantime & until payment thereof, to pay interest for it at 5 per cent. it is no answer to an action of debt for the £300 & interest accrued thereon, to plead that by the same indenture it was amongst other things covenanted, that deft. should pay the property tax, payable for & in respect of the £300; for the plea does not show that the covenant for the payment of the property tax attached on the interest payable for the £300 principal; & the covenants as there exhibited appear to be independent; & therefore, though the latter should be void by 46 Geo. 3, c. 65, s. 115, avoiding all contracts, covenants, etc., for the payment of any interest, etc., in full, without allowing the deduction of the tax as directed by the Act; yet that would not avoid the other independent covenant in the deed for the payment of the £300 & interest.—WIGG v. SHUTTLEWORTH (1810), 13 East, 87; 104 E. R. 300.

401. ———.]—Where deft., by indenture made since the passing of 46 Geo. 3, c. 65, demised to H. certain premises, *reddendum* £40 annually, clear of land tax, property tax, etc., & H. covenanted to pay the yearly rent in the manner the same was reserved to be paid as aforesaid, & to pay the land tax, property tax, etc.:—**Held:** by sect. 115, coupled with sect. 195 of the Act, so much of the *reddendum* & covenant as stipulated for payment of the rent clear of deduction on account of property tax was void, but the residue was good for payment of the rent, subject to such deduction; & therefore pltf., who had paid a deposit as purchaser of the rent was not entitled, on the above ground of objection, to recover back his deposit from deft., who had engaged to make a good assignment to the rent.—FULLER v. ABBOTT (1811), 4 Taunt. 105; 128 E. R. 268.

Annotations:—Apld. Tinckler v. Prentice (1812), 4 Taunt. 549. **Consd.** Festing v. Taylor (1862), 3 B. & S. 218.

402. ——— Annuity.]—A covenant in an annuity deed, made prior to 46 Geo. 3, c. 65, s. 115 [which statute has a retrospective operation] whereby the grantor of the annuity covenanted to pay the same on the days & times, etc., without any deduction whatever out of the same, or any part thereof, for or in respect of the present or any future property tax, is void in respect of its obligation on the grantor not to deduct the property tax, but not in respect of the payment of the annuity, subject to such deduction.—READSHAW v. BALDERS (1811), 4 Taunt. 57; 128 E. R. 248.

Annotations:—Consd. Fuller v. Abbott (1811), 4 Taunt. 105. Apld. Tinckler v. Prentice (1812), 4 Taunt. 549.

ment without deduction—Extent of avoidance—Annuity.]—An obligation for payment "of a free liferent annuity, exempted from all burdens & deduction whatever," assuming it to import an obligation to pay the annuitant without deduction of income tax, is void

403. — — —.]—A deed granting an annuity within the time included by relation back in 46 Geo. 3, c. 65, reciting the agreement for the purchase at a certain price of a certain annuity free from the property or income tax, & covenanting for the payment of it without any deduction in respect of the property or income tax, or other Parliamentary taxes, etc., is not void *in toto*, but only to the extent of such disallowance.—*HOWE v. SYNGE* (1812), 15 East, 439; 104 E. R. 910.

Annotation.—*Reid. Festing v. Taylor* (1862), 3 B. & S. 218.

404. — — —.]—(1) In debt for rent, the tenant may plead, as to part that he has paid landlord's property tax to that amount, in respect of the rent due to pltf. claimed by the declaration, after he has in fact paid the tax.

(2) A lease rendering rent clear of landlord's property tax is good as a lease rendering the same rent subject to a deduction thereout of the property tax.—*TINCKLER v. PRENTICE* (1812), 4 Taunt. 549; 128 E. R. 445.

Annotations.—*As to* (1) *Apprvd. North London & General Property Co. v. Moy*, [1918] 2 K. B. 439. *As to* (2) *Consd. Festing v. Taylor* (1862), 3 B. & S. 218. *Generally, Mentd. Startup v. Macdonald* (1843), 6 Man. & G. 593.

See, further, LANDLORD & TENANT.

405. — — — Jointure.]—By a marriage settlement made in 1810 certain hereditaments were limited to the use that intended wife might, upon the decease of the husband, receive a jointure rentcharge in lieu & bar of dower, thirds & freebench; the rentcharge was to be payable without any deduction in respect of any taxes already imposed, or thereafter to be imposed upon the hereditaments, or the yearly rentcharge, or the intended wife in respect thereof.—*Held*: assuming the terms of the deed to amount to an express provision that the jointure should be paid free of income tax, which it would seem they did, still the income tax must be paid by the jointress, 5 & 6 Vict. c. 105, s. 103, prohibiting any contract to that effect.—*FLOYER v. BANKES* (1863), 2 New Rep. 7; 32 L. J. Ch. 610; 8 L. T. 483; 9 Jur. N. S. 684; 11 W. R. 630; *reversd.* on other grounds, 3 De G. J. & Sm. 306, L. C.

Annotations.—*Distd. Brooke v. Price*, [1916] 2 Ch. 345. *Reid. Gleadow v. Leatham* (1882), 52 L. J. Ch. 102. *Mentd. Fryer v. Morland* (1876), 3 Ch. D. 675; *A.-G. v. Wolverton*, [1896] 2 Q. B. 389; *A.-G. for Ireland v. Rathdonnell*, [1896] W. N. 141; *Re Egmont's S. E.*, *Lefroy v. Egmont*, [1912] 1 Ch. 251; *A.-G. v. Sandwich*, [1922] 2 K. B. 500.

406. — — —.]—*ORD v. ORD*, No. 386, *ante*.

407. Construction of private Act.]—*Shrewsbury Estate Act*, 1843 (c. xxviii), s. 7, empowered any owner in possession of the settled estates by deed to appoint a jointure to his wife for life not exceeding the yearly sum of £3,000, "clear of all deductions whatsoever for taxes or otherwise," but by sects. 9, 10 the estates were not at any time to be subject to the payment of more than £6,000 in respect of three or more jointures, & there were complicated provisions as to the way the excess should be borne between a second & subsequent jointures, the subsequent jointures up to £1,000 being in this respect placed before the second jointure. By a jointure deed of July 20, 1910, the Earl of Shrewsbury exercised this power by appointing two jointures of £1,500 to Lady Shrewsbury, "clear of all deductions whatsoever for taxes or otherwise." On May 5, 1904, another

jointure of £1,000 had been appointed to the wife of the Earl's son & heir apparent under *Shrewsbury Estate Act*, 1862 (c. v), s. 33, which did not contain the words "clear of all deductions," etc. This became payable on the son's death on Jan. 8, 1915, but it was not suggested that it was free from income tax. The total amount of jointures now payable were under £6,000. The Earl died on May 17, 1921. The question then arose whether Lady Shrewsbury's jointures were payable free of income tax:—*Held*: on the authorities, having regard to the provisions of *Income Tax Acts*, & on the construction of the *Shrewsbury Estate Act*, 1843 (c. xxviii), applt. was entitled to have her jointures paid in full free from deduction of income tax.—*Re SHREWSBURY ESTATE ACTS, SHREWSBURY v. SHREWSBURY*, [1924] 1 Ch. 315; 93 L. J. Ch. 171; 130 L. T. 238; 40 T. L. R. 16; 68 Sol. Jo. 79, C. A.

408. Covenant to pay clear annual sum.]—By his marriage settlement the husband covenanted that if during the widowhood of his wife the income of his wife's trust fund in any year should not amount to the clear annual sum of £2,000 his exors. should in every such year pay to his widow such a sum as would make up the income to £2,000:—*Held*: the exors. were entitled to deduct income tax on the amount by which the income of the wife's trust fund fell short of £2,000.—*Re COOPER'S ESTATE* (1911), 55 Sol. Jo. 522.

409. — — — Proportion of net annual income with fixed minimum—Annual income already taxed.]—Pltf. was formerly the wife of deft., but the marriage was dissolved at the instance of deft., who was given the custody of the only child of the marriage. Upon an application by deft., for a settlement the parties agreed the terms of the order. By the settlement pltf. charged the income to which she was beneficially entitled, under her father's will, with the payments thereafter mentioned, & directed the trustees of the will during the joint lives of pltf. & deft. & the child, & whilst the latter should be under the age of twenty-one years, to pay to deft. an annual sum equal to one-fourth of her annual net income, after income tax on the whole income had been paid, or if one fourth part of the said annual net income should be less than £2,500 (which event happened) then the clear annual sum of £2,500, without deducting income tax therefrom out of such annual net income, for the maintenance of himself & the child. Income tax on the whole of the income to which pltf. was entitled under her father's will had been deducted at the source or paid by the trustees of the will. Pltf. claimed that the provision for payment of the clear annual sum of £2,500 to deft. without deduction of income tax was void under *Income Tax Act*, 1842 (c. 35), ss. 102, 103, & she was entitled to deduct income tax therefrom:—*Held*: the settlement took effect according to its terms & was not affected by sects. 102 & 103.—*BROOKE v. PRICE*, [1917] A. C. 115; 86 L. J. Ch. 329; 116 L. T. 452; 61 Sol. Jo. 334, H. L.

Annotations.—*Distd. Re Shaw, Smith v. Shaw*, [1918] P. 47; *Re Cain's Settlement, Cain v. Cain*, [1919] 2 Ch. 364; *Re Peck's Settlement, Peck v. Hamilton*, [1921] 2 Ch. 237; *Burroughes v. Abbott*, [1922] 1 Ch. 86. *Consd. Booth v. Booth*, [1922] 1 K. B. 66. *Distd. Re Gretton's Indenture, Re Ratcliffe & Brinkman's Trusts, Hood v. Byron*, [1923] 1 Ch. 77; *Re Portman, Portman v. Portman*, [1924] 2 Ch. 6. *Reid. Harper v. Hedges*, [1923] 2 K. B. 314.

under *Income Tax Act*, 1842 (c. 35), s. 103.—*BLAIR v. ALLEN* (1868), 21 Durl. (Ct. of Sess.) 15; 31 Sc. Jur. 1. —*SCOT*.

Necessity for express words.]—*As*

between fixed preference & ordinary shareholders in a joint stock co. the former are not entitled to have their dividends paid free of income tax unless there are express words to that effect in the contract regulating the

rights of the parties.—*PURSHOTTAM-DAS HARKISONDAS v. CENTRAL INDIA SPINNING, WEAVING & MANUFACTURING CO., LTD.* (1917), 1 L. R. 42 Bom. 579.—

Sect. 4.—Case III.—Profits of uncertain value, interest on money yearly or otherwise; annuities, discounts, etc.: Sub-sect. 4, A. & B. Sect. 5.—Case IV.]

410. Settlement in pursuance of order of court.]—By a deed of settlement made in pursuance of an order of the Divorce Div. freehold property & stocks sufficient to produce an annuity of £175 clear of income tax were settled by P. upon his wife, pltf., & the trustees of the settlement were directed to pay this annuity to pltf., clear of income tax, out of the net rents & profits of the settled property. By a supplemental deed P. further covenanted for himself & his exors., etc., to make good any deficiency in the annuity. The income from the settled property became insufficient to provide the annuity, & the deficiency was made good by P., but on his death his extrix. declined to make it good. Upon a summons by pltf. for a declaration of her rights under the settlement:—*Held*: the settlement to pay the annuity clear of income tax as well as the covenant by P. to make up any deficiency, so far as it related to the tax, fell within the mischief of the Income Tax Act, 1842 (c. 35), s. 103, & 1919 Act, & were void & unenforceable.—*Re PECK'S SETTLEMENT, PECK v. HAMILTON*, [1921] 2 Ch. 237; 90 L. J. Ch. 491; 125 L. T. 756; 65 Sol. Jo. 735.

Annotations:—Consd. Booth v. Booth, [1922] 1 K. B. 66. *Folld. Burroughes v. Abbott*, [1922] 1 Ch. 86; *Re Gretton's Indenture, Re Ratcliff & Brinckman's Trusts, Hood v. Byron*, [1923] 1 Ch. 77. *Distd. Re Gordon's Settlement, Hunt v. Mortimer*, [1924] 1 Ch. 146.

— **Deed of covenant in pursuance of order of Divorce Court—Alimony or permanent maintenance.]—***See Nos. 355, 356, 358, 362, ante.*

411. — In place of gift by will free of tax.]—A deed of compromise, made in 1883, whereby an annuitant agreed to take an annuity of £5,000 clear of legacy duty, income tax & all other duties whatsoever in lieu & satisfaction of an annuity of £6,000 bequeathed to her by will free of legacy duty income tax & all other duties, & also agreed for the ensuing period of five years to waive & release the right given to her by the will to call upon the trustees thereof to purchase such an annuity in her name, does not offend the provisions of Income Tax Act, 1842 (c. 35), s. 103, now replaced by Rules applicable to all Schedules, r. 23 (2); but where the deed went on to empower, which power was duly exercised, the residuary legatees & next of kin within five years thereafter to purchase or transfer into the names of other trustees, to be then chosen, a sum of govt. stock sufficient to provide by the interest or dividends thereof the annuity of £5,000, & the tax & duties thereon up to a total of £5,300 *per annum*, to be held by the trustees in trust in the first place to pay the annuity tax & duties & subject thereto as part of the residuary estate of the testator, & to provide that on such purchase or transfer the right of the annuitant to call upon the trustees of the will to purchase an annuity was to cease & determine, & that such right should, on request, be released by the annuitant, & that after such purchase or transfer the annuity of £5,000, & the tax & duties thereon should be payable exclusively out of the income of the fund so purchased or transferred, & in case of deficiency out of the capital, the remainder of testator's estate being absolutely released & exonerated from the annuity & all claims & demands in relation thereto:—*Held*: the effect of the later provisions of the deed, when resorted to, was to secure to the annuitant an annuity no longer derived under the will alone, but depending upon an agreement

which was in direct violation of Income Tax Act, 1842 (c. 35), s. 103, & was therefore void & the annuitant was not entitled to have the annuity of £5,000, paid to her free of either ordinary income tax or super tax.—*Re GRETTON'S INDENTURE, Re RATCLIFF & BRINCKMAN'S TRUSTS, HOOD v. BYRON (LADY)*, [1923] 1 Ch. 77; 92 L. J. Ch. 49; 127 L. T. 817; 67 Sol. Jo. 47.

Annotation:—Distd. Re Gordon's Settlement, Hunt v. Mortimer, [1924] 1 Ch. 146.

412. — Appropriation of particular fund in exoneration of residuary estate.]—*Re GRETTON'S INDENTURE, Re RATCLIFF & BRINCKMAN'S TRUSTS, HOOD v. BYRON (LADY)*, No. 411, *ante*.

413. — Terms made rule of court—Payment under order of court distinguished.]—An action in the Probate Div. for proof of a will in solemn form was compromised at the hearing on terms signed by all the parties which provided that the will should be proved, deft. to be paid £300 *per annum* during his life out of the estate as from date of death, payable half-yearly; that the costs should be provided for & "these terms to be filed & made a rule of Ct." The judge thereupon made a decree by which he found for the validity of the will & directed that the terms of compromise should be filed & made a rule of Ct. On an application by deft. for a declaration that the administratrix was not entitled to deduct income tax from the half-yearly payments of the annuity:—*Held*: (1) the £300 *per annum* was not a sum payable under an order of the ct. but was an annuity charged upon the estate by virtue of a contract & as such was chargeable to income tax under Income Tax Act, 1842 (c. 35), s. 102; (2) the administratrix was entitled under Income Tax Act, 1853 (c. 34), s. 41, to deduct & retain the income tax which became payable on the half-yearly payments.

(3) Orders of the Divorce Div. directing payment of alimony or permanent maintenance free of income tax are not within Income Tax Act, 1842 (c. 35), s. 103, therefore the practice with regard to them has no right application to cases where the payments are made in pursuance of contracts.—*Re SHAW, SMITH v. SHAW*, [1918] P. 47; 87 L. J. P. 49; 118 L. T. 334, C. A.

Annotations:—As to (1) Folld. Croft v. Croft (1922), 38 T. L. R. 648. *Refd. Burroughes v. Abbott*, [1922] 1 Ch. 86; *Smith v. Smith*, [1923] P. 191.

414. — — — — —.]—A wife's suit for judicial separation was settled at the hearing upon terms signed by the parties, which provided (*inter alia*) that resp. should pay petitioner £1,500 a year by monthly instalments during their joint lives, & that these terms should be made a rule of ct. Thereupon the ct. ordered that the petition be dismissed & the terms be filed & made a rule of ct. On a summons by the wife for a declaration that the husband was not entitled to deduct income tax from the payments of the allowance:—*Held*: the allowance was payable by virtue of a contract & not under an order of the ct., & the husband was entitled to deduct the income tax payable upon the allowance.—*CROFT v. CROFT* (1922), 38 T. L. R. 648.

415. — Orders of Divorce Division for payment of alimony or maintenance distinguished.]—*Re SHAW, SMITH v. SHAW*, No. 413, *ante*.

See, generally, Sub-sect. 2, D., ante.

416. — After deduction of tax.]—*BOOTH v. BOOTH*, No. 365, *ante*.

What amounts to direction or covenant to pay free of tax.]—*See, generally, RENTCHARGES & ANNUITIES; SETTLEMENTS.*

417. Covenant to repay sums deducted.]—By a deed of settlement, the settlor transferred certain

stocks into the names of trustees upon trust to pay the income thereof to his wife during her life. By clause 5 of the settlement, the settlor covenanted with the trustees that he would, at the expiration of every year, pay to them all such sums as might have been deducted in respect of income tax on payment of interest or dividends on the trust fund during the preceding year, the amount so received by the trustees from the settlor to be paid by them to his wife as income arising from the trust fund:—*Held*: inasmuch as the settlor was entitled to deduct income tax from the amounts he covenanted to pay to the trustees, & the wife suffered the deduction for a year, she never in fact received the income of the trust fund in full, & consequently the covenant in clause 5 did not fall within Income Tax Act, 1842 (c. 35), s. 103, or Rules applicable to all Schedules, r. 23 (2), & was, therefore, valid.—*Re GORDON'S SETTLEMENT, HUNT v. MORTIMER*, [1924] 1 Ch. 146; 93 L. J. Ch. 187; 130 L. T. 502; 68 Sol. Jo. 323.

B. In Wills.

See Rules applicable to all Schedules, r. 23.

418. Whether valid.—There is nothing illegal in a direction by will that certain persons having control over the property shall defray all the taxes, & it is a provision capable of being carried out (*KINDERSLEY, V.-C.*).—*LOVAT (LORD) v. LEEDS (DUCHESS)* (No. 1) (1862), 2 Drew. & Sm. 62; 31 L. J. Ch. 503; 6 L. T. 307; 10 W. R. 397; 62 E. R. 545.

Annotations:—*Appld. Re Bannerman's Estate, Bannerman v. Young* (1882), 21 Ch. D. 105. *Apprvd. Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315. *Reid. Floyer v. Bankes* (1863), 2 New Rep. 7; *Abadam v. Abadam* (1864), 10 L. T. 53; *Gleadow v. Leatham* (1882), 22 Ch. D. 269; *Pearoth v. Marriott* (1882), 22 Ch. D. 182; *Re Crosse, Oldham v. Crosse*, [1920] 1 Ch. 240.

419. — Devise of rentcharge.—If testator by his will grant a rentcharge to be paid free of income tax, the annuitant will be entitled to have the full amount paid him without the tax being deducted.

Income Tax Act, 1843 (c. 35), s. 103, which renders void all contracts to pay rentcharges without allowing the owner of the land to deduct the

income tax, does not extend to rentcharges granted by will.—*FESTING v. TAYLOR* (1862), 3 B. & S. 235; 1 New Rep. 32; 32 L. J. Q. B. 41; 7 L. T. 429; 27 J. P. 281; 9 Jur. N. S. 44; 11 W. R. 70; 122 E. R. 89, Ex. Ch.

Annotations:—*Consd. Lovat v. Leeds* (No. 1) (1862), 2 Drew. & Sm. 62. *Distd. Floyer v. Bankes* (1863), 2 New Rep. 7; *Abadam v. Abadam* (1864), 33 L. J. Ch. 593. *Consd. Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315. *Reid. Gleadow v. Leatham* (1882), 22 Ch. D. 269.

420. Effect of subsequent agreement.—*Re GRETTON'S INDENTURE, Re RATCLIFF & BRINCKMAN'S TRUSTS, HOOD v. BYRON (LADY)*, No. 411, *ante*.

What amounts to devise or bequest free of tax.—*See, generally, RENTCHARGES & ANNUITIES; WILLS.*

421. Right of trustees to recover former payments—Mistake of construction & mistake of law distinguished.—*Re MUSGRAVE, MACHELL v. PARRY*, No. 388, *ante*.

SECT. 5.—CASE IV.—INCOME ARISING FROM SECURITIES OUT OF THE UNITED KINGDOM.

See Schedule D., Case IV. & Miscellaneous Rules applicable to Schedule D., r. 7; 1924 Act, s. 27.

422. Application of Case—Confined to dividends actually remitted to United Kingdom.—Interest arising from foreign securities & paid abroad is not "received in the United Kingdom" within Income Tax Act, 1842 (c. 35), s. 100, Schedule D., Case IV., & is therefore not chargeable with income tax under that clause, unless it is remitted to the United Kingdom.

A life assurance society carried on business at home & abroad, the head office being in London, where the accounts & balance sheets were made up, the profits ascertained & the dividends paid. The interest upon the society's foreign securities paid abroad was received there by their agents, & part of it was applied abroad for the purposes of the society. All the interest on foreign securities was taken into account in the balance-sheets upon which the profits were ascertained:—*Held*: taking the interest into account was not equivalent to a

PART V. SECT. 4, SUB-SECT. 4.—B.

418 i. Whether valid.—Testator left to his wife an annuity "free from all burdens taxes & deductions whatsoever" & declared to it be in full of all her legal rights:—*Held*: she was entitled to the annuity without deduction of income tax.—*MACKIE'S TRUSTEES v. MACKIE, ETC.* (1875), 2 R. (Ct. of Sess.) 312; 12 Sc. L. R. 222.—*SCOT*.

418 ii. ——Testator directed his trustees to hold the whole of the free residue of his estate for behoof of his wife in life " & to pay to her the free revenue & proceeds thereof." By a codicil he directed that "in the event of the income of the free residue of my estate which is to be paid to my wife exceeding in any year the sum of £2,000 my trustees shall restrict the payment to my wife out of the said income to the sum of £2,000 per annum." The annual income of the trust estate after deduction of all outlays including income tax always largely exceeded the sum of £2,000:—*Held*: the widow was entitled to an annual payment of £2,000 free from any deduction on account of income tax.—*MURDOCH v. MURDOCH*, [1918] S. C. 738.—*SCOT*.

418 iii. ——Testator directed his trustees to pay out of the "net annual proceeds" of one half of the residue of his estate the sum of £750 yearly to his niece for her life for alimentary

use:—*Held*: the niece was entitled to an annual payment of the sum of £750, without any deduction on account of income tax.—*SMITH'S TRUSTEES v. GAYDON*, [1919] S. C. 95; 56 Sc. L. R. 92.—*SCOT*.

418 iv. ——Testator left his whole estate to trustees in trust "to pay to my wife the free yearly income thereof up to if possible the sum of £600 per annum as an alimentary provision to cover all rent rates & taxes, any remaining annual income from the estate above £600 to be paid (falling my leaving any lawful issue) to or for the benefit of my nephews & nieces." The free annual income exceeded £600:—*Held*: the £600 fell to be paid to the widow subject to, & not free of, income tax.—*WILSON'S TRUSTEES v. WILSON*, [1919] S. C. 359.—*SCOT*.

m. What amounts to devise or bequest free of tax.—A widow to whom her husband has bequeathed an annuity "exempted from all burdens & deductions whatsoever" is only entitled to payment of her annuity, less income tax, that tax not being "a burden" or "deduction" intended by testator to be borne by the trust estate.—*KINLOCH'S TRUSTEES v. KINLOCH* (1880), 7 R. (Ct. of Sess.) 596; 17 Sc. L. R. 444.—*SCOT*.

n. Annuity accepted by widow in full satisfaction of rights.—A husband directed his trustees to pay his wife if she survived him "a yearly annuity

of £1,200 & he further provided that if she accepted this annuity it should be in full satisfaction of all her rights, legal & conventional. The wife survived & accepted the annuity:—*Held*: it was unnecessary to decide whether the bequest of a free annuity was equivalent to the bequest of an annuity free of income tax, as if it were, the widow, by accepting the annuity as in her legal right, had entered into an agreement of the nature struck at by Income Tax Act, 1842 (c. 35), s. 103.—*RODGER'S TRUSTEES v. RODGER* (1875), 2 R. (Ct. of Sess.) 294; 12 Sc. L. R. 204.—*SCOT*.

PART V. SECT. 5.

422 i. Application of Case—Confined to dividends actually remitted to United Kingdom.—A co. formed for the purpose of borrowing money in this country & investing it abroad at higher rates of interest is chargeable for the interest received under the Case 4 of Schedule D. on the full amounts remitted to this country.—*SCOTTISH MORTGAGE CO. OF NEW MEXICO v. MCKELVIE* (1886), 2 Tax Cas. 165.—*SCOT*.

422 ii. ——*Held*: interest received abroad & invested or applied abroad is not "received" in the United Kingdom within the meaning of Case 4 of Schedule D.—*STANDARD LIFE ASSURANCE CO. v. ALLAN (SUR-*

under the Income Tax Acts & Finance Act, 1914 (c. 10), s. 5, in respect of the dividends arising from those shares is to be computed on the average of the three preceding years.—*SINGER v. WILLIAMS*, [1921] 1 A. C. 41; 89 L. J. K. B. 1218; 123 L. T. 625; 36 T. L. R. 659; 64 Sol. Jo. 569; 7 Tax Cas. 419, H. L.

Annotation:—*Consd. Bradbury v. English Sewing Cotton Co.*, [1923] A. C. 744.

431. Assessment—Person intrusted with payment in the United Kingdom—No actual receipt by agency of dividends from abroad—Payment by agency out of its own profits.]—The Imperial Ottoman Bank, a foreign corp., have an agency in London, carrying on their business of banking & earning profits there. The English profits in the hands of the London agency being in excess of the amount required for the payment of the dividends of those shareholders who resided in England, no remittance from abroad out of foreign profits was made towards their payment. The London agency was assessed to & paid income tax on the English profits for that year, as returned by them under Schedule D. upon an average of the preceding three years, such average being less than the amount of English profits actually earned in the year. They made a return also in respect of dividends, "that there were no interest, dividends or other annual payments payable out of or in respect of the stocks, funds, or shares of the bank, & within the meaning of Income Tax Act, 1853 (c. 34), s. 10, "intrusted" to them for payment to persons in the United Kingdom." The comrs. having made an assessment upon the whole amount of dividends so paid:—*Held*: the London agency of the Imperial Ottoman Bank were persons "intrusted," under Income Tax Act, 1853 (c. 34), s. 10, with the payment of the dividends on the shares presented in London, & therefore must, under that sect., make a return of the whole amount of such dividends; but as such dividends were paid partly out of the English profits of the bank, which had already paid income tax under Schedule D., the bank were entitled to a deduction representing the proportion of the dividends paid in England which was attributable to English-made profits.—*GILBERTSON v. FERGUSON* (1881), 7 Q. B. D. 562; 46 L. T. 10; 1 Tax Cas. 501, C. A.

Annotations:—*Distd. Erichsen v. Last* (1881), 7 Q. B. D. 12. *Refd. I. R. Comrs. v. Roberts* (1925), 41 T. L. R. 623.

— **Whether under Case I. or IV.—At option of Crown—Insurance companies.]—***See* Nos. 305, 306, *ante*.

See, now, Schedule D., Miscellaneous Rules applicable to Schedule D., r. 7.

432. Deductions—Profits partly earned abroad—Deduction of tax already paid on profits earned in United Kingdom.]—*GILBERTSON v. FERGUSON*, No. 431, *ante*.

See, now, Case IV., Rules applicable to Case IV., r. 1.

SECT. 6.—CASE V.—INCOME ARISING FROM POSSESSIONS OUT OF THE UNITED KINGDOM.

See Schedule D., Rules; 1924 Act, s. 26.

433. Application of case—Foreign possessions—All property that may be source of income.]—

the head office in 1908:—*Held*: the sums realised on the sale of the bonds being sums "received in Great Britain" in respect of interest on foreign secur-

PRO-INSTITUTION v. INLAND
[1918] S. C. 452.—SCOT.

(1) The word "possessions" in the fifth case to Sched. D. of Income Tax Act, 1842 (c. 35), s. 100, includes a trade or business. Consequently, a resident in the United Kingdom who derives profit from a trade or business carried on out of the United Kingdom is assessable to income tax in respect thereof upon so much only of the profits as are received by him in the United Kingdom.

(2) The "first case" in Income Tax Act, 1842 (c. 35), s. 100, does not apply to a trade carried on exclusively abroad. The profits of such a business fall within the "fifth case."—*COLQUHOUN v. BROOKS* (1889), 14 App. Cas. 493; 59 L. J. Q. B. 53; 61 L. T. 518; 54 J. P. 277; 38 W. R. 289; 5 T. L. R. 728; 2 Tax Cas. 490, H. L.

Annotations:—*As to* (1) *Distd. London Bank of Mexico & South America v. Apthorpe*, [1891] 2 Q. B. 378. *Appld. Bartholomay Brewing Co. (of Rochester) v. Wyatt*, Nobel Dynamite Trust Co. v. Wyatt, [1893] 2 Q. B. 499. *Distd. San Paulo (Brazilian) Ry. v. Carter*, [1896] A. C. 31. *Appld. Singer v. Williams*, [1921] 1 A. C. 41; *Foulsham v. Pickles*, [1925] A. C. 458. *Consd. Alianza Co. v. I. R. Comrs.*, [1925] A. C. 644. *Refd. Apthorpe v. Schoenhofen Brewing Co.* (1899), 80 L. T. 395; *De Beers Consolidated Mines v. Howe* (1905), 21 T. L. R. 460; *Gramophone & Typewriter v. Stanley*, [1908] 2 K. B. 89; *American Thread Co. v. Joyce* (1912), 106 L. T. 171; *Drummond v. Collins*, [1915] A. C. 1011; *Brooke v. I. R. Comrs.*, [1918] 1 K. B. 257; *Greenwood v. Smidth* (1921), 91 L. J. K. B. 349; *I. R. Comrs. v. Sansom*, [1921] 2 K. B. 492; *Williams v. Singer*, *Pool v. Royal Exchange Assce.*, [1921] 1 A. C. 65; *Swedish Central Ry. v. Thompson*, [1925] A. C. 495; *Whelan v. Henning*, [1925] 1 K. B. 387; *Whitney v. I. R. Comrs.* (1925), 42 T. L. R. 58. *As to* (2) *Appld. Mitchell v. Egyptian Hotels*, [1915] A. C. 1022. *Refd. R. v. Clerkenwell General Taxes Comrs.*, [1901] 2 K. B. 879; *Kodak v. Clark* (1903), 4 Tax Cas. 549; *Liverpool & London & Globe Insee. v. Bennett*, *Brice v. Ocean Accident & Guarantee Corp.*, *Brice v. Northern Assce.* (1912), 6 Tax Cas. 327; *Kensington Income Tax Comrs. v. Aramayo*, [1916] 1 A. C. 215. *Bradbury v. English Sewing Cotton Co.* (1923), 8 Tax Cas. 481. *Generally, Mentd. L. C. C. v. A.-G.*, [1901] A. C. 26; *Garbutt v. Durham Joint Committee*, [1904] 2 K. B. 514; *Lowe v. Dorling*, [1906] 2 K. B. 772; *Wankie Colliery Co. v. I. R. Comrs.*, [1921] 3 K. B. 344.

434. ——— Trade or business included.]—*COLQUHOUN v. BROOKS*, No. 433, *ante*.

435. ——— Trade or business carried on exclusively abroad.]—*COLQUHOUN v. BROOKS*, No. 433, *ante*.

436. ——— Profits of foreign branch—Part not remitted to England.]—*LONDON BANK OF MEXICO & SOUTH AMERICA v. APTHORPE*, No. 141, *ante*.

437. ——— Shares in foreign trading company—Owned by English company—Foreign company subsidiary of English company.]—(1) An English limited co., registered under Cos. Acts, & having an office in London, was formed to acquire certain brewing businesses in New York State, in the United States of America. By a law of that State an English co. is prohibited from owning & carrying on a brewery there, & the English co. thereupon arranged for the formation of an American co., with share capital, & having seven trustees appointed to manage, in the interests of the English co., the businesses in America. All the shares in the American co., except seven, of which each of the trustees held one as a qualifying share, were held by & in the name of the English co. The brewing trade, on which the profits wholly depended, was carried on exclusively at the city of Rochester in New York State. At the end of each financial year the trustees of the American co. sent the English co. the accounts of the breweries at Rochester for the year, & the

PART V. SECT. 6.

*p. Application of case—Foreign possessions—All property that may be source of income.]—**Appld. had kept for a number of years at a Trieste Bank a banking account in his own name as*

an individual, & from time to time had received in the United Kingdom remittances from that account, the credits to which consisted mainly of interest on investments. On the information available *applt.* had been assessed to income tax under Case V.

Sect. 6.—Case V.—Income arising from possessions out of the United Kingdom. Sect. 7.—Case VI.]

directors of the English co., having agreed upon the amount to be distributed out of the profits, informed the American co. of the rate of dividend which the directors thought should be declared by that co. on their shares. On hearing that the American co. had declared a dividend the directors declared a dividend of a similar value upon the shares in the English co. No dividend warrant was issued by the American co., but the amount of profits to be divided on the shares held by the English co., so far as that amount was required for distribution among the shareholders of the English co., was sent over to the English co. in London, such portion of the dividend as was required for certain American shareholders in the English co. being retained by the American co., & distributed by them direct in America on behalf of the English co.:—*Held*: the profits of the English co. arose from "foreign possessions," so as to bring the case within Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Case V.; the portion of the profits retained in America for distribution among the American shareholders of the English co. was not received by that co. in England within the meaning of Case V.; the business on which the profits depended being wholly carried on abroad, the decision of the House of Lords in *Colquhoun v. Brooks*, No. 433, *ante*, applied, & therefore, the English co. were not liable to pay income tax upon the portion of the profits retained in America.

(2) In another case applt. co., an English limited co., registered under the Cos. Acts, & having an office in London, was formed to acquire, & did acquire, shares in various cos. or corpn.s., with limited liability, trading in explosives in England & in Germany. The affairs of the co. were managed & controlled wholly by its directors. It did not carry on any manufacturing business, nor sell any materials or goods, in the United Kingdom or elsewhere. In dividing any profits made the directors declared a dividend in London on all applt. co.'s shares, of which a large number were held by foreigners living in Germany. The dividends due to the applt. co. in respect of its shares in the German cos. were, at the request of the directors, paid by those cos. into banks abroad, & applied in paying the dividend, when declared, to the foreign shareholders of applt. co.:—*Held*: this case also was brought within the decision of the House of Lords in *Colquhoun v. Brooks*, No. 433, *ante*, & applt. co. was not liable to pay income tax on the profits paid by way of dividend to the foreign shareholders of that co. in Germany.—*BARTHOLOMAY BREWING CO. (OF ROCHESTER) v. WYATT, NOBEL DYNAMITE TRUST CO. v. WYATT*, [1893] 2 Q. B. 499; 62 L. J. Q. B. 525; 69 L. T. 561; 58 J. P. 133; 42 W. R. 173; 9 T. L. R. 658; 37 Sol. Jo. 717; 5 R. 564; 3 Tax Cas. 213, 224, D. C.

Annotations:—As to (1) *N.F. St. Louis Breweries v. Apthorpe* (1898), 79 L. T. 551. *Consol. Kodak v. Clark*, [1902] 2 K. B. 450. *Reid. Denver Hotel Co. v. Andrews* (1894), 11 T. L. R. 85; *Apthorpe v. Schoenhofen Brewing Co.* (1898), 79 L. T. 98; *Gresham Life Assce. Soc. v. Bishop* (1900), 70 L. J. Q. B. 298; *I. R. Comrs. v. Sansom*, [1921] 2 K. B. 492; *Singer v. Williams*, [1921] 1 A. C. 41.

of Schedule D. An appeal was lodged against these assessments & thereupon the General Comrs. requested applt. by precept to furnish certain further information. The applt. did not comply with this precept:—*Held*: as applt. had refused to disclose the facts necessary to establish his contentions, the evidence before the comrs. was

sufficient to support the conclusions of fact at which they had arrived & the ct. could not, therefore, question those findings.—*SCHULZE v. BENSTED (SURVEYOR OF TAXES)* (1922), 8 Tax Cas. 259.—*SCOT*.

q. ——— Trade or business included.]—Testamentary trustees were

438. ———.]—*WILLIAMS v. SINGER, POOL v. ROYAL EXCHANGE ASSURANCE*, No. 425, *ante*.

439. ——— Foreign railway owned by English company.]—*SAN PAULO (BRAZILIAN) RY. CO. v. CARTER*, No. 142, *ante*.

440. ——— Business carried on wholly abroad—Financial control by English board of management.]—*MITCHELL v. EGYPTIAN HOTELS, LTD.*, No. 139, *ante*.

441. ——— Remittance of income from foreign trust—Remittances in uncontrolled discretion of trustees.]—A foreigner resident abroad by his will gave his property, which was situate abroad, to trustees upon trust for the benefit of his deceased son's children, who were minors, for life, & their issue after them, there being a provision that the trustees should accumulate the income of the respective shares of the children & add the accumulations to capital until each child should attain the age of twenty-five years, when the child was to become entitled to a portion of the accumulated fund. The will contained a direction to the trustees "out of the net income of the proportionate share of the trust estate held in trust for any child" to make such provision from time to time as they in their uncontrolled discretion might think necessary or advisable for the suitable maintenance & education of such child. The trustees from time to time remitted to the mother of the children, who was their guardian, & who was residing with them in England, sums of money in accordance with the provisions of the will for the maintenance & education of the children:—*Held*: these remittances in the hands of the mother were assessable to income tax under Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Case V., as being moneys received in this country in respect of foreign possessions.—*DRUMMOND v. COLLINS*, [1915] A. C. 1011; 84 L. J. K. B. 1690; 113 L. T. 665; 31 T. L. R. 482; 59 Sol. Jo. 577; 6 Tax Cas. 525, H. L.

Annotations:—*Reid. R. v. Kensington Income Tax Comrs.*, *Ex p. de Polignac*, [1917] 1 K. B. 486. *Mentd. Wankie Colliery Co. v. I. R. Comrs.*, [1921] 3 K. B. 344; *I. R. Comrs. v. Blackwell*, [1924] 2 K. B. 351.

442. ———.]—Testator, who was a citizen of the United States, left his property to trustees in that country to be applied to the use of his daughter for life. The fund constituted under the will consisted of foreign govt. securities, stocks, & shares, & other foreign property. Appct. married testator's daughter, & the trustees paid the income to her in America. Appct. was assessed to income tax on this income under Schedule D.:—*Held*: (1) although the stocks & shares were not in law the possessions of appct.'s wife & she had only an equitable right to call upon the trustees to administer the estate, yet appct. was chargeable with tax under rule 1 of Rules applicable to Case V. of Sched. D., which applies to the income from foreign stocks, shares, or rents, whether the income is remitted to the United Kingdom or not; & (2) rule 2, as to foreign possessions other than stocks, shares, or rents, which requires the tax to be computed on the sum annually received in the United Kingdom, was not applicable.—*ARCHER-SHEE v. BAKER* (1926), 42 R. 367.

assessed for income tax under Case V. of Schedule D. on the full amount received by them in Great Britain of trade profits made in India. The trustees claimed deduction of the trust administration in Great Britain on the ground that the beneficiaries on whom the income tax fell could only receive the profits subject to this

“Securities” & “possessions” distinguished.]—*SINGER v. WILLIAMS*, No. 430, *ante*.

444. ———.] — *ARCHER-SHEE v. BAKER*, No. 442, *ante*.

445. ——— Profits already treated as profits of English company.]—An English co. held practically all the common stock in an American co. which it had formed. In 1915, 1916, & 1917 the American co. was managed & controlled from England, so that it was taxable, & taxed as resident in this country, upon its whole profits under Income Tax Act, 1842 (c. 35), s. 100, Sched. D., Case I. The English co. bore its share of taxation by deduction by the American co. from its dividends of a proportionate part of the tax. In 1917 the management & control of the American co. was transferred to America. The revenue authorities then assessed the English co., under Schedule D., Case V., upon the amount of the American dividends as profits received from a “foreign possession,” & claimed to treat the amount of dividends received from the American co. in the years 1915–1917 as being also profits received from a “foreign possession” in order to ascertain the three years’ average on which the assessment for the subsequent years under Case V. was to be founded:—*Held*: for the purposes of the Income Tax Acts the locality of the shares or stock of a co. was to be determined not by its place of incorporation or registration, but by its place of residence & trading, & consequently the dividends received by the English co. on the stock in the American co. during the years 1915–1917 ought not to be brought into average in computing the liability of the English co. to income tax in respect of foreign possessions under Schedule D., Case V., for the years 1918–1920.—*BRADBURY v. ENGLISH SEWING COTTON CO.*, [1923] A. C. 744; 92 L. J. K. B. 736; 129 L. T. 546; 39 T. L. R. 590; 67 Sol. Jo. 678; 8 Tax Cas. 481, H. L.
Annotation:—*Consd. Swedish Central Ry. v. Thompson*, [1925] A. C. 495.

See, also, No. 427, *ante*.

443. ——— Employment abroad under English company—Salary & commission paid into banking account in United Kingdom.]—*FOULSHAM v. PICKLES*, No. 131, *ante*.

447. Assessment—Whether limited to profits remitted from abroad.]—*BARTHOLOMAY BREWING CO. (OF ROCHESTER) v. WYATT*, *NOBEL DYNAMITE TRUST CO. v. WYATT*, No. 437, *ante*.

448. ——— Income of foreign trust.]—*ARCHER-SHEE v. BAKER*, No. 442, *ante*.

See, now, Schedule D., Rules applicable to Case V., r. 1.

——— Question of “residence.”]—*See* Sect. 2, sub-sect. 2, *ante*.

449. ——— Calculation of three years’ average—Seat of management of English company transferred abroad—Transfer during period of average.]—*BRADBURY v. ENGLISH SEWING COTTON CO.*, No. 445, *ante*.

450. ——— No income received during year of assessment—Income during period of average.]—Resp. was possessed of shares in a co. outside the United Kingdom, income from which was taxable

deduction:—*Held*: deductions could not be allowed as the trust administration was not an expenditure for trade purposes.—*INLAND REVENUE v. MACDONALD’S TRUSTEES* (1894), 22 R. (Ct. of Sess.) 88; 32 Sc. L. R. 85; 2 S. L. T. 317.—*SCOT*.

PART V. SECT. 7.

451. Application of case—Profits or gains—Profits from backing horses.]—

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Income Tax Assessment Act, 1915–1918, s. 14, provides that “the income of any person shall include . . . (h) a cash prize in a lottery,” & a special rate of taxation in respect of such income is imposed by Income Tax Act, 1919, s. 7:—*Held*: dividends received in respect of investments in a totalisator are not prizes in a lottery.—*AUTOMATIC TOTALISATORS v. FEDERAL COMRS.* (1920), 27 C. L. R. 513.—*AUS*.

under Schedule D., Rules applicable to Case V., as profits or gains from a foreign possession. In the year of assessment there was no such income, though there had been in the three previous years. Resp., however, was assessed on the sum of £3,424, being the average of the three preceding years. On appeal, the General Comrs. discharged that assessment, but stated a case:—*Held*: resp.’s liability did not depend on the possession of the shares in the year of assessment, but on the receipt of some profit therefrom in that year, & therefore the discharge of the assessment must be affirmed.—*WHELAN v. HENNING*, [1926] A. C. 293; 134 L. T. 513; 42 T. L. R. 259, H. L.; *affg.*, [1925] 1 K. B. 387, C. A.

Annotations:—*Consd. R. v. Swansea Income Tax Comrs., Ex p. English Crown Spelter Co.*, [1925] 2 K. B. 250. *Refd. Grainger v. Maxwell*, [1925] 2 K. B. 376.

——— Whether under Case I. or Case V.—At option of crown—Insurance companies.]—*See* No. 306, *ante*.

SECT. 7.—CASE VI.—PROFITS OR GAINS NOT OTHERWISE CHARGED.

See Schedule D., Rules applicable to Case VI.

451. Application of case—Analogy to other taxed sources of income.]—*A.-G. v. BLACK*, No. 100, *ante*.

452. ———.]—*SEVERN FISHERY BOARD v. O’MAY*, No. 112, *ante*.

453. ——— “Annual”—Accruing in any one year or in a succession of years.]—The directors of a limited co. were paid commission for personally guaranteeing the co.’s overdraft at the bank. The transactions were isolated transactions & the profits accordingly casual:—*Held*: the commissions received were “annual profits or gains” within the meaning of Schedule D., Case VI.

The word “annual” here can only mean “calculated in any one year” & “annual profits or gains” mean “profits or gains in any one year or in any year as the succession of years comes round (ROWLATT, J.).—*RYALL v. HOARE*, *RYALL v. HONEYWILL*, [1923] 2 K. B. 447; 92 L. J. K. B. 1010; 129 L. T. 505; 39 T. L. R. 475; 67 Sol. Jo. 750; 8 Tax Cas. 521.

Annotation:—*Consd. Graham v. Green*, [1925] 2 K. B. 37.

454. ——— Goods purchased & sold within a year.]—*MARTIN v. LOWRY*, *MARTIN v. INLAND REVENUE COMRS.*, No. 114, *ante*.

455. ——— Profits or gains—Statutory contributions to conservancy board.]—*HUMBER CONSERVANCY BOARD v. BATER*, No. 37, *ante*.

456. ——— Green fees at golf club paid by non-members.]—*CARLISLE & SILLOTH GOLF CLUB v. SMITH*, No. 90, *ante*.

457. ——— Any emolument accruing by virtue of service rendered—Directors’ commission on guaranteeing overdraft.]—*RYALL v. HOARE*, *RYALL v. HONEYWILL*, No. 453, *ante*.

458. ——— Profits from backing horses.]—*GRAHAM v. GREEN*, No. 116, *ante*.

459. ——— Speculation in contracts for future delivery of cotton.]—*COOPER v. STUBBS*, No. 113, *ante*.

r. ———.]—Appls. were breeders & buyers of cattle, & in addition to farming lands in respect of the occupation of which they were assessed under Schedule B., they rented land for grazing on what is known as the eleven months system & for which tax under both Schedule A. & B. was assessed upon & paid by the owner. Appls. themselves were neither assessed under Schedule B. nor rated to the poor for this land.

Sect. 7.—Case VI.—Profits or gains not otherwise charged. Sects. 8 & 9.]

460. Stud fees—Stallions kept primarily for racing establishment.]—DERBY (EARL) v. BASSOM, No. 99, ante.

See, also, No. 310, ante.

What are profits & gains within Schedule D., *see, generally, Sect. 1, ante.*

461. — Not charged under any other case or schedule—Conversion of business into limited company—In year preceding year of assessment.]—RYHOPE COAL CO. v. FOYER, No. 208, ante.

462. — Profits of charity by letting rooms.]—The governors of a maternity hospital established for charitable purposes by Royal Charter in 1756, were the owners of a building which comprised rooms adapted for public entertainments, & which was connected with the hospital buildings proper by an internal passage. The hospital derived a substantial income from letting the rooms for public entertainments, concerts, etc., for periods varying from one night to six months & applied the income to the general maintenance of the hospital. The rooms were let upon terms which included the provision of seating, heating, & attendance, but an additional charge was made for gas & electricity consumed:—*Held*: the profits derived from the letting of the rooms were assessable to income tax under Schedule D., either under Case I., as the profits of a trade or business, or under Case VI. of that Schedule, & there was, therefore, no exemption conferred by the Income Tax Acts which was applicable to the profits.—COMAN v. ROTUNDA HOSPITAL, DUBLIN (GOVERNORS), [1921] 1 A. C. 1; 89 L. J. P. C. 162; 123 L. T. 529; 36 T. L. R. 646; 64 Sol. Jo. 548; *sub nom.* ROTUNDA HOSPITAL, DUBLIN (GOVERNORS) v. COMAN, 7 Tax Cas. 517, H. L.

Annotations:—Reid. R. v. Income Tax Special Comrs., Ex p. Shaftesbury Homes & Arethusa Training Ship, [1922] 2 K. B. 729; Brighton College v. Marriott, [1925] 1 K. B. 312.

SECT. 8.—DEDUCTION OF TAX BY PERSONS PAYING DIVIDENDS.

See Schedule D., Miscellaneous Rules, applicable to Schedule D., r. 7; Rules applicable to all Schedules, r. 20.

Duty to deduct.]—See Sect. 4, sub-sect. 2, ante.

Effect of duty to deduct—Statutory undertaking—Maximum dividend limited.]—See COMPANIES, Vol. X., p. 1162, Nos. 8224, 8225.

— In calculation of “net profits” for pur-

They appealed against assessments made under Schedule D. in respect of profits from grazing cattle thereon:—*Held*: applts. were correctly charged under Case 6 of Schedule D.—MCKENNA v. HERLIHY, WOODBURN v. HERLIHY (1920), 7 Tax Cas. 620.—IR.

t. —.]—A landed proprietor, on whose estate certain bings of colliery dross had lain for many years, entered into agreements with a contractor to remove the whole of a bing within three & a half months, & to make monthly payments at a tonnage rate as the weight of the material was ascertained on removal. The proprietor did not carry on a business of selling colliery dross:—*Held*: the payments were not assessable to income tax either as the annual value of land under Schedule A., Rule 1, in respect that the agreement was not a lease, or under Schedule D., Case 6, in respect that they were not annual profits or gains, but the price of a subject sold.—ROBERTS (INSPECTOR OF

TAXES) v. BELHAVEN & STENTON'S (LORD) EXECUTORS, [1925] S. C. 635.—SCOT.

PART V. SECT. 8.

464 i. Amount of deduction—Rebate allowed in respect of Colonial tax.]—A co., which earned part of its profits in the Colonies, paid Colonial income tax on those profits & also paid United Kingdom income tax on its total profits. It obtained from the Comrs. of Inland Revenue a repayment of a proportion of the United Kingdom income tax in respect of the Colonial income tax that had been paid:—*Held*: in paying to preference shareholders the dividend on preference shares, which was fixed by the arts. of assocn. at 4 per cent. *per annum* “& no more” the co. were right in taking no account of the repayment & in deducting income tax at the full United Kingdom rate.—NEW ZEALAND & AUSTRALIAN LAND CO., LTD. v. SCOTTISH UNION & NATIONAL IN-

pose of commission.]—See COMPANIES, Vol. IX., p. 545, No. 3597.

463. Nature of deduction—Whether as agent of person charged.]—RITSON v. PHILLIPS, No. 541, post.

464. Amount of deduction—Rebate allowed in respect of Colonial tax.]—ROVER v. SOUTH AFRICAN BREWERIES, No. 552, post.

465. —.]—WAKEFIELD v. WHITEAWAY, LAIDLAW & CO. No. 554, post.

466. —.]—SHELDRIK v. SOUTH AFRICAN BREWERIES, LTD., No. 555, post.

467. —.]—GOLD FIELDS AMERICAN DEVELOPMENT CO., LTD. v. CONSOLIDATED GOLD FIELDS OF SOUTH AFRICA, LTD., No. 556, post.

See, now, 1920 Act, c. 18, s. 27.

468. Omission to deduct—Right to recoupment—From Inland Revenue.]—A person who has omitted to avail himself of the privilege conferred upon him by Income Tax Act, 1853 (c. 34), s. 40, of deducting & retaining income tax out of payments of yearly interest of money which he makes, cannot subsequently claim a return of such income tax from the Board of Inland Revenue. Where, therefore, a person obtained a loan from his bankers for the purpose of taking up certain stock in a co. in respect of which loan he paid interest to the bankers out of income received by him after the income tax payable thereon had been deducted & retained at the source of payment, the Board of Inland Revenue were held to be entitled to decline to return to such person the income tax on the interest so paid by him, which they did upon the ground that the loan in respect of which the interest was paid had not been outstanding for a period of a year or more.—DE PEYER v. R. (1909), 100 L. T. 256, C. A.

— By deduction from future payments.]—*See* Sect. 4, sub-sect. 2, F., ante.

SECT. 9.—EXEMPTIONS.

See 1918 Act, s. 37 (1) (b); 1925 Act, s. 19.

469. Exemption of charities—Hospital—Asylum mainly supported by paying patients.]—An institution, founded by voluntary contributions, for the reception of insane persons, made large annual profits from the sums paid by patients in affluent circumstances for their treatment. A portion of the profits so received was applied to treating, maintaining, & clothing a few patients gratuitously, & others at less than their cost to the institution. The remainder of the profits was expended in the

SURANCE CO., [1920] S. C. 13; 57 Sc. L. R. 15.—SCOT.

a. Interest not payable out of profits brought into charge—Tax deducted a Crown debt.]—A bridge co. during the construction of its works made no profits, but paid under deduction of income tax interest on its share & debenture capital:—*Held*: the income tax so deducted was a debt to the Crown.—LORD ADVOCATE v. FORTH BRIDGE Ry. Co. (1890), 3 Tax Cas. 1.—SCOT.

PART V. SECT. 9.

b. Moneys realised by assets companies—From properties taken over from liquidating banks.]—MELBOURNE TRUST, LTD. v. TAXES COMR. (VICTORIA) (1912), 15 C. L. R. 274.—AUS.

c. Profits of casual nature.]—*Held*: on the facts of the case, profits that accrued to a banker & money-lender from certain stray speculative

better adaptation of the buildings & premises to the curative treatment carried on. The donations & annual subscriptions to the institution during the last three years had only amounted to £15 :—*Held* : (1) the institution was not a "hospital" within Income Tax Act, 1842 (c. 35), s. 61, r. 6, & therefore income tax under Schedule A. was payable in respect of the "buildings, offices, & premises belonging thereto"; (2) the profit made by the institution was not exempt from the payment of income tax under Schedule D. of the Income Tax Acts, as it did not come within the exemption of Income Tax Act, 1842 (c. 35), s. 105, as "yearly interest or other annual payment applied to charitable purposes only" although the whole of the profit was expended on the charitable treatment of poor persons & the improvement of the institution.—*NEEDHAM v. BOWERS* (1888), 21 Q. B. D. 436; 59 L. T. 404; 37 W. R. 125; 2 Tax Cas. 360, D. C.

Annotations :—As to (1) *Distd. Cawse v. Nottingham Lunatic Hospital Committee*, [1891] 1 Q. B. 585. *Refd.* *Mary Clark Home, Trustees v. Anderson*, [1904] 2 K. B. 645; *Rotunda Hospital, Dublin v. Coman* (1920), 7 Tax Cas. 517. As to (2) *Refd.* *Rotunda Hospital, Dublin v. Coman* (1920), 7 Tax Cas. 517. *Generally, Mentd.* *Charterhouse School v. Lamarque* (1890), 25 Q. B. D. 121; *Musgrave v. Dundee Royal Lunatic Asylum* (1895), 59 J. P. 758; *Southwell v. Royal Holloway College, Egham*, [1895] 2 Q. B. 487.

470. — Charitable purposes—General purposes of university.]—*R. v. INCOME TAX SPECIAL COMRS., Ex p. UNIVERSITY COLLEGE OF NORTH WALES*, No. 53, *ante*.

471. — Headmasters' Conference.]—*Held* : neither the Headmasters' Conference nor the Incorporated Association of Preparatory Schools was entitled to exemption from income tax under s. 37 (1) (b) of 1918 Act, s. 37 (1) (b), the ground of the decision being that in the terms of that provision neither body was "established for charitable purposes only" & their income was not "applied to charitable purposes only."—*R. v. INCOME TAX SPECIAL COMRS., Ex p. HEADMASTERS' CONFERENCE, SAME v. SAME, Ex p. INCORPORATED ASSOCN. OF PREPARATORY SCHOOLS* (1925), 41 T. L. R. 651; 69 Sol. Jo. 780, D. C.

472. — Incorporated Association of Preparatory Schools.]—*R. v. INCOME TAX SPECIAL COMRS., Ex p. HEADMASTERS' CONFERENCE, SAME v. SAME, Ex p. INCORPORATED ASSOCN. OF PREPARATORY SCHOOLS*, No. 471, *ante*.

473. — "Applied to charitable purposes only"—Maintenance & treatment of poor hospital patients—Improvement of buildings.]—The managing committee of a hospital, founded by voluntary contributions for the care & treatment of insane persons, made large yearly profits by receiving wealthy patients, who were charged sums greatly exceeding the actual cost of their maintenance & treatment. The committee applied a portion of those profits in aid of the maintenance & treatment of poorer patients, who were themselves unable to pay the actual cost thereof, & the remainder in executing works which were pressed upon the committee by the Comrs. in Lunacy & were deemed necessary to bring the hospital into a proper state of efficiency :—*Held* : the profits were not, by reason of such application of them to the purposes of the hospital, payments "applied to charitable purposes only" within Income Tax Act, 1842 (c. 35), s. 105, so as to exempt the institution from payment of income tax under Schedule D.—

ST. ANDREW'S HOSPITAL, NORTHAMPTON v. SHEARSMITH (1887), 19 Q. B. D. 624; 57 L. T. 413; 35 W. R. 811; 3 T. L. R. 732; 2 Tax Cas. 219, D. C.

Annotations :—*Fold.* *Needham v. Bowers* (1888), 21 Q. B. D. 436. *Refd.* *Psalms & Hymns (Baptist) Trustees v. Whitwell* (1890), 7 T. L. R. 164; *Rotunda Hospital, Dublin v. Coman* (1920), 7 Tax Cas. 517.

474.

—]—*NEEDHAM v.*

BOWERS, No. 409, *ante*.

475. — Headmasters' Conference.]—*R. v. INCOME TAX SPECIAL COMRS., Ex p. HEADMASTERS' CONFERENCE, SAME v. SAME, Ex p. INCORPORATED ASSOCN. OF PREPARATORY SCHOOLS*, No. 471, *ante*.

476. — Incorporated Association of Preparatory Schools.]—*R. v. INCOME TAX SPECIAL COMRS., Ex p. HEADMASTERS' CONFERENCE, SAME v. SAME, Ex p. INCORPORATED ASSOCN. OF PREPARATORY SCHOOLS*, No. 471, *ante*.

477. — Applicable to charitable purposes only—Settlement for such purposes as settlor should appoint—Appointment of income for charitable purposes—Settlor having power to appoint to other purposes.]—*R.* by an indenture executed in Mar. 1917, had settled upon trustees certain funds, to be held, together with the income thereof, upon trust "for the benefit of such persons, institutions or purposes as *R.* shall by any writing under his hand or by will appoint." In default of any such appointment the deed provided that the trust funds & income were to be held by the trustees upon trust for the benefit of the Wesleyan Methodist Church. The whole of the income of the trust for the three years ending Apr. 5, 1918, 1919 & 1920 had been applied by the trustees to certain charitable institutions in accordance with written directions given at various dates by *R.* The trustees applied to the Special Comrs. under the provisions of Income Tax Act, 1842 (c. 35), s. 105, & 1918 Act, s. 37 (1) (b), for repayment of the income tax which had been deducted at the source from the trust income during the three years ending Apr. 5, 1918, 1919 & 1920, on the ground that under the deed of trust the income in question was applicable to charitable purposes only & had been so applied. The application being unsuccessful, the trustees applied for & obtained a rule *nisi* calling upon the Special Comrs. to show cause why a writ of *mandamus* should not issue commanding them to allow exemption from income tax on the income in question & to repay the tax which had been deducted therefrom :—*Held* : discharging the rule *nisi*, inasmuch as the settlor possessed under the deed of settlement power to execute an appointment in favour of purposes that were not charitable, the deed did not create a trust for charitable purposes only within Income Tax Act, 1842 (c. 35), s. 105, & 1918 Act, s. 37 (1) (b), although ultimately powers were exercised by the settlor in favour of charity; & the trustees were not, therefore, entitled to claim repayment of the tax deducted from the trust income during the years 1918, 1919 & 1920.—*R. v. INCOME TAX SPECIAL COMRS., Ex p. RANKS TRUSTEES* (1922), 91 L. J. K. B. 662; 127 L. T. 651; 38 T. L. R. 603; 66 Sol. Jo. 472; 8 Tax Cas. 286, O. A.

478. — "Yearly interest"—Interest on bank balance—Calculated on daily balance.]—The overseers of the poor for a certain district kept a current account with a bank, into which they

purchases & sales of dollars in the Straits Settlements were taxable as profits arising from his business & were not exempt from taxation as arising from occupation of a casual

nature within the meaning of Indian Income Tax Act, 1918, s. 3 (2), vii.—*MADRAS BOARD OF REVENUE v. ARUNABHALAM CHETTIAR* (1923), I. L. R. 47 Mad. 197.—IND.

d. — By co-operative society.]—*Held* : (1) a registered co-operative society occupying lands for the purposes of husbandry only had the same right of election as an ordinary occupier

Sect. 9.—Exemptions. Sect. 10. Part VI. Sect. 1: Sub-sects. 1 & 2.]

paid the amounts collected by them as poor rate, & out of which from time to time they made the payments for which they were liable. Under a long-standing arrangement with the bank, interest was allowed by the bank half-yearly at an agreed rate, without deduction of income tax, calculated upon the daily balances standing to the credit of the overseers. The overseers, contending that they were trustees for charitable purposes only within Income Tax Act, 1842 (c. 35), s. 105, claimed an exemption from income tax in respect of the interest on the ground that it was "yearly interest" within that sect. On a case stated raising this latter question only:—*Held*: that the interest was not "yearly interest" within s. 105.—*GARSTON OVERSEERS v. CARLISLE*, [1915] 3 K. B. 381; 84 L. J. K. B. 2016; 113 L. T. 879; 13 L. G. R. 969; 6 Tax Cas. 659.

Annotation:—*Reid*. I. R. Comrs. v. Hay (1924), 8 Tax Cas. 636.

479. — "Annual payment"—Profits from sale of hymn book.—Trustees published a hymn book, & in accordance with the directions of the trust deed distributed the profits among widows & orphans of Baptist ministers & missionaries:—*Held*: trading profits are not an "annual payment" within Income Tax Act, 1842 (c. 35), s. 105, so as to be exempt from income tax when applied to charitable purposes.—*PSALMS & HYMNS (BAPTIST) TRUSTEES v. WHITWELL* (1890), 7 T. L. R. 164; 3 Tax Cas. 7, D. C.

Annotations:—*Apprvd*. *Coman v. Rotunda Hospital*, Dublin, [1921] 1 A. C. 1. *Distd*. *R. v. Income Tax Special Comrs., Ex p. Shaftesbury Homes & Arethusa Training Ship*, [1923] 1 K. B. 393. *Consd*. *R. v. Income Tax Special Comrs., Ex p. Headmasters' Conference, Same v. Same, Ex p. Incorporated Asscn. of Preparatory Schools* (1925), 41 T. L. R. 651. *Reid*. *Brighton College v. Marriott*, [1925] 1 K. B. 312.

480. — Balance of income from profits of business.—A testator bequeathed to his trustees the goodwill of & the property in certain proprietary medicines upon trust out of the annual income & profits thereof to pay certain annuities, & subject thereto, upon trust to pay the balance of the annual income & profits thereof to certain persons, since deceased, & after their deaths to pay such yearly balance to a charitable society. The yearly profits & the annual income & profits arising from certain other proprietary medicines were to be paid, after the deaths of certain persons, to the same society. After testator's death his business in these properties was carried on by his trustees who paid the balance of the income & profits, after satisfying the various annuities, to the charitable society in accordance with the directions of the will. The charity claimed exemption from income tax under 1918 Act, s. 37, in respect of the sums so received from testator's trustees, & repayment under sect. 40 of the Act of the tax which had been deducted & paid by the trustees before paying the yearly sums to the charity:—*Held*: (1) the money received by the charity from testator's trustees was an annual payment within 1918 Act, s. 37 (b), which grants exemption from income tax under Schedule D. in respect of any yearly interest or other annual payment forming part of the income of a charity, & therefore, that the charity was entitled to the exemption & repayment claimed; (2) although

the amount of the tax paid by the trustees on the profits of the business had been computed & paid in the usual way upon a three years' average, nevertheless the charity had shown that the duty in respect of each yearly payment had been paid by deduction or otherwise, within Income Tax Act, 1842 (c. 35), s. 105.

Semble: the question of repayment cannot arise under 1918 Act, because sect. 40 (3), of that Act provides, "where the Special Comrs. allow a claim they shall issue an order for repayment."—*R. v. INCOME TAX SPECIAL COMRS., Ex p. SHAFTESBURY HOMES & ARETHUSA TRAINING SHIP*, [1923] 1 K. B. 393; 92 L. J. K. B. 152; 128 L. T. 463; 39 T. L. R. 99; 8 Tax Cas. 367, O. A.

Annotation:—*As to* (1) *Distd*. *Brighton College v. Marriott*, [1925] 1 K. B. 312.

481. — Profits on school fees.—*BRIGHTON COLLEGE v. MARRIOTT*, No. 127, *ante*.

482. — Proof of deduction—Tax calculated on three years' average.—*R. v. INCOME TAX SPECIAL COMRS., Ex p. SHAFTESBURY HOMES & ARETHUSA TRAINING SHIP*, No. 480, *ante*.

See, now, 1925 Act, s. 19.

483. — Gift of residue for charitable purposes—Extent of relief.—By Income Tax Act, 1842 (c. 35), s. 88, Sched. C., r. 3, coupled with sect. 105 of the Act, charitable institutions are exempted from the duties on any yearly interest or other annual payment chargeable under Schedule D., in so far as the same shall be applied to charitable purposes only, & the exemption is to be allowed by the Comrs. for Special Purposes on due proof before them. Testator who died on Nov. 14, 1914, by his will bequeathed the residue of his property, which consisted of stocks & shares, to a charitable institution absolutely. Between the date of testator's death & Dec. 4, 1916, when the residue was finally ascertained & distributed, the exors. received income of the estate from which income tax had been deducted at the source. The income so received by the exors. was part of the fund handed over in due course by them to the charitable institution. The institution claimed the return of the income tax deducted on the ground that the deduction was contrary to Income Tax Act, 1842 (c. 35), s. 105:—*Held*: until the date when the residue was ascertained the institution had no property in any specific investment forming part of the estate, or in the income therefrom, the payment by deduction of income tax made by the exors. in respect of the income was not made on behalf of the institution, & the institution was therefore not entitled to repayment of the income tax so paid.—*BARNARDO'S HOMES v. INCOME TAX SPECIAL COMRS.*, [1921] 2 A. C. 1; 90 L. J. K. B. 545; 125 L. T. 250; 37 T. L. R. 540; 65 Sol. Jo. 433; *sub nom.* *R. v. INCOME TAX ACTS SPECIAL PURPOSES COMRS., Ex p. DR. BARNARDO'S HOMES NATIONAL INCORPORATED ASSOCN.* 7 Tax Cas. 646, H. L.

Annotation:—*Reid*. *Herbert v. I. R. Comrs., I. R. Comrs. v. Herbert* (1925), 9 Tax Cas. 593.

See, now, 1922 Act, s. 30.

SECT. 10.—PLACE OF ASSESSMENT.

See Schedule D., Miscellaneous Rules applicable to Schedule D., r. 4.

regarded an assessment for a year or & a year subsequent to the passing of Income Tax Act, 1918; (2) the society having elected to be

assessed under Schedule D. the provisions of Industrial & Provident Societies Act, 1893, s. 24, & Income Tax Act, 1918, s. 39 (4), conferred no

exemption from taxation.—*TRANENT CO-OPERATIVE SOCIETY v. INLAND REVENUE*, [1921] S. C. 219; 58 Sc. L. R. 263.—*SCOT*.

Part VI.—Schedule E.

SECT. 1.—SCOPE OF SCHEDULE.

SUB-SECT. 1.—PUBLIC OFFICE AND EMPLOYMENT OF PROFIT.

See Schedule E.

484. Transfer of employment from Sched. D.—Effect of 1922 Act, s. 18 (6).—I. was an assistant of the second class in the employment of the London County Council, & was remunerated by a salary & bonus which varied with the cost of living. His remuneration for the year ending Apr. 5, 1922, was £436. A first assessment for that year was made upon applt. under Schedule E. in the sum of £359. No appeal was made against that assessment, & the duty was paid, although in accordance with the decisions in *Great Western Railway v. Bater*, No. 486, *post*, applt. was not liable to assessment under Schedule E., but should have been assessed under Schedule D. on the average of his remuneration for the three preceding years in the sum of £259 only. On Sept. 13, 1922, an additional assessment under Schedule E. was made on I. under 1918 Act, s. 125, in respect of the balance of his remuneration for the year ending Apr. 5, 1922, in the sum of £77. He appealed against this additional assessment on the ground that the first assessment being excessive it was not competent to the Crown to make an additional assessment upon him:—*Held*: an additional assessment was covered by the words “any assessment” in above sub-sect., & there being abundant reason to have proceeded under 1918 Act, s. 125 (1), to make an additional assessment, under above sub-sect., at the moment the additional assessment came up for consideration, Schedule E. governed the case, as the effect of the above sub-sect. was to provide that for the purpose of the additional assessment the original assessment must be deemed to have been in accordance with the law as altered by 1922 Act, s. 15 (1), & that sub-sect. having such a retrospective effect the £77 was correctly considered to be omitted from the original assessment & the appeal of the Crown succeeded.—*INGLE v. FARRAND*, [1925] 2 K. B. 728; 95 L. J. K. B. 13; 133 L. T. 747, C. A.

485. Who is person holding public office—Employees of railway company—At weekly wage.]—Persons employed by a railway co. at weekly wages are not persons holding public employments, etc., within Income Tax Act, 1842 (c. 35), Sched. E., r. 3, & a railway co. is not liable to be assessed in respect of such servants under Income Tax Act, 1860 (c. 14), s. 6.—*A.-G. v. LANCASHIRE & YORKSHIRE RY. CO.* (1864), 2 H. & C. 792; 4 New Rep. 23; 33 L. J. Ex. 163; 10 L. T. 95; 10 Jur. N. S. 705; 13 W. R. 8; 159 E. R. 327.

Annotation:—*Consd. G. W. Ry. v. Bater*, [1922] 2 A. C. 1.

PART VI. SECT. 1, SUB-SECT. 1.

g. Who is person holding public office—Minister of the Crown.]—The salaries of a Minister of the Crown for the Commonwealth & of a member of the Commonwealth Parliament, so far as they are earned in Victoria, are not liable to assessment under the Income Tax Acts of Victoria.—*DEAKIN v. WEBB* (1904), 1 C. L. R. 585.—*AUS.*

h. —.]—The Parliament of had power under B. N. A. Act, 1867, s. 91 (3), to enact the Income War Tax Act, 1917, & the amending Act of 1919, whereby every person residing, or ordinarily residing, or carrying on business in Canada is

rendered liable to pay income tax; & a minister of the Govt. of a Province is liable under the Acts in respect of the salary & sessional indemnity payable to him under statutes of the Province.—*CARON v. R.*, [1924] A. C. 999; 4 D. L. R. 105; 3 W. W. R. 417.—*CAN.*

i. — Judge.]—Where a judge has accepted an increase of salary provided for by 10 & 11 Geo. 5, c. 56, being an amendment to Judges Act, he loses the benefit of exemption previously enjoyed under sect. 37 of the Act, & such salary thereupon becomes liable to taxation under Income War Tax Act, 1917, & amendments.—*Re JUDGES' SALARIES TAXATION*, [1924] Exch. C. R. 161.—*CAN.*

486.

Effect of Income Tax Act, 1860 (c. 14), s. 6.]—A clerk on the permanent staff of a railway co., paid by a yearly salary, not by weekly wages, & a member of a superannuation scheme under which he may be entitled to a pension, is not the holder of a public office or employment of profit within Schedule E. of the Income Tax Acts, & the co. which employs him is not liable to assessment to income tax under that schedule in respect of such office or employment. Schedule E., r. 3, is to be so read that the whole of it is controlled by the word “public.”

This construction of the rule is not affected by above sect., which makes a railway co. assessable to “the duties payable under Schedule E. in respect of all offices & employments of profit” held in or under the co.—*GREAT WESTERN RY. CO. v. BATER*, [1922] 2 A. C. 1; 91 L. J. K. B. 472; 127 L. T. 170; 38 T. L. R. 448; 66 Sol. Jo. 365; 8 Tax Cas. 231, H. L.

Annotations:—*Consd. Ingle v. Farrand*, [1925] 2 K. B. 728. *Reid. Performing Right Soc. v. Mitchell & Booker (Palais De Danse)*, [1924] 1 K. B. 762. *Mentd. Gloucester Ry. Carriage & Wagon Co. v. I. R. Comrs.* (1924), 131 L. T. 595.

See, now, Schedule E., r. 7; 1922 Act, s. 18 (3).

487. — Schoolmaster of national school.]—*BOWERS v. HARDING*, No. 571, *post*.

488. — Bursar of a college.]—The bursar of a college, not being a member of the corporate body, although a necessary officer of the college, is liable to direct assessment to income tax.—*LANGSTON v. GLASSON*, [1891] 1 Q. B. 567; 60 L. J. Q. B. 356; 65 L. T. 159; 55 J. P. 567; 39 W. R. 476; 7 T. L. R. 270; 3 Tax Cas. 46, D. C.

489. Application to employment outside United Kingdom—Employee of English company abroad.]—*PICKLES v. FOSTER*, No. 516, *post*.

SUB-SECT. 2.—SALARIES, ETC., PERQUISITES OR PROFITS DERIVED FROM EMPLOYMENT.

See Schedule E., r. 1, replacing & substantially re-enacting Income Tax Act, 1842 (c. 35), s. 146, Sched. E., r. 1; 1922 Act, s. 18 (1).

490. Profit derived “from employment”—Voluntary gift—Whether office necessarily an office of profit.]—Applt. acted as secretary of a co. without remuneration from the date of its incorporation in Jan. 1912, & when the co. was wound up voluntarily in Sept. 1916, he was appointed liquidator for the purpose of the winding up, & he acted in that capacity also without remuneration. A final general meeting of the co. was held in Nov. 1916, for the purpose of having an account of the winding up laid before the members of the

PART VI. SECT. 1, SUB-SECT. 2.

h. Profit derived “from employment”—Voluntary gift.]—The minister of a Scottish parish received annually at Christmas a gift of money raised by voluntary subscription amongst his friends, for the most part members of the congregation:—*Held*: the minister was liable for the assessment for the money.—*Re STRONG* (1878), 1 Tax Cas. 207.—*SCOT.*

k. —.]—A director of a company, after retiring from the directorship, was voted by the co. £1,000 “in recognition of his services in previous years & as a solatium for the loss of his seat on transference to the head office”:—*Held*: that the

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co. It appeared that there was a sum in hand amounting to £1,172, which was divisible amongst the ordinary shareholders of the co. A resolution was passed at that meeting, which was assented to by all the shareholders of the co., that the chairman & applt. be asked each to accept a moiety of the balance, & that the best thanks of the shareholders were due & were tendered to them for the services they had rendered to the co. throughout its existence & during the winding up. Applt. received a moiety of the balance amounting to the sum of £586. Applt. having been assessed to income tax in respect of that sum appealed:—**Held:** (1) in order to constitute a voluntary payment a profit accruing by reason of an office within Schedule E. it was not necessary that the office previously to the payment being made should have been an office of profit & there might well be a payment in respect of an office which had been gratuitous up to its termination such as to be a profit by reason of the office; (2) the ct. ought to deal with the appeal on the facts as stated in the case, & ought not to speculate as to whether there might not be something in the relations of the parties & of the co. with other cos. which might throw a different light on the transactions; on the facts as stated, having regard to the important factor that the office had terminated when the payment was made, & to the almost equally important factor that the payment was made, not by the co., but by other persons, the proper & only inference that could be drawn was that the money was paid to applt. after his office had terminated as a tribute or testimonial for his services in the past, & not as a payment for those services; & he was therefore not assessable to income tax in respect of it.—**COWAN v. SEYMOUR**, [1920] 1 K. B. 500; 89 L. J. K. B. 459; 122 L. T. 465; 36 T. L. R. 155; 64 Sol. Jo. 259; 7 Tax Cas. 372, C. A.

Annotations:—As to (1) **Distd.** Chibbett v. Robinson (1924), 132 L. T. 26. As to (2) **Consd.** Chibbett v. Robinson (1924), 132 L. T. 26. **Distd.** Mudd v. Collins (1925), 133 L. T. 186.

491. ——— Grant to clergy from augmentation fund.]—TURNER v. CUXON, No. 313, *ante*.

492. ———.]—Applt., a beneficed clergyman, received for several years an annual grant of money from a diocesan branch affiliated to the Queen Victoria Clergy Sustentation Fund, a body incorporated with the object of providing adequate remuneration for the beneficed clergy for the work done by them; the fund was not intended to be merely a clerical charity. The funds of the diocesan branch were administered by a council whose aim was to raise the incomes of all benefices under £200 *per annum* in value to that amount. The council did not take into consideration the personal circumstances of the particular incumbent, but the *onus* rested upon applt. of deciding whether his own circumstances justified him in applying for a grant. The incumbent of a benefice of less than £200 a year was not necessarily entitled to a grant, but the giving, withholding, continuance, & discontinuance of grants out of the funds were matters wholly

within the discretion of the council. Where a benefice fell vacant during the year for which the grant was made, the grant was divided between the outgoing & incoming incumbent in proportion to the length of time for which each had been incumbent:—**Held:** the grants received by the incumbent from the diocesan branch were "perquisites or profits accruing by reason of his office" within Income Tax Act, 1842 (c. 35), s. 146, Sched. E., r. 1, & he was therefore liable to pay income tax under Schedule E. upon them.—**HERBERT v. MCQUADE**, [1902] 2 K. B. 631; 71 L. J. K. B. 884; 87 L. T. 349; 66 J. P. 692; 18 T. L. R. 728; 4 Tax Cas. 489, C. A.

Annotations:—**Expld.** Poynting v. Faulkner (1905), 93 L. T. 367. **Distd.** Turton v. Cooper (1905), 92 L. T. 863. **Consd.** Cooper v. Blakiston, [1907] 2 K. B. 688; Cowan v. Seymour, [1920] 1 K. B. 500; Hartland v. Diggins, [1925] 1 K. B. 372. **Refd.** Smith v. Smith, [1923] P. 191; Barson v. Airey (1925), 42 T. L. R. 145.

493. ———.]—The minister of a chapel received a grant from a fund called the "Minister's Stipend Augmentation Fund." That fund was vested in trustees, & managed by a committee. The income of the fund was to be applied by the committee towards the augmentation of the stipends of ministers of such congregations as they might from time to time in their discretion select. Each grant was to be made for the current year only, & in making such grant, regard was to be paid to the state & condition of the congregation, & their ability to make adequate provision for their minister. The private income, the stipend received from the congregation, the age, training, & length of service of each applt. for a grant was also taken into consideration. Each grant was paid half-yearly, & ceased on the death, resignation, or removal of the recipient, & any part of the grant then unpaid was not paid at all either to him or his successor:—**Held:** the amount of the grant was part of the profits or gains of the minister in his profession or vocation, & he was chargeable with income tax in respect thereof.—**POYNTING v. FAULKNER** (1905), 93 L. T. 367; 21 T. L. R. 560; 5 Tax Cas. 145, C. A.

Annotations:—**Consd.** Cooper v. Blakiston, [1907] 2 K. B. 688. **Refd.** Turton v. Cooper (1905), 92 L. T. 863; Cowan v. Seymour, [1920] 1 K. B. 500.

494. ——— Collection in church paid to clergy.]—Portions of collections made in a church were paid to the incumbent. They were paid to him by reason of his being incumbent, but they would not have been paid to him if he had not been poor:—**Held:** he was not assessable to income tax in respect of the amount so received.—**TURTON v. COOPER** (1905), 92 L. T. 863; 21 T. L. R. 546; 5 Tax Cas. 138.

Annotation:—**Consd.** Cooper v. Blakiston, [1907] 2 K. B. 688.

495. ——— Easter offerings to clergy.]—Voluntary Easter offerings of money given as a freewill gift to the incumbent of a benefice as such for his personal use are, if given for the purpose of increasing his stipend, assessable to income tax as "profits accruing to him by reason of his office" under Income Tax Act, 1842 (c. 35), s. 146, Sched. E., r. 1.—**BLAKISTON v. COOPER**, [1909] A. C. 104; 78 L. J. K. B. 135; 100 L. T. 51; 25 T. L. R.

grant was a gift & not a payment for services rendered & was not assessable.—**INLAND REVENUE COMR. v. LUNNON**, [1924] App. D. 94.—S. AF.

1. ——— Allowance to detective for plain clothes.]—A detective officer received, in addition to his pay, a money allowance with which he was bound to purchase plain clothes

suitable for his duties & approved by his superior officer. The detective received the same pay as an ordinary policeman of a similar grade, but, whereas the ordinary policeman received his uniform free, the detective received the money allowance in lieu thereof:—**Held:** the allowance paid the detective was a profit accruing

to him by reason of an office or employment under a public corp'n. within Income Tax Act, 1842, Schedule (E.), & accordingly was subject to income tax.—**FERGUSON v. NOBLE**, [1919] S. C. 534; 7 Tax Cas. 176.—SCOT.

m. "Perquisites or profits" — of house.]—Customs &

164; *sub nom.* COOPER v. BLAKISTON, 53 Sol. Jo. 149; 5 Tax Cas. 347, H. L.

Annotations.—*Consd.* Hartland v. Diggins, [1925] 1 K. B. 372. *Refd.* Bolam v. Allgood (1913), 110 L. T. 8; Cowan v. Seymour, [1920] 1 K. B. 500. *Mentd.* Penn v. Spiers & Pond, [1908] 1 K. B. 766.

496. ——— Testimonial to officers of company—Distinguished from payment for services.]—COWAN v. SEYMOUR, No. 490, *ante*.

Compare No. 98, *ante*.

497. ——— Remuneration of trustee of settlement—Payable out of income of trust.]—Applt. was appointed a trustee under a deed of settlement by the terms of which he was entitled to remuneration for his services at the rate of £100 *per annum*, that remuneration being payable out of the income arising from the trust funds:—*Held*: the sum of £100 was an “annual payment” payable wholly out of profits or gains brought into charge to tax within All Schedules Rules, r. 19, & was not a payment in respect of an employment so as to be the subject of direct assessment under Schedule D., Case II.—BAXENDALE v. MURPHY, [1924] 2 K. B. 494; 93 L. J. K. B. 974; 132 L. T. 490; 40 T. L. R. 784; 69 Sol. Jo. 12; 9 Tax Cas. 76.

498. ——— Commission paid to salaried officer—For negotiating sale of part of business.]—Applt., an incorporated accountant, was secretary & director of a co. & received a salary as such. He negotiated the sale of a branch of the co.’s business & was granted by the co. the sum of £1,000 “as commission for his services in negotiating the sale.” He was assessed to income tax, Schedule E., in respect of this payment, & appealed against the assessment on the ground that the negotiation of the sale was not part of his duties as secretary & director & that the payment was a voluntary gift which did not constitute a profit for income tax purposes:—*Held*: the £1,000 was part of the profit of applt.’s office & was accordingly assessable to income tax under Schedule E.—MUDD v. COLLINS (1925), 133 L. T. 186; 41 T. L. R. 358; 69 Sol. Jo. 490; 9 Tax Cas. 297.

499. ——— Remuneration of company director—Whether company public or private.]—A director of a co. is to be assessed to income tax under Schedule E. & not under Schedule D., whether the co. is a public or a private co.—WATSON v. ROWLES (1926), 42 T. L. R. 379.

500. ——— Additional remuneration—For additional services.]—Applt., who was the chairman of the directors of a London co. with interests in China, paid visits to China on behalf of the co., & in addition to his fees as chairman, was awarded by the directors remuneration for his services there. This award was made under the arts. of assocn., which provided that if any director agreed to go abroad & perform extra services he was to receive remuneration therefor. Applt. was assessed to income tax under Schedule E. in respect of the additional remuneration, & the Comrs. upheld the assessment, finding that the additional remuneration was paid to applt. as chairman of the co. for services rendered by him as a director under the provisions of the arts.:—*Held*: there was evidence to support the finding of the Comrs., & their decision must be affirmed.—BARSON v. AIREY (1925), 134 L. T. 586; 42 T. L. R. 145; 69 Sol. Jo. 679, C. A.

501. ———.]—DAUNCEY v. HOWLETT (1926), 161 L. T. Jo. 235.

502. ——— Proceeds of benefit match—Professional cricketer.]—*Held*: the proceeds of a professional cricketer’s benefit match do not constitute an income, profit, or gain, but a mere present not assessable to income tax.—REED v. SEYMOUR (1926), 42 T. L. R. 377; *revid.* 161 L. T. Jo. 388, C. A.

503. “Perquisites or profits”—Occupation of house—Whether profits restricted to money payments.]—TENNANT v. SMITH, No. 87, *ante*.

504. ——— Commission on profits—General manager of company.]—Applt., whose remuneration as general manager of a limited co. consisted partly of a fixed annual salary & partly of a commission or bonus on the co.’s net profits, had been assessed to income tax under Schedule E., r. 1, for the years 1914–15 to 1917–18 on the basis of the total amount of salary & commission or bonus received or receivable by him from the co. in respect of each of those years:—*Held*: the commission or bonus on net profits fell within the definition of the expression “perquisites” in Schedule E., r. 4, & was assessable to income tax under Schedule E., not on the basis of the actual sum received as commission in the year of assessment, as provided by rule 1 of the schedule, but on the basis of the average amounts in the three preceding years, as provided by rule 4.—M’DONALD v. SHAND, [1923] A. C. 337; 92 L. J. P. C. 174; 129 L. T. 641; 39 T. L. R. 444; 67 Sol. Jo. 516; 8 Tax Cas. 420, H. L.

505. “Salary”—Increases not paid person charged—Compulsorily carried to provident fund.]—Under a provident fund scheme at D. College the following increases of salaries came into operation: (a) assistant masters having not less than five, but less than fifteen years’ service, an increase of 5 per cent.; (b) those having fifteen years’ & over, 7½ per cent.; (c) a further addition equal to those sums subject to certain conditions. The whole of these increases were not to be paid to the masters, but were to be accumulated at compound interest to form the fund. The conditions above referred to were that masters of less than ten years’ service who resigned or ceased to belong to the college from any other cause than ill-health were to be entitled to increase (a) & the accumulations thereof, but not to increase (c); if the master retired from ill-health, the governors in addition to (a) might grant him (c); & in the event of death both (a) & (c) were to be paid to his legal representative. Masters of over ten years’ service were to receive on retirement before the age of sixty the total sum due under (a) or (b) & (c) with accumulations, & in the case of death the same was to be paid to his legal representative. Masters removed for misconduct or, having been guilty of misconduct, allowed to resign were not entitled to (c):—*Held*: these increases of salary were sums really added to the salary, & were assessable to income tax under Income Tax Act, 1842 (c. 35), s. 146, Sched. E.—SMYTH v. STRETTON (1904), 90 L. T. 756; 53 W. R. 288; 20 T. L. R. 443; 48 Sol. Jo. 437; 5 Tax Cas. 36.

Annotations.—*Refd.* Cowan v. Seymour, [1920] 1 K. B. 500; Bruce v. Hatton, [1922] 2 K. B. 206.

Compare Nos. 529–531, *post*.

Inland Revenue Act, 1876, s. 8, allows an abatement from income tax to a person assessed when “his total income from all sources is less than £400:—*Held*: the annual value of a manse occupied rent free by the Minister of a congregation of the Free Church

of Scotland, the feudal title of which was in trustees for behoof of the congregation, did not fall to be reckoned as “income” of the minister in the sense of the above section.—INLAND REVENUE v. SUTHERLAND (1894), R. (Ct. of Sess.) 753.—SCOT.

n. ———.]—INLAND REVENUE v. FRY (1895), 22 R. (Ct. of 422; 3 Tax Cas. 335.—SCOT.

o. ——— Sum placed to credit of employee.]—WALKER v. REITH (1906), 8 F. (Ct. of Sess.) 351.—SCOT.

Sect. 1.—Scope of schedule: Sub-sect. 2.]

co. It appeared that there was a sum in hand amounting to £1,172, which was divisible amongst the ordinary shareholders of the co. A resolution was passed at that meeting, which was assented to by all the shareholders of the co., that the chairman & applt. be asked each to accept a moiety of the balance, & that the best thanks of the shareholders were due & were tendered to them for the services they had rendered to the co. throughout its existence & during the winding up. Applt. received a moiety of the balance amounting to the sum of £586. Applt. having been assessed to income tax in respect of that sum appealed:—*Held*: (1) in order to constitute a voluntary payment a profit accruing by reason of an office within Schedule E. it was not necessary that the office previously to the payment being made should have been an office of profit & there might well be a payment in respect of an office which had been gratuitous up to its termination such as to be a profit by reason of the office; (2) the ct. ought to deal with the appeal on the facts as stated in the case, & ought not to speculate as to whether there might not be something in the relations of the parties & of the co. with other cos. which might throw a different light on the transactions; on the facts as stated, having regard to the important factor that the office had terminated when the payment was made, & to the almost equally important factor that the payment was made, not by the co., but by other persons, the proper & only inference that could be drawn was that the money was paid to applt. after his office had terminated as a tribute or testimonial for his services in the past, & not as a payment for those services; & he was therefore not assessable to income tax in respect of it.—*COWAN v. SEYMOUR*, [1920] 1 K. B. 500; 89 L. J. K. B. 459; 122 L. T. 465; 36 T. L. R. 155; 64 Sol. Jo. 259; 7 Tax Cas. 372, C. A.

Annotations:—As to (1) *Distd.* Chibbett v. Robinson (1924), 132 L. T. 26. As to (2) *Consd.* Chibbett v. Robinson (1924), 132 L. T. 26. *Distd.* Mudd v. Collins (1925), 133 L. T. 186.

491. ——— Grant to clergy from augmentation fund.]—*TURNER v. CUXON*, No. 313, *ante*.

492. ———.]—Applt., a beneficed clergyman, received for several years an annual grant of money from a diocesan branch affiliated to the Queen Victoria Clergy Sustentation Fund, a body incorporated with the object of providing adequate remuneration for the beneficed clergy for the work done by them; the fund was not intended to be merely a clerical charity. The funds of the diocesan branch were administered by a council whose aim was to raise the incomes of all benefices under £200 *per annum* in value to that amount. The council did not take into consideration the personal circumstances of the particular incumbent, but the *onus* rested upon applt. of deciding whether his own circumstances justified him in applying for a grant. The incumbent of a benefice of less than £200 a year was not necessarily entitled to a grant, but the giving, withholding, continuance, & discontinuance of grants out of the funds were matters wholly

within the discretion of the council. Where a benefice fell vacant during the year for which the grant was made, the grant was divided between the outgoing & incoming incumbent in proportion to the length of time for which each had been incumbent:—*Held*: the grants received by the incumbent from the diocesan branch were "perquisites or profits accruing by reason of his office" within Income Tax Act, 1842 (c. 35), s. 146, Sched. E., r. 1, & he was therefore liable to pay income tax under Schedule E. upon them.—*HERBERT v. MCQUADE*, [1902] 2 K. B. 631; 71 L. J. K. B. 884; 87 L. T. 349; 66 J. P. 692; 18 T. L. R. 728; 4 Tax Cas. 489, C. A.

Annotations:—*Expld.* Poynting v. Faulkner (1905), 93 L. T. 367. *Distd.* Turton v. Cooper (1905), 92 L. T. 863. *Consd.* Cooper v. Blakiston, [1907] 2 K. B. 688; Cowan v. Seymour, [1920] 1 K. B. 500; Hartland v. Diggins, [1925] 1 K. B. 372. *Refd.* Smith v. Smith, [1923] P. 191; Barson v. Airey (1925), 42 T. L. R. 145.

493. ———.]—The minister of a chapel received a grant from a fund called the "Minister's Stipend Augmentation Fund." That fund was vested in trustees, & managed by a committee. The income of the fund was to be applied by the committee towards the augmentation of the stipends of ministers of such congregations as they might from time to time in their discretion select. Each grant was to be made for the current year only, & in making such grant, regard was to be paid to the state & condition of the congregation, & their ability to make adequate provision for their minister. The private income, the stipend received from the congregation, the age, training, & length of service of each applt. for a grant was also taken into consideration. Each grant was paid half-yearly, & ceased on the death, resignation, or removal of the recipient, & any part of the grant then unpaid was not paid at all either to him or his successor:—*Held*: the amount of the grant was part of the profits or gains of the minister in his profession or vocation, & he was chargeable with income tax in respect thereof.—*POYNTING v. FAULKNER* (1905), 93 L. T. 367; 21 T. L. R. 560; 5 Tax Cas. 145, C. A.

Annotations:—*Consd.* Cooper v. Blakiston, [1907] 2 K. B. 688. *Refd.* Turton v. Cooper (1905), 92 L. T. 863; Cowan v. Seymour, [1920] 1 K. B. 500.

494. ——— Collection in church paid to clergy.]—Portions of collections made in a church were paid to the incumbent. They were paid to him by reason of his being incumbent, but they would not have been paid to him if he had not been poor:—*Held*: he was not assessable to income tax in respect of the amount so received.—*TURTON v. COOPER* (1905), 92 L. T. 863; 21 T. L. R. 546; 5 Tax Cas. 138.

Annotation:—*Consd.* Cooper v. Blakiston, [1907] 2 K. B. 688.

495. ——— Easter offerings to clergy.]—Voluntary Easter offerings of money given as a freewill gift to the incumbent of a benefice as such for his personal use are, if given for the purpose of increasing his stipend, assessable to income tax as "profits accruing to him by reason of his office" under Income Tax Act, 1842 (c. 35), s. 146, Sched. E., r. 1.—*BLAKISTON v. COOPER*, [1909] A. C. 104; 78 L. J. K. B. 135; 100 L. T. 51; 25 T. L. R.

grant was a gift & not a payment for services rendered & was not assessable.—*INLAND REVENUE COMR. v. LUNNON*, [1924] App. D. 94.—S. AF.

1. ——— Allowance to detective for plain clothes.]—A detective officer received, in addition to his pay, a money allowance with which he was bound to purchase plain clothes

suitable for his duties & approved by his superior officer. The detective received the same pay as an ordinary policeman of a similar grade, but, whereas the ordinary policeman received his uniform free, the detective received the money allowance in lieu thereof:—*Held*: the allowance paid to the detective was a profit accruing

to him by reason of an office or ment under a public corpn. within Income Tax Act, 1842, Schedule (E.), & accordingly was subject to income tax.—*FRAGGUSON v. NOBLE*, [1925] S. C. 534; 7 Tax Cas.

m. "Perquisites or Occupation of Office"

164; *sub nom.* COOPER v. BLAKISTON, 53 Sol. Jo. 149; 5 Tax Cas. 347, H. L.

Annotations.—*Consd.* Hartland v. Diggins, [1925] 1 K. B. 372. *Refd.* Bolam v. Allgood (1913), 110 L. T. 8; Cowan v. Seymour, [1920] 1 K. B. 500. *Mentd.* Penn v. Spiers & Pond, [1908] 1 K. B. 766.

496. ——— Testimonial to officers of company—Distinguished from payment for services.]—COWAN v. SEYMOUR, No. 490, *ante*.

Compare No. 98, *ante*.

497. ——— Remuneration of trustee of settlement—Payable out of income of trust.]—Applt. was appointed a trustee under a deed of settlement by the terms of which he was entitled to remuneration for his services at the rate of £100 *per annum*, that remuneration being payable out of the income arising from the trust funds:—*Held*: the sum of £100 was an “annual payment” payable wholly out of profits or gains brought into charge to tax within All Schedules Rules, r. 19, & was not a payment in respect of an employment so as to be the subject of direct assessment under Schedule D., Case II.—BAXENDALE v. MURPHY, [1924] 2 K. B. 494; 93 L. J. K. B. 974; 132 L. T. 490; 40 T. L. R. 784; 69 Sol. Jo. 12; 9 Tax Cas. 76.

498. ——— Commission paid to salaried officer—For negotiating sale of part of business.]—Applt., an incorporated accountant, was secretary & director of a co. & received a salary as such. He negotiated the sale of a branch of the co.’s business & was granted by the co. the sum of £1,000 “as commission for his services in negotiating the sale.” He was assessed to income tax, Schedule E., in respect of this payment, & appealed against the assessment on the ground that the negotiation of the sale was not part of his duties as secretary & director & that the payment was a voluntary gift which did not constitute a profit for income tax purposes:—*Held*: the £1,000 was part of the profit of applt.’s office & was accordingly assessable to income tax under Schedule E.—MUDD v. COLLINS (1925), 133 L. T. 186; 41 T. L. R. 358; 69 Sol. Jo. 490; 9 Tax Cas. 297.

499. ——— Remuneration of company director—Whether company public or private.]—A director of a co. is to be assessed to income tax under Schedule E. & not under Schedule D., whether the co. is a public or a private co.—WATSON v. ROWLES (1926), 42 T. L. R. 379.

500. ——— Additional remuneration—For additional services.]—Applt., who was the chairman of the directors of a London co. with interests in China, paid visits to China on behalf of the co., & in addition to his fees as chairman, was awarded by the directors remuneration for his services there. This award was made under the arts. of assocn., which provided that if any director agreed to go abroad & perform extra services he was to receive remuneration therefor. Applt. was assessed to income tax under Schedule E. in respect of the additional remuneration, & the Comrs. upheld the assessment, finding that the additional remuneration was paid to applt. as chairman of the co. for services rendered by him as a director under the provisions of the arts.:—*Held*: there was evidence to support the finding of the Comrs., & their decision must be affirmed.—BARSON v. AIREY (1925), 134 L. T. 586; 42 T. L. R. 145; 69 Sol. Jo. 679, C. A.

501. ———.]—DAUNCEY v. HOWLETT (1926), 161 L. T. Jo. 235.

502. ——— Proceeds of benefit match—Professional cricketer.]—*Held*: the proceeds of a professional cricketer’s benefit match do not constitute an income, profit, or gain, but a mere present not assessable to income tax.—REED v. SEYMOUR (1926), 42 T. L. R. 377; *reversd.* 161 L. T. Jo. 388, C. A.

503. “Perquisites or profits”—Occupation of house—Whether profits restricted to money payments.]—TENNANT v. SMITH, No. 87, *ante*.

504. ——— Commission on profits—General manager of company.]—Applt., whose remuneration as general manager of a limited co. consisted partly of a fixed annual salary & partly of a commission or bonus on the co.’s net profits, had been assessed to income tax under Schedule E., r. 1, for the years 1914–15 to 1917–18 on the basis of the total amount of salary & commission or bonus received or receivable by him from the co. in respect of each of those years:—*Held*: the commission or bonus on net profits fell within the definition of the expression “perquisites” in Schedule E., r. 4, & was assessable to income tax under Schedule E., not on the basis of the actual sum received as commission in the year of assessment, as provided by rule 1 of the schedule, but on the basis of the average amounts in the three preceding years, as provided by rule 4.—M’DONALD v. SHAND, [1923] A. C. 337; 92 L. J. P. O. 174; 129 L. T. 641; 39 T. L. R. 444; 67 Sol. Jo. 516; 8 Tax Cas. 420, H. L.

505. “Salary”—Increases not paid person charged—Compulsorily carried to provident fund.]—Under a provident fund scheme at D. College the following increases of salaries came into operation: (a) assistant masters having not less than five, but less than fifteen years’ service, an increase of 5 per cent.; (b) those having fifteen years’ & over, 7½ per cent.; (c) a further addition equal to those sums subject to certain conditions. The whole of these increases were not to be paid to the masters, but were to be accumulated at compound interest to form the fund. The conditions above referred to were that masters of less than ten years’ service who resigned or ceased to belong to the college from any other cause than ill-health were to be entitled to increase (a) & the accumulations thereof, but not to increase (c); if the master retired from ill-health, the governors in addition to (a) might grant him (c); & in the event of death both (a) & (c) were to be paid to his legal representative. Masters of over ten years’ service were to receive on retirement before the age of sixty the total sum due under (a) or (b) & (c) with accumulations, & in the case of death the same was to be paid to his legal representative. Masters removed for misconduct or, having been guilty of misconduct, allowed to resign were not entitled to (c):—*Held*: these increases of salary were sums really added to the salary, & were assessable to income tax under Income Tax Act, 1842 (c. 35), s. 146, Sched. E.—SMYTH v. STRETTON (1904), 90 L. T. 756; 53 W. R. 288; 20 T. L. R. 443; 48 Sol. Jo. 437; 5 Tax Cas. 36.

Annotations.—*Refd.* Cowan v. Seymour, [1920] 1 K. B. 500; Bruce v. Hatton, [1922] 2 K. B. 206.

Compare Nos. 529–531, *post*.

Inland Revenue Act, 1876, s. 8, allows an abatement from income tax to a person assessed when “his total income from all sources is less than £400:—*Held*: the annual value of a manse free by the Minister of congregation of the Free Church

of Scotland, the feudal title of which was in trustees for behoof of the congregation, did not fall to be reckoned as “income” of the minister in the sense of the above section.—INLAND REVENUE v. SUTHERLAND (1894), 21 R. (Ct. of Sess.) 753.—SCOT.

n. ———.]—INLAND REVENUE v. FRY (1895), 22 R. (Ct. of Sess.) 422; 3 Tax Cas. 335.—SCOT.

o. ——— Sum placed to credit of employee.]—WALKER v. REITH (1906), 3 F. (Ct. of Sess.) 221.—SCOT.

Sect. 1.—Scope of schedule: Sub-sect. 2. Sects. 2

506. — Tax paid by employer.]—A shipping co. voluntarily paid the income tax on the salary of their accountant:—*Held*: the amount of this payment must be added to the salary of the accountant in order to ascertain his income for income tax purposes.—*HARTLAND v. DIGGINES*, [1926] A. C. 289; 134 L. T. 492; 42 T. L. R. 262; 70 Sol. Jo. 344, H. L.

Compare No. 658, post.

507. — Cost of board, lodging, washing & uniform—Provided by employer at expense of employee.]—Man & wife were employed at an asylum at separate fixed salaries payable weekly. Under the terms of their employment, the institution provided them with board, lodging, washing & uniform for which they were required to pay amounts varying with the cost of living, such amounts being deducted from their gross salaries before payment. The General Comrs. held, on appeal, that only the net amounts received in cash were assessable to income tax:—*Held*: the husband was assessable to income tax in respect of the gross amount of the remuneration of himself & his wife without any deduction for the amounts paid in respect of the board, lodging, etc., provided by the institution.—*CORDY v. GORDON*, [1925] 2 K. B. 276; 94 L. J. K. B. 670; 133 L. T. 184; 41 T. L. R. 401; 9 Tax Cas. 304.

SECT. 2.—METHOD OF ASSESSMENT AND COLLECTION.

See Schedule E.; 1922 Act, s. 18 (5).

508. Basis of assessment—Whether three years' average to be taken.]—*BRAY v. BROTHERS*, No. 528, *post*.

509. — Assessment of commission on profits.]—*M'DONALD v. SHAND*, No. 504, *ante*.

510. — Additional remuneration of company director.]—*DAUNCEY v. HOWLETT* (1926), 161 L. T. Jo. 235.

See, now, 1922 Act, Sched. III., Part I.

511. — Earnings under Schedule D. & Schedule E.—Whether commingled for purposes of average.]—*ELLIOTT v. GUASTAVINO*, No. 312, *ante*.

512. — Whether one or two employments—Question of fact.]—*ELLIOTT v. GUASTAVINO*, No. 312, *ante*.

513. Deduction from salary—Employees of railway company—Application of Income Tax Act, 1860 (c. 14), s. 6.]—*A.-G. v. LANCASHIRE & YORKSHIRE RY. CO.*, No. 485, *ante*.

514. — Where agreement not to deduct.]—In assessing a railway co. under Income Tax Act, 1860 (c. 14), s. 6, for the duties payable under Schedule E. in respect of offices & employments of profit held under the co., where the co. agrees with its officers not to exercise the right conferred upon it by the sect. to deduct or retain out of the salaries of its officers the duty so charged in respect of their profits & gains, the amount paid by the co. as income tax in respect of the salaries of its officers & not deducted is part of the officers' income for income-tax purposes, & the co. is assessable on that basis.—*NORTH BRITISH RY. CO.* A. C. 37; 92 L. J. P. C. 16; 128

372. — *Consd. Hartland v. Digginnes*, [1925] 1 K. B.

See, now, Schedule E., r. 7; 1922 Act, s. 18 (3).

515. — Special Act providing for payment of salary without deductions—Special Act passed before 1842.]—The special Act passed in 1829 incorporating a charitable institution provided that the salary of the chaplain should not be less than £300 nor more than £500 *per annum*, & that the wardens should pay it to him "without any deduction or abatement for taxes or otherwise howsoever":—*Held*: the wardens were nevertheless bound under Income Tax Act, 1842 (c. 35), to deduct income tax from the chaplain's salary.—*Re LIVERPOOL SCHOOL FOR INDIGENT BLIND*, [1898] 2 Ch. 669; *sub nom. LUND v. LIVERPOOL SCHOOL FOR INDIGENT BLIND*, 67 L. J. Ch. 680; 79 L. T. 68; 62 J. P. 728; 47 W. R. 6; 42 Sol. Jo. 655.

Annotations:—Reid. Harper v. Hedges (1923), 40 T. L. R. 156; *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315.

516. Place of assessment—"Head office of department"—Whether company included.]—Applt. entered into a contract in England with a limited co., whose head office was in England & who carried on a trading business in West Africa, to serve the co. as their agent in West Africa; his employment & salary commenced from the date of his leaving England for West Africa & continued until the date of his giving up charge of the agency in West Africa. Applt. had a place of residence in England where his wife & children resided during his absence in West Africa, & where he himself resided when he was in England:—*Held*: Income Tax Act, 1842 (c. 35), s. 146, Sched. E., r. 3, only applied to an office or employment of profit exercised within the United Kingdom & therefore did not apply to applt.'s employment which was exercised wholly out of the United Kingdom; the employment of applt. by the co. was not an employment under a "department" within sect. 147 so as to make him assessable at the head office of the co.; & therefore applt. was not assessable to income tax in respect of his employment under the co.—*PICKLES v. FOSTER*, [1913] 1 K. B. 174; 82 L. J. K. B. 121; 108 L. T. 106; 29 T. L. R. 112; 20 Mans. 106; 6 Tax Cas. 131.

Annotation:—Reid. Barson v. Airey (1925), 42 T. L. R. 145.

See, now, Schedule E., r. 18 (2), (5); 1922 Act, s. 18 (4).

517. Notice of assessment—Service of—"Usual or last known place of abode."—*BERRY v. FARROW*, No. 10, *ante*.

See, now, 1918 Act, s. 220 (3).

518. Additional assessment—Former assessment wrongly made under Sched. E.—Effect of 1922 Act, s. 18 (6).]—*INGLE v. FARRAND*, No. 484, *ante*.

SECT. 3.—DEDUCTIONS FROM GROSS SALARY.

See, now, Schedule E., rr. 1, 8–10, 17; 1921 Act, s. 32 (1); 1922 Act, s. 31.

519. Expenses incidental to performance of office—Limited to necessary expenses actually incurred.]—Rule 9 of Rules applicable to Schedule E. provides for the deduction from the emoluments of an office for the purposes of assessment to income tax of travelling expenses which the holder of the office is necessarily obliged to incur in the performance of the duties of the office & of other expenses incurred "wholly, exclusively, & necessarily" in performance of those duties. The expenses contemplated by the rule are only those which the holder of the office is obliged to incur by the fact that he holds the office & has to perform its duties & are incurred actually in the course of the performance of those

duties. Expenses which result from the holder's volition to live away from the place where the work of his office has to be performed do not come within the rule.

The recorder of a borough is not entitled to deduct from the amount of his salary for the purposes of its assessments to income tax under Schedule E. travelling expenses between the place where he resides or practises as a barrister & the borough where he sits as recorder, such expenses being incurred on his visits to hold quarter sessions, nor is he entitled to deduct his hotel expenses during his stay in the borough for that purpose, since these expenses are not necessarily incurred & defrayed in the performance of the duties of his office within the meaning of the above rule.—*RICKETTS v. COLQUHOUN*, [1926] A. C. 1; 95 L. J. K. B. 82; 134 L. T. 106; 90 J. P. 9; 42 T. L. R. 66, H. L.

520. — Travelling expenses—Solicitor clerk to justices.]—A solr. residing & carrying on his profession at W. was clerk to the justices at B., & claimed to deduct from the emolument of his office the cost of travelling between W. & B.:—*Held*: the expenses were not incurred in the performance of the duties of the office, & he was not entitled to the deduction claimed.—*COOK v. KNOTT* (1887), 4 T. L. R. 164; 2 Tax Cas. 246, D. C.

Annotations:—*Fold*. *Revell v. Elworthy* (1890), 55 J. P. 392; *Friedson v. Glyn-Thomas* (1922), 128 L. T. 24. *Consd.* *Ricketts v. Colquhoun*, [1926] A. C. 1.

521. — Director of company.]—Travelling expenses incurred by a director of a co. from the place where he lives to the place of meeting are not such "expenses of travelling" as should be deducted for the purposes of the income tax.—*REVELL v. ELWORTHY BROTHERS & Co.* (1890), 55 J. P. 392; 3 Tax Cas. 12.

Annotation:—*Consd.* *Ricketts v. Colquhoun*, [1925] 1 K. B. 725.

522. — Recorder.]—*RICKETTS v. COLQUHOUN*, No. 519, *ante*.

523. — House unobtainable near work.]—A storekeeper employed by a shipbuilding co. in Bideford contended that, owing to the abnormal shortage of houses in that town, he was compelled to take a house at some distance outside, & claimed to deduct from his salary the expenses of maintaining a motor-cycle to get to his work:—*Held*: the expenses in question were not incurred in the performance of the duties of the office, & the deduction claimed was not admissible.—*ANDREWS v. ASTLEY* (1924), 8 Tax Cas. 589.

524. — Board & wages of servant—Wife engaged as mistress of school.]—*BOWERS v. HARDING*, No. 571, *post*.

525. — Cost of removal—Clergyman moving to another incumbency.]—The expenses incurred by a clergyman in removing from one incumbency to another are not "expenses incurred by him wholly, exclusively, & necessarily in the performance of his duty as a clergyman" within All Schedules Rules, r. 2 (1), & cannot be allowed as a deduction.—*FRIEDSON v. GLYN-THOMAS* (1922), 128 L. T. 24; 67 Sol. Jo. 81; 8 Tax Cas. 302.

526. — Cost of board, lodging, washing & uniform—Provided by employer at cost of employee.]—*CORDY v. GORDON*, No. 507, *ante*.

527. — Subscription to professional association—Membership voluntary but customary.]—

A county medical officer claimed to deduct his subscriptions to certain professional societies in the computation of his liability to income tax under Schedule E. in respect of his salary. It was not a condition of his employment that he should be a member of these societies, but such membership is customary for county medical officers. The Special Comrs., on appeal, allowed the deductions sought:—*Held*: the subscriptions in question were not expenses wholly, exclusively & necessarily incurred in the performance of the duties of the office of county medical officer, & they were accordingly not admissible deductions in computing his liability to income tax.—*SIMPSON v. TATE*, [1925] 2 K. B. 214; 94 L. J. K. B. 817; 133 L. T. 187; 41 T. L. R. 370; 69 Sol. Jo. 460; 9 Tax Cas. 314.

528. Previous losses in business—Business converted into company—Former owner appointed managing director.]—In assessing salary under Schedule E. the average of three years is not to be taken.

A person who had made losses in his business, converted it into a limited co. & was appointed managing director at a salary. He was assessed to income tax under Schedule E. for this salary, but claimed to be allowed to set off against it the average loss incurred in the three previous years when the business was his own:—*Held*: he was not entitled to set off such loss.—*BRAY v. BROTHERS* (1897), 13 T. L. R. 325; 3 Tax Cas. 550, D. C.

529. "Sum chargeable by virtue of any Act of Parliament"—Contribution to superannuation or provident fund—Deduction imposed by statute.]—Applt., who was clerk to the guardians of a union, & to the assessment & school attendance committees, was assessed in respect of his salary, under Schedule E., on a net amount of £289. He contributed annually under Poor Law Officers Superannuation Act, 1896 (c. 50), s. 12, for the purposes of that Act, a sum of £15 10s., which was deducted from his salary under that sect. He claimed to deduct this sum from the amount on which he was assessed, by virtue of Income Tax Act, 1842 (c. 35), s. 146, Sched. E., r. 1, by which duty is payable on salaries, etc., "after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament":—*Held*: the amount contributed by applt., under Poor Law Officers Superannuation Act, 1896 (c. 50), came within the words "duties or other sums payable or chargeable by virtue of any Act of Parliament," in Income Tax Act, 1842 (c. 35), s. 146, & therefore he was entitled to the deduction claimed.—*BEAUMONT v. BOWERS*, [1900] 2 Q. B. 204; 69 L. J. Q. B. 600; 83 L. T. 126; 64 J. P. 552; 48 W. R. 557; 16 T. L. R. 376; 44 Sol. Jo. 467; 4 Tax Cas. 189, D. C.

Annotations:—*Dttd.* *Hudson v. Gribble*, *Bell v. Gribble*, [1903] 1 K. B. 517. *Consd.* *North British Ry. v. Scott*, [1923] A. C. 37.

530. — Deduction compulsory under scheme—Scheme authorised by statute.]—A municipal corpn. were by a local Act empowered to establish a fund for the encouragement of thrift among their officers & servants, & with a view to

PART VI. SECT. 3.

528 i. Expenses incidental to performance of office—Travelling expenses—House unobtainable near work.]—Resp. who was principal of a National School situated at C., could not procure a suitable residence near C. He therefore resided at K., about five miles from C., & was obliged to keep a pony

& trap & to employ a man for the purpose of getting from his residence at K. to the National School at C. & back, at an expense of £80 a year, of which he claimed as a deduction:—*Held*: the deduction claimed was

Allowance to

*of religion.]—*A minister of the Church of Scotland is entitled under Property & Income Tax Act, 1853, s. 52, to deduction from his emoluments, of expenses incurred by him in visiting members of his congregation beyond the limits of his parish, & of travelling expenses involved in the discharge of duties laid upon him

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providing a sum of money which, in the event of the retirement or death of any person in the service of the corpn., who had contributed to the fund, should be available for himself or his representatives, & to frame a scheme for that purpose. By a scheme framed by the corpn. in pursuance of the Act, it was provided that persons in the service of the corpn. should respectively contribute to the fund a certain percentage of their salaries, to be from time to time deducted from those salaries by the corpn. In accordance with the requirements of the Act, the scheme provided that the amount so contributed by each contributor should be repaid with interest to him, upon his retirement from the service of the corpn., or in the event of his "death in that service," to his personal representatives:—*Held*: amounts deducted in pursuance of the scheme from the salaries of persons in the service of the corpn. did not come within the words "sums payable or chargeable on the same by virtue of any Act of Parliament where the same are really & *bonâ fide* paid & borne by the party to be charged," & therefore they could not be deducted from the amounts of the salaries for the purpose of assessment to income tax under Income Tax Act, 1842 (c. 35), Sched. E.—*HUDSON v. GRIBBLE, BELL v. GRIBBLE*, [1903] 1 K. B. 517; 72 L. J. K. B. 242; 88 L. T. 186; 67 J. P. 85; 51 W. R. 457; 19 T. L. R. 260; 1 L. G. R. 292; 4 Tax Cas. 522, C. A.

Annotations:—*Consd. Smyth v. Stretton* (1904), 90 L. T. 756. *Apld. Bruce v. Hatton*, [1922] 2 K. B. 206. *Consd. Davis v. I. R. Comrs.* (1922), 92 L. J. K. B. 252; *North British Ry. v. Scott*, [1923] A. C. 37.

531. ——— Membership of fund voluntary—Fund applicable for benefit of wife & issue.]—The East London College adopted a superannuation scheme & invited the members of their existing staff to join it. The principal of the college joined the scheme. The college in accordance with the scheme deducted from his salary of £1,000 £50 *per annum*, being 5 per cent. of his salary of £1,000 *per annum*, & provided a further sum of £50, which was added to the deduction from the principal's salary & accumulated with similar sums deducted from the other members of the staff who joined the scheme & held by the college in accordance with the trusts set out in the scheme, namely, to apply the accumulated funds for the benefit of the member his wife & issue or any of them or partly in one way or partly in another as the institution should in their uncontrolled

discretion think proper. The principal, having been assessed to income tax in the sum of £1,000, in respect of his salary, appealed against his assessment on the ground that the sum of £50, being the amount of the contribution to the superannuation scheme, should not be reckoned as part of his income or should be deducted from his income for income tax purposes:—*Held*: in law the principal of the college must be held to have received the £50 deducted from his salary, inasmuch as the fact that a taxpayer did not actually receive a sum which was a profit or gain was for income tax purposes immaterial, & also what the taxpayer did with the sum or agreed to do with it was equally immaterial.—*BRUCE v. HATTON*, [1922] 2 K. B. 206; 91 L. J. K. B. 958; 127 L. T. 244; 38 T. L. R. 323; 8 Tax Cas. 180.

See, now, 1920 Act, s. 26 (1); 1921 Act, s. 32 (1); 1922 Act, s. 31; & compare No. 505, *ante*.

532. ——— Tax imposed by Income Tax Acts.]—*DAVIS v. INLAND REVENUE COMRS.*, No. 685, *post*.

533. "Really & bonâ fide paid & borne by the party to be charged"—Contributions to provident fund—Repayable on retirement.]—*HUDSON v. GRIBBLE, BELL v. GRIBBLE*, No. 530, *ante*.

534. Relief in respect of loss—Whether claimed by deduction.]—A commercial traveller claimed to deduct from the assessment on him, for salary & commission, a loss incurred by him in connection with the production of a railway signal:—*Held*: the procedure under Customs & Inland Revenue Act, 1890 (c. 8), s. 23, should have been followed.—*GRIMES v. LETHEN* (1898), 3 Tax Cas. 622, D. C.

Annotation:—*Refd. Furtado v. City of London Brewery Co.*, [1914] 1 K. B. 709.

See, now, 1918 Act, s. 34.

535. Allowance to ministers of religion—In respect of house—Calculation of annual value.]—In computing his liability to income tax under Schedule E., a vicar was allowed, under General Rules, applicable to all Schedules, r. 2 (1) (b), a deduction of one-eighth of the annual value of the vicarage which he owned & occupied. He also claimed & was allowed by the General Comrs., on appeal, under the same rule, a deduction of one-eighth of the rates & inhabited house duty paid by him upon the vicarage:—*Held*: rates & inhabited house duty do not fall within the term "rent" or "annual value" in the said rule, & there was no title to any deduction in respect of such payments.—*BUTCHER v. CHITTY* (1925), 9 Tax Cas. 301.

Part VII.—General Allowances, Exemptions and Abatements.

SECT. 1.—IN GENERAL.

See, now, 1918 Act, s. 14 (3), (4), rules applicable to all schedules, r. 19; & 1920 Act, ss. 17–23; 1921 Act, s. 21; 1922 Act, s. 27; 1924 Act, s. 22; 1925 Act, s. 15.

536. "Total income"—Free occupation of house.]—*TENNANT v. SMITH*, No. 87, *ante*.

ecclesiastical superiors.—*CHARLTON v. CORKE* (1890), 17 R. (Ct. of Sess.) 785; 27 Sc. L. R. 647.—*SCOT*.

q. ———.]
GILLESPIE (SURVEYOR
 . 5 Tax Cas. 263.—*SCOT*.

r. ——— Voluntary payments to as-

istant.]—Voluntary contributions by a minister towards the stipend of his assistant minister are not expenses incurred by him wholly, exclusively, & necessarily in the performance of his duty within 16 & 17 Vict. c. 34, s. 52.—*LOTHIAN (SURVEYOR OF TAXES) v. MACRAE* (1884), 2 Tax Cas. 5.—*SCOT*.

NOTE.—1918 Act, ss. 9–13, 14 (1) & (2), 15, granting relief where the "total income" of the person to be charged did not exceed certain limits therein specified were repealed by 1920 Act; by s. 17 (1) of that Act relief in the form of the allowances authorised is made conditional upon making a return of "total income."

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536 i. "Total income"—Free occupation of house.]—A minister of the Free Church of Scotland claims that the annual value of the manse occupied by him is not to be taken into account in calculating his total income for the purpose of the abatement of £120:—

537. Annual payment charged on profits—Part of profits of partnership paid to reserve fund.]—Applt. & his brother were partners in a business of which the property & goodwill had been bequeathed by their father's will upon trust for his two sons for life upon condition that they should enter into partnership. In order to preserve the assets of the business the trustees under the will required the partners to enter into an agreement under which a certain percentage of the net profit of the business was to be set aside in each half-year to create a reserve fund to meet any losses arising out of the business. Subject to that condition the reserve fund remained the property of the partners:—*Held*: the sum set aside was an annual payment reserved or charged upon the net profits of the partnership whereby the income of each of the partners is diminished.—**STOCKER v. INLAND REVENUE COMRS.**, [1919] 2 K. B. 702; 88 L. J. K. B. 993; 121 L. T. 380; 35 T. L. R. 607; 7 Tax Cas. 304.

Annotation:—*Reid*. I. R. Comrs. v. Hay (1924), 8 Tax Cas. 636.

See, now, 1918 Act, s. 27 (1).

— **Remuneration to trustee of settlement—Payable out of trust income.]—***See* No. 497, *ante*.

538. Who may claim exemption—Corporate body or association—Income below limit of taxable income for a private person—Limited company.]—A limited co. registered under Cos. Acts is not exempt from liability to the payment of income tax by reason merely of its income not exceeding £160 a year.—**MYLAM v. MARKET HARBOROUGH ADVERTISER CO.**, [1905] 1 K. B. 708; 74 L. J. K. B. 205; 92 L. T. 94; 53 W. R. 478; 21 T. L. R. 201; 5 Tax Cas. 95; *sub nom.* **KNIGHT v. MARKET HARBOROUGH CO., LTD.**, 49 Sol. Jo. 315.

Annotation:—*Mentd.* *Re* Royal Naval School, Seymour v. Royal Naval School, [1910] 1 Ch. 806.

539. ——— Unincorporated association.]—An unincorporated assocn. is not exempt from liability to the payment of income tax by reason of its income not exceeding £160 a year.—**CURTIS v. OLD MONKLAND CONSERVATIVE ASSOCN.**, [1906] A. C. 86; 75 L. J. P. O. 31; 94 L. T. 7; 22 T. L. R. 177; 5 Tax Cas. 189, H. L.

Annotation:—*Reid*. Mylam v. Market Harborough Advertiser Co. (1905), 92 L. T. 94.

540. Children allowance—Child “living”—Whether child en ventre sa mère included.]—The rule extending the meaning of the words “child living” to a child *en ventre sa mère* does not apply to 1920 Act, s. 21, by which a certain relief from income tax is granted in respect of children “living” at the beginning of the year of taxation.—**JACKSON v. VOSS**, [1923] 2 K. B. 357; 92 L. J. K. B. 683; 39 T. L. R. 445; 67 Sol. Jo. 620; 8 Tax Cas. 429.

Held: the annual value of the manse does not form part of his income for such purpose.—**M'DOUGALL v. SUTHERLAND** (1894), 3 Tax Cas. 261.—**SCOT**.

t. War profits.]—The only deduction from the assessable income received by a taxpayer in a given year allowed in respect of war time profits tax is the amount of that tax which was payable in respect of any part of that assessable income, & a deduction of war time profits tax paid during the year of assessment in respect of profits earned during the preceding year or years is not allowed.—**FEDERAL MR. OF TAXATION v. MCCOMAS** (1923), C. L. R. 479; *reversg.* *Re* **FEDERAL**

a. Casual receipts.]—Indian Income Tax Act, 1922, s. 4 (3) vii., exempts only receipts of a casual & non-recurring nature which are not

receipts from business or the exercise of a profession or occupation by an assessee.—*Re* **CHUNNI LAL KALYAN DAS** (1924), I. L. R. 47 All. 368.—**IND.**

b. American company—With factory in India.]—A co. incorporated in United States of America & having its head office in New York & branch offices, agencies & factories in Calcutta, London, etc., which purchases goods in India for sale in the open market in America or for another co. in America, the commission for the purchase for the co. being paid in America, & which has also a factory in the United Provinces, where raw produce is bought locally, & is worked up into a form suitable for exports to America, is not exempt from assessment to income tax or super tax in India.—*Re* **ROGERS PYATT SHELLEAC & CO. v. SECRETARY FOR INDIA** (1924), I. L. R. 52 Cal. 1.—**IND.**

541. Calculation of relief—Where income from shares in public companies—Position of companies in relation to shareholders—Effect of change in rate of tax.]—Applt.'s sole income for the year ended Apr. 5, 1923, was derived from interest & dividends on stocks & shares in public cos., which having paid income tax on their profits, had made proportionable deductions from the dividends paid to applt. Applt. claimed relief & was repaid £61 17s. 6d., being 5s. in the pound (the full rate of tax for the year) on the first £135, & 2s. 6d. in the pound on the next £225. He now claimed to be entitled to repayment of the amount by which the aggregate amount of the tax deducted by the cos. exceeded the amount of income tax which would have been payable by him for the year in question upon the income actually received by him in that year:—*Held*: the cos. being taxable on their profits & not as agents for the shareholders, & there being no provision for the return of any of the tax to the shareholder save in the process of giving effect to deductions & reliefs, applt.'s contention failed.

There does exist, however, a question upon the operation of these deductions & reliefs in cases where a change in the rate of tax has produced a state of figures such as exists in applt.'s case, namely, whether in according the refunds the current rate is to be applied though the income to be exonerated from tax has in fact borne tax at an earlier & different rate, or, taken as a whole, at a rate averaged between the current & such earlier rate. The taxation which I uphold in dismissing this appeal proceeds upon this principle, & it might be thought that my decision affirms it. I must make it clear that it does not. The point was not in question before the comrs. It was not raised by the case stated. Applt., confident in a larger proposition, said he did not argue it, & the necessary figures are not before me. If the point is ever discussed the principle on which tax is added for super-tax purposes may fall to be considered with it (**ROWLATT, J.**).—**RITSON v. PHILLIPS** (1924), 131 L. T. 384; 9 Tax Cas. 10.

542. Statutory exemption from parliamentary tax—Local Act—Exemption after income tax instituted—Whether tax annual or continuing.]—Resps., the conservators of the river Thames claimed exemption under Thames Conservancy Act, 1894 (c. clxxxvii), s. 289, from the payment of income tax for the years 1905 & 1906 in respect of properties within the sect. The surveyor of taxes contended that, income tax being an annual tax, the income tax for the years 1905 & 1906 was not a tax existing at the date of the passing of the Act, & that resps. were, therefore, not entitled to the exemption claimed:—*Held*: though income

c. Interest on loans.]—A financial & investment co. obtained from bankers in New York sums on loan for periods not exceeding six months in order to pay for securities purchased by it:—*Held*: the sums borrowed could not be regarded as capital, & the interest fell to be deducted in arriving at the assessable profits.—**SCOTTISH NORTH AMERICAN TRUST, LTD. v. INLAND REVENUE**, [1910] S. C. 966; *affd.*, [1912] S. C. (H. L.) 26.—**SCOT**.

d. Trust estate—Income of beneficiaries—Earned in business by trustees.]—Where a business is carried on by trustees under trusts which, although for the benefit of the beneficiaries, do not constitute them the owners of the business, & the beneficiaries are entitled to the income of the trust estate, the beneficiaries & not the trustees are the taxpayers in respect

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tax is in form an annual tax, the income tax payable in the years subsequent to 1894 must, for the purpose of the exemption, be deemed to be a tax which was existing at the date of the passing of the Act, & resps. were, therefore, entitled to the exemption claimed.—**STEWART v. THAMES CONSERVATORS**, [1908] 1 K. B. 893; 77 L. J. K. B. 396; 98 L. T. 900; 72 J. P. 181; 24 T. L. R. 333; 5 Tax Cas. 297.

Annotations:—**Consd.** *Argyle v. I. R. Comrs.* (1913), 7 Tax Cas. 225; *Pole-Carew v. Craddock*, [1920] 3 K. B. 109. **Refd.** *Re Shrewsbury Estate Acts*, *Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315. **Mentd.** *Associated Newspapers v. London Corpn.*, [1916] 2 A. C. 429.

543. Exemption granted before income tax instituted.—A ferry was established by & maintained under 30 Geo. 3, c. 61, which was to be deemed to be a public Act, & contained a provision that the then proprietors, or their respective heirs or assigns, "shall not be rated or assessed for or toward the payment of any tax, rate, or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry. . . .":—**Held**: the exemption granted by the statute extended to parliamentary taxes whether in existence at the date of the Act or not, & therefore included income tax, although that tax was first imposed subsequently to the passing of the Act.—**POLE-CAREW v. CRADDOCK**, [1920] 3 K. B. 109; 89 L. J. K. B. 507; 123 L. T. 309; 36 T. L. R. 447; 7 Tax Cas. 488, C. A.

Annotations:—**Consd.** *Re Shrewsbury Estate Acts*, *Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315. **Refd.** *Harper v. Hedges*, [1923] 2 K. B. 314.

544. Statutory exemption from all taxes—Public general Act—Act inconsistent with Income Tax Acts.—(1) By sect. 1 of a special Act of Parliament passed in 1871 (34 Vict. c. 1), it was provided that an annuity of £6,000 *per annum* for life should be settled upon Her Royal Highness the Princess Louise Caroline Alberta, "to commence from the date of the marriage of Her Royal Highness with John Douglas Sutherland Campbell aforesaid (now the Duke of Argyll) to be free from all taxes, assessments, & charges." The Duke of Argyll was assessed for super tax under Finance (1909–10) Act, 1910 (c. 8), on the grounds that the income of his wife was a sum exceeding £5,000, & he paid the sum demanded for the three years, 1910, 1911, & 1912 "as a matter of grace," when he appealed against the assessment. The assessment was afterwards affirmed by the Comrs. of Inland Revenue. On a case stated, it was contended on behalf of applt. that the grant which was made under the special Act of 1871 "free from all taxes, assessments, & charges" exempted the same from charges of any kind whatsoever, in spite of Income Tax Act, 1842 (c. 35), s. 187, which enacted that any future Act of Parliament conferring an exemption from "taxes" should not include income tax, as Parliament could not pass an Act fettering the sovereignty of Parliament in its

future Acts, & that any future Parliament could abrogate the same. On behalf of the Crown it was contended that "all taxes" in the Act of 1871 meant all taxes except income tax, & that the super tax was simply an additional income tax:—**Held**: as the two Acts of 1842 & 1871 were inconsistent in their terms, the later Act, which freed the grant from "all taxes," must prevail, & the Comrs. of Inland Revenue had arrived at an erroneous conclusion.

(2) Super tax is a variety of income tax (**SCRUTTON, J.**).—**ARGYLL (DUKE) v. INLAND REVENUE COMRS.** (1913), 109 L. T. 893; 30 T. L. R. 48; 7 Tax Cas. 225.

Annotation:—As to (1) **Refd.** *Pole-Carew v. Craddock*, [1920] 3 K. B. 109.

See 1918 Act, s. 213.

545. Relief in respect of income accumulated under trust—Date of vesting.—Testatrix who died in 1904 bequeathed her residuary estate on trust, after payment of a weekly sum to each of three granddaughters, of whom resp. was one, to accumulate the surplus income thereof until the youngest of the said granddaughters should attain the age of 30, when the capital & accumulated income were to be held on trust for the three granddaughters in equal shares. The will provided that the interest of each granddaughter should be absolutely vested at the age of 21 or marriage & settled it on her for life. Resp. married on Mar. 31, 1906, & the youngest granddaughter attained the age of 30 on Aug. 11, 1918. & as from the latter date resp. was paid the income arising from her share of the capital & accumulations. On Apr. 4, 1922, resp. preferred a claim under 1918 Act, s. 25, for repayment of the income tax paid or deducted in respect of her share of the income accumulated from Apr. 6, 1904, to Aug. 1918, & this was allowed by the General Comrs. on appeal:—**Held**: so far as resp. was concerned, the contingency contemplated by sect. 25 had happened in 1906, when her interest under the will became absolutely vested on her marriage, & she was accordingly not entitled to relief under the said sect.—**STONELEY v. AMBROSE** (1925), 133 L. T. 233; 9 Tax Cas. 389.

SECT. 2.—ALLOWANCE OF PREMIUMS ON LIFE INSURANCE POLICIES.

See, now, 1918 Act, s. 32; 1920 Act, s. 26, Sched. III.

546. Application to foreign insurance company—Though office in England.—By Income Tax Act, 1853 (c. 34), s. 54, provision is made for the deduction from assessments under Schedule D. of the premium paid by the person assessed for an insurance on his life with any insurance co. registered as therein mentioned; & by 16 & 17 Vict. c. 91, s. 1, the benefit of the provision is extended

of the incomes of the beneficiaries, & the whole of the income is taxable as the produce of property.—**WEBB v. SYME** (1910), 10 C. L. R. 482.—**AUS.**

e. — — — — —.]—Trustees carried on a business, forming part of the residue of the trust-estate, for behoof of two daughters of testator who were in minority:—**Held**: the profits of the business were earned by individuals to whom they did not belong, & belonged to individuals who did not earn them, & therefore the beneficiaries were not entitled to the relief sought.—**INLAND REVENUE v. SHIEL'S TRUSTEES**, [1915] S. C. 159;

52 Sc. L. R. 103.—**SCOT.**

f. Curator bonis of lunatic—Carrying on business of lunatic—Not "earned income" of lunatic.—**M'DOUGALL v. INLAND REVENUE**, [1919] S. C. 86.—**SCOT.**

g. Relief in respect of repairs.—A property-owner claimed relief under Schedule A. in respect of the excess cost of maintenance, etc., of one of his estates on a five years' average over the fixed statutory allowances for repairs made in the Schedule A. assessments on the property. The excess cost of maintenance, etc., was greater than the net annual value of the

estate under Schedule A. & he claimed that in addition to the repayment of the whole of the income tax, Schedule A., paid on the estate he was entitled to repayment against his other taxed income of tax on the amount by which the excess of maintenance, etc., exceeded the net annual value of the estate:—**Held**: the relief to which he was entitled was limited to repayment of the amount of income tax paid by him under the Schedule A. assessments on the estate concerned.—**CROMPTON (INSPECTOR OF TAXES) v. CAMPBELL** (1924), 9 Tax Cas. 224.—**SCOT.**

to any person who shall have insured his life "in or with any insurance co. existing on Nov. 1, 1844, or in or with any insurance co. registered pursuant to 7 & 8 Vict. c. 110":—*Held*: this provision did not apply to an insurance with a foreign co., even although that co. was in existence on Nov. 1, 1844, & had an office in England.—*COLQUHOUN v. HEDDON* (1890), 25 Q. B. D. 129; 59 L. J. Q. B. 465; 62 L. T. 853; 38 W. R. 545; 6 T. L. R. 331; 2 Tax Cas. 621, C. A.

Annotations:—*Mentd. Adam v. British & Foreign S.S. Co.*, [1898] 2 Q. B. 430; *Davidsson v. Hill*, [1901] 2 K. B. 606; *Whitney v. I. R. Comrs.* (1925), 42 T. L. R. 58, H. L.

547. Effect of agreement between company & commissioners.]—MURPHY v. COLQUHOUN (1891), 7 T. L. R. 613.

548. What amounts to "payment" of premium—Premium advanced by insurer.]—Where under a life insurance policy the insurer advances the annual premium to the assured as a loan on the security of the policy, & gives him receipts for the premium as "paid" the assured is not entitled to deduct the amount of the premium from his profits & gains under Schedule D., of the Income Tax Act; for it is not in fact "paid by him" within Income Tax Act, 1853 (c. 34), s. 54.—*HUNTER v. R.*, [1904] A. C. 161; 73 L. J. K. B. 381; 90 L. T. 325; 52 W. R. 593; 20 T. L. R. 370; 5 Tax Cas. 13, H. L.

Annotation:—*Distd. Turton v. O'Brien* (1919), 7 Tax Cas. 170.

549. What amounts to "insurance on life" Endowment insurance.]—An insurance contract, whereby, in consideration of an annual premium, £100 is payable on the death of the assured within fifteen years & £200 if he is alive at the end of that period, is an "insurance on his life" within Income Tax Act, 1853 (c. 34), s. 54, & the assured is entitled to deduct the whole amount of the premium from his assessment to income tax.—*GOULD v. CURTIS*, [1913] 3 K. B. 84; 82 L. J. K. B. 802; 108 L. T. 779; 29 T. L. R. 469; 57 Sol. Jo. 461; 6 Tax Cas. 293, C. A.

550. What is "premium or other payment"—Lump sum paid in commutation.]—Applt. had taken out a policy of insurance on his life &, after paying the annual premiums thereunder for some years, entered into an arrangement with the insurance co. under which he made a lump sum payment in consideration of a reduction in the amount of future annual premiums. He claimed that he was entitled for income tax purposes to an allowance of the amount (including this lump sum payment) actually paid by him in the year "on a policy for securing a capital sum at death," so long as such amount did not exceed one-sixth of his net income, & 7 per cent. if the capital sum assured under the terms of the policy:—*Held*: the words "premium or other payment" in Finance Act, 1915 (c. 62), s. 17 (1), did not in any way extend the allowance granted by Income Tax Act, 1853 (c. 34), s. 54, & a lump sum paid in commutation of future annual premiums was not an annual premium within Income Tax Act, 1853 (c. 34), s. 54.—*TURTON v. O'BRIEN* (1919), 7 Tax Cas. 170.

See, now, 1918 Act, s. 32 (1), as amended by 1920 Act, s. 26 (1).

551. Limitation of allowance—Insurance made "after June 22, 1916"—Fresh policy taken out in different policy—Former policy allowed to lapse.]—Resp., on Nov. 30, 1915, took out with the S. Life Assurance Co. an ordinary whole life policy, insuring the payment of £10,000 on his death, at an annual premium of £350. On Aug. 29, 1916, he took out with the R. Assurance Corpn. another

similar policy for £10,000, at an annual premium of £338 6s. 8d., & on Nov. 30, 1916, i.e. after a period of about three months during which he had been insured under both policies, he allowed the earlier policy to lapse. For the purpose of the second policy resp. made a fresh proposal & declaration & underwent a fresh medical examination:—*Held*: the policy effected with the R. Assurance Corpn. was a fresh contract of insurance made after June 22, 1916, &, in view of 1918 Act, s. 32 (3) (e) (i), an allowance in respect of the premiums payable thereunder could not be granted for income tax purposes for the year ended Apr. 5, 1920, at a greater rate than 3s. in the pound.—*BARTON (H.M. INSPECTOR OF TAXES) v. MILLER* (1922), 8 Tax Cas. 315.

Allowance for purposes of super tax.]—See No. 683, post.

SECT. 3.—RELIEF IN RESPECT OF DOMINION INCOME TAX.

See, now, 1920 Act, s. 27; 1921 Act, s. 28.

552. Right of preference shareholders to relief.]—A co. registered in the United Kingdom but carrying on business in South Africa paid United Kingdom income tax on its profits at the rate of 5s. in the pound, & under Finance Act, 1916 (c. 24), s. 43, received repayment of part of the United Kingdom tax at the rate of 1s. 6d. in the pound in respect of South African income tax paid on the same profits. The co. having declared a dividend on its preference shares deducted 5s. in the pound from the dividends in respect of United Kingdom income tax:—*Held*: (1) on the declaration of the dividend the co. was bound to pay the whole to the preference shareholders, less only such deduction as was authorised by Income Tax Act, 1842 (c. 35), s. 54; (2) under that sect. "duty charged" meant duty paid; (3) under the combined effect of Finance Act, 1916 (c. 24), s. 43, & Income Tax Act, 1842 (c. 35), s. 54, the only deduction the shareholder was bound by statute to allow was a deduction of what the co. was actually out of pocket by the payment on his account of British income tax.—*ROVER v. SOUTH AFRICAN BREWERIES*, [1918] 2 Ch. 233; 87 L. J. Ch. 516; 119 L. T. 481; 34 T. L. R. 478; 62 Sol. Jo. 636.

Annotations:—*As to* (3) *Overd. Scottish Union & National Insce. v. New Zealand & Australian Land Co.*, [1921] 1 A. C. 172. *Consd. Wakefield v. Whiteaway, Laidlaw*, [1922] 1 Ch. 200; *Sheldrick v. South African Breweries*, [1923] 1 K. B. 173.

553. —.]—Where a co., registered in the United Kingdom but carrying on business in a Colony, has paid United Kingdom income tax on its profits, &, under Finance Act, 1916 (c. 24), s. 43, has received repayment of part of the income tax so paid in respect of Colonial income tax paid on the same profits, & has paid to the preference shareholders the full amount of its dividend to which they were entitled under their contract, deducting United Kingdom income tax, such shareholders are not entitled, as between themselves & the co., to participate in the allowance made under above sect. in respect of the Colonial income tax which had to be paid before the net profits earned in the Colony could be ascertained.—*SCOTTISH UNION & NATIONAL INSURANCE CO. v. NEW ZEALAND & AUSTRALIAN LAND CO.*, [1921] 1 A. C. 172; 89 L. J. P. O. 220; 124 L. T. 225; 36 T. L. R. 830; 65 Sol. Jo. 24, H. L.

Annotations:—*Consd. Wakefield v. Whiteaway, Laidlaw*, [1922] 1 Ch. 200; *Sheldrick v. South African*, [1923] 1 K. B. 173.

Sect. 3.—Relief in respect of Dominion income tax.
Sect. 4. Part VIII. Sect. 1: Sub-sect. 1.]

554. — Effect of 1920 Act, s. 27 (5).]—A co. incorporated under Cos. Acts & carrying on business in the United Kingdom & the Colonies claimed the right to deduct from the dividends of the preference shareholders income tax at the full rate, without granting relief from that tax corresponding with that to which the co. was entitled under 1920 Act, s. 27, in respect of Dominion income tax:—*Held*: 1920 Act, s. 27 (5), did not, notwithstanding the apparent generality of the language of that sub-sect., entitle the preference shareholders to payment of their dividends without deduction of income tax therefrom at a rate exceeding the United Kingdom income tax as reduced by the relief from that tax conferred upon the co. under 1920 Act, s. 27, in respect of any payment by the co. of Dominion income tax; & accordingly, the co. were entitled to deduct from those dividends the full rate of United Kingdom income tax.—*WAKEFIELD v. WHITEAWAY, LAIDLAW & Co.*, [1922] 1 Ch. 200; 90 L. J. Ch. 521; 127 L. T. 120; 37 T. L. R. 569.

Annotation:—*Overd. Sheldrick v. South African Breweries*, [1923] 1 K. B. 173.

555. — —.]—A co. incorporated under Cos. Acts, 1862 to 1892, & carrying on business mainly in South Africa, claimed the right to deduct from the dividends of the preference shareholders United Kingdom income tax at the full rate, without making any reduction in the rate of that tax corresponding with the relief which the co. had itself allowed under 1920 Act, s. 27 (1), in respect of Dominion income tax:—*Held*: the words "any dividends" in 1920 Act, s. 27 (5), were clear & unambiguous & included all dividends whether preferential or ordinary, & the co. was not entitled to deduct from the preferential dividends income tax at a rate exceeding the United Kingdom income tax as reduced by the relief from that tax conferred upon the co. under 1920 Act, s. 27 (1), in respect of any payment by the co. of Dominion income tax.

Wakefield v. Whiteaway, Laidlaw & Co., No. 554, *ante*, *overd.*—*SHELDRIK v. SOUTH AFRICAN BREWERIES, LTD.*, [1923] 1 K. B. 173; 92 L. J. K. B. 112; 128 L. T. 485; 39 T. L. R. 26; 67 Sol. Jo. 95, C. A.

556. — —.]—A co. which has income tax deducted from dividends paid to it reduced as the result of the operation of Finance Act, 1920 (c. 18), s. 27 (5), is itself within the operation of that subsection when seeking to deduct income tax from its own dividends, & must therefore pass on the benefit of the relief received in respect of the payment of Dominion income tax.—*GOLD FIELDS AMERICAN DEVELOPMENT CO., LTD. v. CONSOLIDATED GOLD FIELDS OF SOUTH AFRICA, LTD.* (1926), 42 T. L. R. 261; 70 Sol. Jo. 426.

557. Tax on profits on Colonial branch business —Branch formerly run at loss.]—By 1920 Act, s. 27 (1), "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Comrs. that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income" at a certain rate. Applt. co. had its chief seat of business in England, but it had branches in India & Australia. It was assessed to British income tax on the whole of its profits, wherever made. The assessment for the year ending Apr. 5, 1921, was £261,711, which was based on the average profits for the three years to Oct. 31, 1919, & £250,000 for the year ending Apr. 5, 1922, on the average profits for the three years to Oct. 31, 1920. For the three years to Sept. 30, 1919, there was an average loss on the Indian business of £2,454, & for the three years to Sept. 30, 1920, there was an average loss on the Indian business of £483. The accounts of the Indian branch to Sept. 30 in each year were incorporated in the accounts of applt. co. for the year ending Oct. 31 following. The Indian income tax year ending on Mar. 31. For the years ending Mar. 31, 1921, & Mar. 31, 1922, the basis of assessment to Indian income tax was the amount of the profits of the year of assessment. The co. was assessed to Indian income tax for the year ending Mar. 31, 1921, in the sum of £4,120, & the tax paid thereon was £257 10s. 1d. For the year ending Mar. 31, 1922, the assessment was in the sum of £14,543, & the income tax & super tax paid thereon amounted to £1,896 5s. 4d.:—*Held*: though appls. would be entitled to relief in respect of British income tax paid or payable by them on their Indian income in the year of assessment, yet, since by reason of the Indian business having made a loss on the average of the three years they had not in fact paid, & were not liable to pay, British income tax on their Indian income in the year of assessment, they were not entitled to relief.—*ROLLS-ROYCE, LTD. v. SHORT* (1925), 94 L. J. K. B. 849; 133 L. T. 759; 41 T. L. R. 620; 69 Sol. Jo. 726, C. A.

SECT. 4.—CHARITIES.

Exemption in respect of interest.]—See Part V., Sect. 9, *ante*.

Trade carried on by charity.]—See Part V., Sect. 2, sub-sect. 1, C., *ante*.

Property vested in or occupied by charity.]—See Part II., Sect. 4, sub-sect. 1, *ante*.

PART VII. SECT. 4.

h. Gifts to charitable institutions.]—In calculating the taxable income of

a taxpayer there shall be deducted from the total assessable income derived by him from all sources in Australia (*inter alia*) gifts exceeding

five pounds each to public charitable institutions in Australia.—*SWINBURNE v. FEDERAL COMR. OF TAXATION* (1920), 27 C. L. R. 377.—AUS.

Part VIII. Miscellaneous Provisions Applicable to the Duties Generally.

SECT. 1.—WHO MAY BE CHARGEABLE.

SUB-SECT. 1.—TRUSTEES, AGENTS, ETC.

See 1918 Act, Rules applicable to all schedules, rr. 4-7, 10-13, 18; 1925 Act, s. 17.

558. Liability of agents—Foreign principals—Where principals able to be charged.]—TISCHLER & Co. v. APTHORPE, No. 169, *ante*.

559. — Both principals foreign — Profits not received by agent.]—MACLAINE & Co. v. ECCOTT, No. 172, *ante*.

560. — Goods not consigned to United Kingdom.]—MACLAINE & Co. v. ECCOTT, No. 172, *ante*.

561. — Who are agents — Custodian under Trading with the Enemy Amendment Act, 1914 (c. 12).]—Property belonging to an enemy which is paid to or vested in the custodian under above Act is, pending its disposition by Ord. in Council after the termination of the war, removed from the control & beneficial ownership of the enemy. During the interval the beneficial ownership is in statutory suspense or abeyance, the custodian having meanwhile limited powers of dealing with the property. When war broke out in 1914, M., an enemy within the Act, owned real estate in England & shares & securities in British cos. By orders under sect. 4 of the Act the real estate, shares & securities were vested in the custodian. The Special Comrs. for Income Tax assessed the custodian to super tax as agent or receiver for M. The custodian disputed the legality of the assessment:—*Held*: M.'s beneficial ownership of the property having ceased on the making of the vesting orders, the profits & gains received by the custodian were received by him in respect of M., but did not in his hands belong to M.; he did not receive or hold them as agent or receiver or trustee for M. within Income Tax Act, 1842 (c. 35), s. 41; &, therefore, he was not liable to be assessed to super tax; but, as M. could not, after the war, ask to receive back the property except on the footing that a sum equal to the amount of super tax which, but for the war, he would have been liable to pay was paid, the custodian must, under the discretion given to the ct. by sub-sect. 1 of Trading with the Enemy Amendment Act, 1914 (c. 12), s. 5, pay that sum (the amount to be agreed) to the comrs. as analogous to payment of a debt under sub-sect. 2.—*Re MUNSTER*, [1920] 1 Ch. 268; 89 L. J. Ch. 138; 36 T. L. R. 173; 64 Sol. Jo. 309.

Annotation:—*Mentd. Re Ferdinand, Ex-Tsar of Bulgaria*, [1921] 1 Ch. 107.

See, now, 1925 Act, s. 20.

562. — Where profit divided.]—WEISS, BIEHLLER & BROOKS, LTD. v. FARMER, No. 180, *ante*.

563. — Commission agent or broker.]—WILCOCK v. PINTO & Co., No. 173, *ante*.

564. — — — — — BELFOUR v. MACE, No. 178, *ante*.

565. — — — — —.]—GAVAZZI v. MACE, No. 179, *ante*.

566. — — — — — Shipping broker receiving interest on deposit held for principal.]—A Danish steamship co. employed an English co. of ship-brokers from time to time to secure freights & charters for its steamers & effect insurances thereon. There was no written agreement between the cos. & specific instructions were given on each occasion. The Danish co. also employed other brokers & the English co. acted for many other shipowners. Two of the Danish co.'s steamers were torpedoed &, as requested by that co., the English co. collected the insurance moneys & placed them on deposit with a London bank in a special account opened in their own name, but earmarked to the Danish co. Owing to wartime difficulties of communication the English co. was given authority to withdraw the money. The interest on the deposit was credited by the bank to the English co. No remuneration was paid to the English co. in respect of the transaction. Assessments to Income Tax were made upon the Danish co. in the name of the English co. in respect of such interest. The English co. appealed, contending that they had acted merely as brokers for the Danish co., &, in view of General Rules applicable to all schedules, r. 10, could not be assessed on behalf of that co. The General Comrs., discharged the assessments, deciding that, while the interest was assessable income of the Danish co., that co. was not assessable in the name of the English co.:—*Held*: the English co. was assessable in respect of the interest as the agent of the Danish co.—*SCALES v. ATALANTA S.S. Co. OF COPENHAGEN (IN THE NAME OF ANDERSEN BECKER & Co., LTD.)* (1925), 134 L.T. 411; 41 T. L. R. 591; 69 Sol. Jo. 760; 9 Tax Cas. 586.

The ct. affirmed two decisions of the Special Comrs. of Income Tax that applts., who acted in this country as agents of a foreign shipping co., were assessable to income tax on that co.'s profits.—*NIELSEN, ANDERSEN & Co. v. COLLINS, TARN v. SCANLON* (1926), 42 T. L. R. 420.

568. Liability of trustees—Foreign investments—Where income received abroad.]—*WILLIAMS v. SINGER, POOL v. ROYAL EXCHANGE ASSURANCE*, No. 425, *ante*.

569. — Personal remuneration—Payable out of income of trust.]—*BAXENDALE v. MURPHY*, No. 497, *ante*.

Liability of executor.]—See 1918 Act, s. 161.

— Effect of death of testator pending appeal.]—See No. 604, *post*.

Assessment on foreign principal—Carrying on trade in United Kingdom.]—See, generally, Part V., Sect. 2, sub-sect. 3, B., *ante*.

PART VIII. SECT. 1, SUB-SECT. 1.

558 i. Liability of agents—Foreign principal—Where principals able to be charged.]—The liability for income tax of the agent of a co. not resident in British India, but in receipt through such agent of income chargeable under Income Tax Act, 11 of 1886, is personal, & sect. 22 does not make such liability conditional upon his having funds of the co. in his hands.—*PLUNKETT v. NARAYAN PARASHRAM TULLU* (1896),

I. L. R. 22 Bom. 332.—IND.

k. Liability of trustees.]—The owner of property declared himself a trustee of it for himself, his wife & his daughter equally. At the time of executing the document he intended that his wife & daughter should become the beneficial owners of two-thirds of the property comprised in it:—*Held*: the declaration created a trust which was valid & binding on the settlor & was not affected by the Income Tax Assessment Act, 1915-1916, s. 53, &

the assessment of the settlor to income tax should be made in accordance with sects. 26 (1) & 27 (2) of the Act.—*DEPUTY FEDERAL COMR. OF TAXATION v. PURCELL* (1921), 29 C. L. R. 464.—AUS.

l. Liability of executor.]—Income accruing to an exor. under the will of a testator is "income" & is liable to be taxed.—*FORBES v. SECRETARY OF STATE FOR INDIA* (1914), I. L. R. 42 Cal. 151.—IND.

Sect. 1.—Who may be chargeable: Sub-sects. 2, 3 & 4. Sects. 2 & 3.]

SUB-SECT. 2.—IN RESPECT OF INCOME OF MARRIED WOMEN, ETC.

See, now, 1918 Act, s. 14 (4), Rules applicable to all schedules, rr. 16 & 17; 1919 Act, s. 26; 1920 Act, ss. 18, 25.

570. Liability of married woman to be charged—Income on which tax deductible at source.]—The suppliant in this petition of right, a married woman living with her husband, was the holder of certain shares in an English limited liability co., & also of certain foreign bonds. The income tax on these securities was under Income Tax Act, 1842 (c. 35), s. 54, & Income Tax (Foreign Dividends) Act, 1842 (c. 80), s. 2, deducted in the first instance by the co. & in the second by the agents in this country entrusted with the payment of the interest before any dividend or interest was paid to the suppliant. The suppliant admitted that such deduction was right, but contended that by virtue of the first proviso to sect. 45 of Income Tax Act, 1842 (c. 35), she was not chargeable with income tax, & that, therefore, she was entitled to repayment by the Crown of the sums deducted:—*Held*: the first proviso to sect. 45 of Income Tax Act, 1845 (c. 35), applied to taxation by assessment on the person & not to taxation by the deduction of the tax at the source; the suppliant, therefore, was not entitled to any repayment.—**PURDIE v. R.**, [1914] 3 K. B. 112; 83 L. J. K. B. 1182; 111 L. T. 531; 30 T. L. R. 553.

Annotation:—Reid. Brooke v. I. R. Comrs., [1918] 1 K. B. 257.

— **After death of husband—For purposes of super tax.]—See No. 698, post.**

571. Liability of husband to be charged—Joint salary.]—(1) A man & his wife engaged as master & mistress respectively of a national school at a joint salary cannot deduct from their income for the purposes of taxation the cost of the board & wages of a servant. **(2)** The whole income is to be charged in the name of the husband under Schedule E. as being derived from a public office or employment.

(3) Where, upon an appeal by the Crown against a decision of Income Tax Comrs., resp. appears to support the decision, costs may be given against him if an appeal should be allowed.—**BOWERS v. HARDING**, [1891] 1 Q. B. 560; 60 L. J. Q. B. 474; 64 L. T. 201; 55 J. P. 376; 39 W. R. 558; 7 T. L. R. 267; 3 Tax Cas. 22, D. C.

Annotation:—As to (1) Distd. Ricketts v. Colquhoun, [1925] 1 K. B. 725.

572. — Whether income on which tax deducted at source included.]—PURDIE v. R., No. 570, *ante*.

573. — Tax not accounted for in wife's lifetime—Right of indemnity.]—A husband assessed to income tax jointly with his wife under Income Tax Act, 1842 (c. 35), s. 45, & who is called upon after her death to pay income tax & super tax, not accounted for in her lifetime, in respect of income from property of which she was tenant for life, has no right of indemnity against her estate, either under the Act or in equity, for the tax so paid by him in accordance with the liability imposed upon him by the Act.—*Re WARD*,

HARRISON v. WARD, [1922] 1 Ch. 517; 91 L. J. Ch. 332; 126 L. T. 628; 66 Sol. Jo. 268.

— **“Total income” for purposes of super tax—Marriage during year previous to year of assessment.]—See No. 698, post.**

Deduction for insurance premiums.]—See 1920 Act, s. 26 (7).

SUB-SECT. 3.—IN RESPECT OF INCOME OF INFANT.

See, now, 1918 Act, s. 161.

574. Liability of guardian.]—DRUMMOND v. COLLINS, No. 441, *ante*.

575. Where no trustee or guardian—Liability in respect of personal earnings.]—An infant who has no trustee or guardian having the direction, control, or management of his property within Income Tax Act, 1842 (c. 35), s. 41, is assessable to income tax in respect of his personal earnings.—**R. v. NEWMARKET INCOME TAX COMRS.**, *Ex p. HUXLEY*, [1916] 1 K. B. 788; 85 L. J. K. B. 925; 114 L. T. 963; 32 T. L. R. 353; 60 Sol. Jo. 336; *sub nom. R. v. NEWMARKET TAXES COMRS.*, *Ex p. HUXLEY*, **R. v. COPTHORNE TAXES COMRS.**, *Ex p. HUXLEY*, 7 Tax Cas. 49, C. A.

Annotations:—Reid. Williams v. Singer, Pool v. Royal Exchange Assce. Corpn. (1919), 88 L. J. K. B. 757; *Whitney v. I. R. Comrs.*, [1924] 2 K. B. 602.

Income payable to or for the benefit of infant—Under revocable disposition.]—See 1922 Act, s. 20.

SUB-SECT. 4.—OTHER PERSONS.

576. Quarter sessions as compensation authority—Interest on compensation fund.]—GLAMORGAN QUARTER SESSIONS v. WILSON, No. 319, *ante*.

SECT. 2.—WHEN ASSESSMENT CAN BE ENFORCED.

See, now, 1918 Act, ss. 210, 211.

577. When Act not yet passed—Right to demand returns for purposes of super-tax—Interpretation of Finance (1909–10) Act, 1910 (c. 8), s. 72 (3).]—The super-tax on incomes over £5,000 a year, first imposed by Finance (1909–1910) Act, 1910 (c. 8), s. 66, & then only for the financial year beginning Apr. 6, 1909, is additional income tax, & one of the “duties of income tax” within those words in Customs & Inland Revenue Act, 1890 (c. 8), s. 30, & therefore, in order to ensure the collection in due time of super-tax granted for any financial year commencing on Apr. 6, statutory provisions relating to income tax in force on the preceding day have effect with respect to the tax so granted as if the tax had been actually imposed by Act of Parliament & the statutory provisions had been applied thereto by that Act.

Returns with a view to assessing super-tax may, therefore, be required, although no Act of the financial year imposing the tax has been passed, if, as is usual, there was an Act as to collection in force on Apr. 5.

Qu.: whether, before the Act imposing the tax

PART VIII. SECT. 2.

*m. When Act not yet passed.]—*In 1910 resp. co. purchased certain timber limits in British Columbia at the price of \$87,500. In 1917 they sold a portion of the timber, & in 1920 they sold the balance of the timber at the rate of \$4 per 1,000 feet for a gua-

ranteed minimum payment of \$180,000, to be paid as to \$80,000 on the date of contract, upon payment of which a clear title was to be given, & the balance by two payments of \$50,000 each in Jan. 1921 & 1922. The profit of \$130,001.08 as shown by the adjustment of the figures was transferred in an “undivided profits

account” to the credit of the shareholders’ accounts as being a “profit on sale of capital assets.” In making their return for income tax for 1921 under Income & Personal Property Taxation Act, 1921, of British Columbia, resp. co. took the view that the whole profit on the transactions was merely an enhancement of capital

has been passed, the revenue authority can assess & demand payment of it.

Super-tax was imposed for the financial year beginning Apr. 6, 1910, by Finance Act, 1910 (c. 35), s. 3, which provided that enactments relating to super-tax in force with respect to the tax granted for the year beginning Apr. 6, 1909, should have effect with respect to the tax granted by the Finance Act, 1910 (c. 35). Revenue Act, 1911 (c. 2), passed in Mar. 1911, contained provisions with respect to super-tax, but did not impose the tax for the financial year beginning Apr. 6, 1911. Before any Act imposing super-tax for that year had been passed the revenue authorities demanded from pltf. returns of his income under Finance (1909-10) Act, 1910 (c. 8), s. 72 (2), for the purpose of assessing the tax:—*Held*: the demand was lawful.

Finance (1909-10) Act, 1910 (c. 8), s. 72 (3), shows that the Act was not intended to regulate the collection of super-tax for the financial year 1909 only, but also its collection for subsequent financial years.—*BOWLES v. A.-G.*, [1912] 1 Ch. 123; 81 L. J. Ch. 155; 105 L. T. 870; 76 J. P. 57; 28 T. L. R. 137; 56 Sol. Jo. 176; 5 Tax Cas. 685.

Annotations:—*Apld.* *Argyll v. I. R. Comrs.* (1913), 7 Tax Cas. 225. *Consd.* *Re Crosse, Oldham v. Crosse*, [1920] 1 Ch. 240. *Reid.* *Bowles v. Bank of England*, [1913] 1 Ch. 57; *Brooks v. I. R. Comrs.*, (1914), 7 Tax Cas. 236; *Gresham Life Assce. Soc. v. A.-G.*, [1916] 1 Ch. 228; *Brooke v. I. R. Comrs.*, [1918] 1 K. B. 257; *Whitney v. I. R. Comrs.* (1925), 42 T. L. R. 58.

578. — **Right to levy tax**—Though tax assented to by Committee for Ways & Means—Effect of Customs & Inland Revenue Act, 1890 (c. 8), s. 30.]—A resolution of the Committee of the House of Commons for Ways & Means, either alone or when adopted by the House, does not authorise the Crown to levy on the subject an income tax assented to by such resolution, but not yet imposed by Act of Parliament.

Although above sect. keeps alive the machinery of the Income Tax Acts & enables the officials charged with the collection of income tax to carry out all the preliminary work necessary for the collection & assessment of any income tax which may be imposed for any financial year, it does not authorise any assessment or collection of income tax not yet imposed by Act of Parliament:—*Held*: the Bank of England were not entitled to deduct any sum in respect of income tax from dividends due on Govt. Stock before income tax for the current financial year had been imposed by Act of Parliament.—*BOWLES v. BANK OF ENGLAND*, [1913] 1 Ch. 57; 82 L. J. Ch. 124; 108 L. T. 95; 29 T. L. R. 42; 57 Sol. Jo. 43; 6 Tax Cas. 136.

Annotations:—*Reid.* *Argyll v. I. R. Comrs.* (1913), 109 L. T. 893; *Gresham Life Assce. Soc. v. A.-G.*, [1916] 1 Ch. 228.

579. — **Right to deduct tax from dividends.**—*BOWLES v. BANK OF ENGLAND*, No. 578, *ante*.

See, now, Provisional Collection of Taxes Act, 1913 (c. 3).

SECT. 3.—CLAIMS FOR REPAYMENT.

See Miscellaneous Rules applicable to Schedule D., r. 3.

580. **Time for making claim** — “At the end of

& that no return fell to be made. In Mar. 1922, the assessor of income tax made a supplementary assessment upon resp. co. under sect. 65 (1), of the Act. That assessment was upheld by the Cta. of British Columbia, but it was reduced by the Supreme Ct. of Canada to \$66,269.28 upon the ground

that the assessor had no authority to make any assessment in respect of money received before the statute of 1921 was passed. The assessor appealed by special leave:—*Held*: the sum of \$130,001.08 was not taxable because it was merely an estimate conditional upon the eventual pay-

the year.”]—A co. applied under Income Tax Act, 1842 (c. 35), s. 133, for a return of duties paid for three successive preceding years, & after hearing evidence the district Comrs. amended the assessment for these years, & issued three certificates to the Special Comrs. certifying the amount so overpaid. The special comrs. had laid down an office rule that no such application should be heard or certificate would be acted on by them where the application was made more than a year after the year current at the time of making the assessment, & issued their order in accordance with such rule for repayment of the amount overpaid in the last year, & refused to do so in respect of the two preceding years:—*Held*: (1) a *mandamus* was the proper remedy to compel the Special Comrs. to issue orders for the repayment of the two last mentioned amounts; (2) the words “at the end of the year” in sect. 133 do not mean either at any time after the end of the year or any fixed period within which any particular case must be found & proved, but as soon after the end of the year as any person by the use of due exertion could, having regard to the circumstances of each particular case, have found & proved the overpayment; (3) jurisdiction is given to the district Comrs. by sect. 133 to decide whether each particular case has been found & proved within the time fixed by the sect. as interpreted by the Ct. & there is no appeal from such decision.—*R. v. INCOME TAX SPECIAL PURPOSES COMRS.* (1888), 21 Q. B. D. 313; 53 J. P. 84; 36 W. R. 776; *sub nom.* *R. v. INCOME TAX SPECIAL COMRS.*, *Ex p. CAPE COPPER MINING CO., LTD.*, 57 L. J. Q. B. 513; 59 L. T. 455; 4 T. L. R. 636; 2 Tax Cas. 332, C. A.

Annotations:—*As to* (1) *Consd.* *R. v. Income Tax Special Purposes Comrs.*, *Ex p. Dr. Barnardo's Homes National Incorporated Asscn.*, [1920] 1 K. B. 26. *As to* (2) *Fold.* *Russell v. North of Scotland Bank* (1891), 3 Tax Cas. 14. *As to* (3) *Consd.* *Furtado v. City of London Brewery Co.*, (1913) 83 L. J. K. B. 255. *Apld.* *R. v. Bloomsbury Income Tax Comrs.*, [1915] 3 K. B. 768. *Reid.* *L. C. v. Galsworthy*, [1917] 1 K. B. 85; *R. v. Board of Trade*, *Ex p. Derry* (1917), 33 T. L. R. 316; *R. v. Nat Bell Liquors*, [1922] 2 A. C. 128; *R. v. Labour Minister*, [1924] 2 K. B. 210; *R. v. Swansea Income Tax Comrs.*, *Ex p. English Crown Spelter Co.*, [1925] 2 K. B. 250.

581. **Whether claim out of time**—Jurisdiction of commissioners to decide—Whether decision final.]—*R. v. INCOME TAX SPECIAL PURPOSES COMRS.*, No. 580, *ante*.

582. — **Onus of proof.**]—*R. v. INCOME TAX SPECIAL PURPOSES COMRS.*, No. 580, *ante*.

583. **Whether claim for repayment an appeal**—Power of commissioners to state a case.]—*FURTADO v. CITY OF LONDON BREWERY CO.*, No. 618, *post*.

584. **Method of calculating loss**—Loss in particular business—Customs & Inland Revenue Act, 1890 (c. 8), s. 23.]—(1) Above sect. does not apply to a particular loss in ascertaining the profits of a particular business which has occurred in the course of the business, but to a general loss resulting from the business, that is a loss as the total result of the business operations.

(2) The comrs. under above sect. ought to consider the aggregate income of the person; then whether he has sustained a loss in any trade, manufacture, etc.; & if so, what is a proper

ment of the whole sums which would become due under the agreement; but the \$66,269.28 being the amount of the supplementary assessment, was taxable as being the profit realised in the period embraced in the assessment.—*R. v. ANDERSON LOGGING CO., LTD.* (1925), 134 L. T. 386.—CAN.

INCOME TAX.

Sect. 3.—Claims for repayment. Part IX. Sects. 1 & 2: Sub-sects. 1 & 2.]

adjustment of his liability to pay income tax by reference to that loss.

(3) If comrs. of income tax purporting to act under above sect. consider a wrong question altogether, then their decision can be dealt with by a writ of *certiorari*, but if they consider the right question the ct. cannot interfere by *certiorari*, even although they may have gone wrong in point of fact or of law.—*R. v. CITY OF LONDON INCOME TAX COMRS., Ex p. INLAND REVENUE COMRS.* (1904), 91 L. T. 94, D. C.

585. Right to interest on repayment—Excessive assessment on persons not chargeable—No assess-

ment on person chargeable.]—The trustees of certain minors applied to have interest allowed on moneys which had been deducted as income tax from dividends, which moneys had never been paid to the revenue authorities, & which were held to be recoverable on the ground that the dividends were the income of the minors & not of the settlor who had created the trust, & that the incomes of the minors were not large enough to be taxable:—*Held*: (1) Taxes Management Act, 1880 (c. 19), s. 59 (4), only applied where a direct assessment had been made; (2) this was not so in the present case, & there was, therefore, no jurisdiction to allow interest.—*BRENNAN MINORS TRUSTEES v. SCANLAN* (1925), 41 T. L. R. 452; 9 Tax Cas. 427.

Part IX.—Procedure After Assessment.

SECT. 1.—ADDITIONAL AND SUPPLEMENTARY ASSESSMENTS.

See, now, 1918 Act, ss. 125 et seq.; 1923, s. 29.

586. Jurisdiction of general commissioners—Where no determination of original assessment—Appeal withdrawn.]—A public house let as a tied house at £30 *per annum* was originally assessed to income tax under Schedule A. for the year ending Apr. 5, 1911, at £35. An appeal by the owner against this assessment was withdrawn on its coming before the comrs. on Oct. 5, 1911. On July 22, 1912, an additional first assessment of £10 for the same year was made, & an appeal came before the comrs. on Nov. 14, 1912. At this time an appeal to the assessment committee was pending against the poor rate assessment made in Oct. 1912, fixing the gross estimated rental at £45. At the hearing on Nov. 14, 1912, the comrs. decided that, subject to any amendment as the result of the pending appeal to the assessment committee; £45 should be adopted as the annual value as being the rack rent at which the premises were worth to be let by the year in the market to a free tenant. The appeal against the poor rate assessment was dismissed on Nov. 19, 1912, & on Dec. 5, 1912, the comrs. confirmed the additional first assessment to income tax. On an appeal against their decision:—*Held*: (1) the appeal against the original first assessment had never been determined on Oct. 5, 1911, so as finally to determine the assessment under Taxes Management Act, 1880 (c. 19), s. 57 (10), the appeal having been withdrawn; (2) the comrs. had not allowed themselves to be controlled by the poor rate assessment, but had merely had regard to it, as they were entitled to do; (3) as the result of the additional first assessment was to raise the annual value of the premises to the correct amount, it was immaterial whether, owing to an incorrect return of profits under Schedule D., the increase in the annual value would result in a double assessment.

Even if it were true that applt. had been assessed to a higher amount than she need have been under Schedule D., because she did not at the proper time claim a deduction to which she was entitled, that is not a matter which we can take into consideration at all in arriving at a conclusion as to whether the additional assessment was properly made upon her in respect of Schedule A. (*SWINFEN EADY, L.J.*).—*GUNDRY v. DUNHAM* (1915), 85 L. J. K. B. 417; 114 L. T. 106; 82 T. L. R. 142; 7 Tax Cas. 12 C. A.

587. Where rents of properties increased.]—*R. v. KINGSLAND PARISH, INSPECTOR OF TAXES, Ex p. PEARSON, KINGSLAND ESTATE, R. v. INCOME TAX COMRS. & KINGSLAND PARISH, INSPECTOR OF TAXES*, No. 620, *post*.

588. Jurisdiction of additional commissioners—When arising—Existing return “discovered” by surveyor to be insufficient—Whether return must be insufficient in fact.]—(1) Under Taxes Management Act, 1880 (c. 19), ss. 52, 57 (2), coupled with the Income Tax Acts, the surveyor has jurisdiction to report if he “discovers,” i.e. if he honestly comes to the conclusion upon the information in his possession, that a person chargeable has not made a full & proper return to income tax, & the additional comrs. have jurisdiction then to make an additional assessment upon that person which is binding unless challenged by the means prescribed under the statutes.

(2) The decision of the additional comrs. can only be challenged by an appeal to the general comrs. under Taxes Management Act, 1880 (c. 19), s. 57 (3), whose decision is final subject to the right of the person assessed to require the statement of a case for the opinion of the High Ct. upon questions of law under sect. 59 (1) of the Act.

(3) A writ of prohibition will not be granted to restrain the comrs. from proceeding upon the assessment unless it can be shown that there were no grounds upon which the surveyor or comrs. could honestly have believed that the person assessed is chargeable.—*R. v. BLOOMSBURY INCOME TAX COMRS.*, [1915] 3 K. B. 768; *sub nom. R. v. BLOOMSBURY INCOME TAX COMRS., Ex p. HOOPER*, 85 L. J. K. B. 129; 113 L. T. 1015; 31 T. L. R. 565; 7 Tax Cas. 59, D. C.

Annotations:—As to (1) *Reff. Ingle v. Farrand*, [1925] 2 K. B. 728. As to (3) *Consd. R. v. Aldington, Houghton & Hove Income Tax Comrs., Ex p. Singer* (1916), 85 L. J. K. B. 1753. *Foll. R. v. Swansea Income Tax Comrs., Ex p. English Crown Spelter Co.*, [1925] 2 K. B. 250. *Generally, Mentd. L. C. C. v. Galsworthy*, [1917] 1 K. B. 85; *R. v. Board of Trade, Ex p. Derry* (1917), 33 T. L. R. 316.

589. —Where person not resident in their district.]—The additional comrs. for the Income Tax Acts in the district of A. in Sept. 1915, made an additional assessment upon S. in respect of dividends received by him, from an American co. S. having obtained a rule *nisi* for a prohibition to the general comrs. of the district directing them not to proceed in the assessment on the ground that he was not ordinarily resident in their district within Income Tax Act, 1842 (c. 35), s. 106:—*Held*: since the facts as to S.'s residence

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were clearly established, & that if an appeal were taken to the general comrs. they would be bound to decide that S.'s ordinary place of residence was not at any material time within the district, the rule *nisi* must be made absolute, as the comrs. had exceeded their jurisdiction in making the assessment.—*R. v. ALDRINGTON, HOUGHTON & HOVE INCOME TAX COMRS., Ex p. SINGER* (1916), 85 L. J. K. B. 1753; 114 L. T. 1170; 32 T. L. R. 421, D. C.

590. — Effect of assessment—Whether person assessed “charged to income tax.”—On Mar. 30, 1915, an additional assessment to income tax was made upon S. by the additional comrs. for the district in which he resided in respect of dividends received by him in England from an American company. Notice of the assessment was given to S. on Oct. 19, 1915, & on Oct. 26 he obtained a rule *nisi* to prohibit the general comrs. for the district from proceeding upon the assessment on the ground that by Income Tax Act, 1842 (c. 35), s. 108, the assessment could only be made by the comrs. for Bristol, that being the nearest of the four places mentioned in the sect. to the place where S. resided. Cause was shown against the rule on Jan. 13, 1916:—*Held*: inasmuch as the assessment made upon S. by the additional comrs. had not been allowed or confirmed by the general comrs., he had not been effectively “charged” to income tax within Finance (No. 2) Act, 1915 (c. 89), s. 32 (1), & the rule *nisi* for a prohibition must be made absolute.—*R. v. SOUTHAMPTON INCOME TAX GENERAL COMRS., Ex p. SINGER*, [1917] 1 K. B. 259; 86 L. J. K. B. 66; 115 L. T. 693; 33 T. L. R. 45; 61 Sol. Jo. 70, C. A.

Annotations:—*Reid. R. v. Aldington, Houghton & Hove Income Tax Comrs., Ex p. Singer* (1916), 85 L. J. K. B. 1753; *R. v. Kensington Income Tax Comrs., Ex p. de Polignac*, [1917] 1 K. B. 486.

Appeals as to residence, *see, now*, 1924 Act, s. 27.

591. What may be considered — Poor rate assessment.—*GUNDRY v. DUNHAM*, No. 586, *ante*.

Effect of destruction of original assessment.—*See* 1920 Act, s. 61.

592. Additional assessment under Sched. E. — Original assessment under Sched. E. in error—Original assessment excessive at time of making—Effect of 1922 Act, s. 18 (6).—*INGLE v. FARRAND*, No. 484, *ante*.

SECT. 2.—APPEALS.

SUB-SECT. 1.—IN GENERAL.

593. Signature of special case — Plaintiff proposing to argue in person.—*UDNEY v. EAST INDIA CO.*, No. 346, *ante*.

On questions of domicile or residence.—*See* 1924 Act, s. 27.

PART IX. SECT. 2, SUB-SECT. 1.

n. Grounds for appeal—Assessment excessive.—The effect of Income Tax Assessment Act, 1915–1916, s. 32, is to make the assessment final unless the taxpayer establishes that it is excessive.—*STONE v. FEDERAL COMR. OF TAXATION*, [1918] 25 C. L. R. 389.—AUS.

o. Whether appeal lies—On question of fact.—The Ontario Railway & Municipal Board cancelled the business assessment of resps. in respect of a retail business. The city of Toronto claimed the business as that of a departmental store. On appeal the Ct. of Appeal held the question was

one of fact, therefore the ct. had no jurisdiction to entertain an appeal.—*Re KNOX & CO.'S ASSESSMENT* (1908), 13 O. W. R. 823; 18 O. L. R. 645.—CAN.

p. Not provided for by amending Act.—The Assessment Act, R. S. O., 1914, c. 195, s. 11, was amended in 1922 by 12 & 13 Geo. V. c. 78, s. 10, by adding a clause authorising an application to a ct. of revision for a reduction of income tax, where a person has been assessed for income in 1922, but does not receive the whole income with respect to which he has been assessed:—*Held*: this clause is applicable only to the year 1922; & in conferring this

SUB-SECT. 2.—APPEALS TO THE COMMISSIONERS.

See, now, 1918 Act, ss. 133 *et seq.*; 1922 Act, s. 19; 1923, ss. 25, 26, Sched.

594. Jurisdiction of general commissioners—An appeal from additional commissioners.—*R. v. BLOOMSBURY INCOME TAX COMRS.*, No. 588, *ante*.

595. — No evidence in support of appeal.—The accounts of applt. firm for the purposes of income tax for certain years had been prepared by an accountant who was subsequently discredited; the accounts in question were consequently not accepted & additional assessments in estimated amounts were raised upon applt. firm for the years affected. The firm appealed against these assessments to the general comrs., contending that the returns as made by the accountant should be accepted, but they produced no evidence in support of the appeal & admitted that the relevant account books had been destroyed. The general comrs. thereupon confirmed the assessments:—*Held*: in the absence of evidence in support of the appeal, the comrs. were right in confirming the additional assessments.—*TUDOR & ONIONS v. DUCKER* (H.M. INSPECTOR OF TAXES) (1924), 8 Tax Cas. 591.

596. Jurisdiction of special commissioners—To increase assessment.—Before the year 1910 the owner of applt.'s business had in his employment his three sons, each of whom was paid a salary of £150. In 1910 an agreement was entered into by the father with his sons whereby each of the latter received 25 per cent. of the net profits; but the sons were not taken into partnership, & they continued to hold subordinate positions in the business. From 1912 the profits greatly increased, & large sums were paid to the sons. In assessing the profits of the business to excess profits duty the Inland Revenue Comrs. disallowed as a deduction the difference between the sums paid to the sons in the last pre-war year & those paid to them in each of the three accounting years 1914–16. On appeal to the special comrs., £250 of the amount paid to each son was held to be the full amount which was wholly & exclusively laid out or expended for the purposes of the trade or business, the balance being disallowed as a deduction. The effect of this was to increase the amount of the assessable profits. On appeal:—*Held*: (1) the special comrs. had jurisdiction to increase the assessment; (2) they were entitled to say what amount of the share of the profits paid to the sons should be allowed to be deducted as their remuneration for the time & labour expended by them in the business.—*JOHNSON BROTHERS & CO. v. INLAND REVENUE COMRS.*, [1919] 2 K. B. 717; 89 L. J. K. B. 94; 121 L. T. 643.

597. — To determine allowances or deductions—Allowances by father to sons employed in

special jurisdiction upon the revision ct. in that year, the Legislature, intentionally or unintentionally, did not provide a right of appeal.—*Re KILBOURN & OWEN SOUND CITY* (1923), 54 O. L. R. 601.—CAN.

PART IX. SECT. 2, SUB-SECT. 2.

q. Jurisdiction of general commissioners.—The Comrs. of Inland Revenue have an absolute discretion to decide whether they will apply or refuse to apply the special provisions of Finance Act, 1917, s. 47, & an appeal against their decision to the Comrs. for General Purposes of the Income Tax Acts is incompetent.—*NORTHERN*

Sect. 2.—Appeals: Sub-sects. 2 & 3, A., B. & C.] business.]—JOHNSON BROTHERS & CO. v. INLAND REVENUE COMRS., No. 596, ante.

598. Power to amend assessment—Income Tax Act, 1842, s. 133.]—R. v. INCOME TAX SPECIAL PURPOSES COMRS., No. 580, ante.

599. ———.]—YUANMI GOLD MINES v. EBORALL, No. 202, ante.

See, now, 1918 Act, ss. 18, 23, 34; Miscellaneous Rules applicable to Schedule D., r. 3; 1923 Act, s. 29 (3).

600. The hearing—Whether appellant entitled to be heard on oath.]—Applt. appealed against his assessment for income tax. He sent in a schedule of accounts, & on appearing before the special comrs., tendered himself for examination on oath for the purpose of verifying his schedule. The comrs. refused to put him upon oath, & upon the evidence before them confirmed the assessment. Applt. obtained a rule *nisi* for a *mandamus* to the comrs. to hear & determine the matter, or to state a special case:—*Held*: the decision of the comrs. was a decision merely on a question of fact; but, assuming that there was a point of law in applt.'s contention that the comrs. were bound to put him on oath, & that his oath as to the correctness of his schedule would be conclusive, nevertheless it was not one in respect of which the ct. ought to grant a *mandamus*.—*R. v. CHEW* (1894), 71 L. T. 541; 11 T. L. R. 1; 39 Sol. Jo. 8; 14 R. 74; *sub nom. R. v. INCOME TAX SPECIAL COMRS., Re FLETCHER*, 59 J. P. 356; 3 Tax Cas. 289, C. A.

601. ——— Refusal by commissioners to hear expert valuer.]—The owner & occupier of licensed premises appealed to the Income Tax Comrs. against the assessment of his premises. He attended & gave evidence before the comrs., & his solr. then stated that he wished to call an expert valuer. The comrs. said they already had all the facts before them & did not think any further evidence would assist them, & they declined to hear the expert. A rule *nisi* was then obtained calling upon the comrs. to show cause why they should not hear & determine the appeal according to law:—*Held*: *mandamus* would not lie for the purpose of appealing from the comrs.' decision as to the non-necessity of hearing the evidence tendered, & the rule should therefore be discharged.—*R. v. GENERAL INCOME TAX COMRS. FOR OFFLOW* (1911), 27 T. L. R. 353, D. C.

See, now, 1918, s. 137; 1923 Act, s. 25, Sched.

602. ——— Right of surveyor to be present—While commissioners considering decision.]—Rule for *certiorari* to quash an order made by comrs. of income tax, & rule for a *mandamus* to them to hear & determine an appeal according to law, made absolute, the A.-G. admitting that the surveyor of taxes, who had claimed, & been conceded, the right by the comrs. to be present with them while they were considering their decision,

had no such right under Taxes Management Act, 1880 (c. 19), s. 57 (7).—R. v. BRIXTON INCOME TAX COMRS. (1913), 29 T. L. R. 712; 6 Tax Cas. 195, D. C.

Annotation:—Reid. R. v. Glamorgan Appeal Tribunal, Ex p. Fricker (1917), 115 L. T. 930.

603. Determination to appeal—What amounts to—Appeal withdrawn.]—GUNDY v. DUNHAM, No. 586, ante.

SUB-SECT. 3.—APPEALS TO HIGH COURT OF JUSTICE.

A. In General.

604. Death of party charged before case signed—Whether proceedings abate.]—Resp. successfully appealed to the general comrs. against his assessment to income tax, whereupon applt., the surveyor, expressed his dissatisfaction, & by notice in writing under Taxes Management Act, 1880 (c. 19), s. 59, required the comrs. to state & sign a case for the opinion of the High Ct. Subsequently, & before the case was signed & filed, resp. died. A copy of the case when signed was served on resp.'s exor. On motion by applt. that the proceedings in the appeal be continued between him & the exor. & that the latter be added as resp.:—*Held*: (1) the proceedings in the appeal were begun in the lifetime of resp., inasmuch as the notice in writing given by applt. to the comrs. requiring them to state & sign a case was the commencement of the proceedings; (2) the proceedings did not abate on the death of resp., & the ct. was entitled, in the absence of apt procedure being provided by statute on the subject, to mould a convenient form of procedure so that the appeal could be heard, & it would do this by ordering that resp.'s exor. be added as resp.; (3) service of a copy of the case on the exor. was a sufficient compliance with above sect. as to serving the other party to an appeal with a copy of the case.—*SMITH v. WILLIAMS*, [1922] 1 K. B. 158; 91 L. J. K. B. 156; 126 L. T. 410; 38 T. L. R. 116; 8 Tax Cas. 321.

B. When Appeal lies.

See Taxes Management Act, 1880 (c. 19), s. 59; 1918 Act, ss. 133 et seq.

605. Jurisdiction of court—Point not raised in case stated by commissioner.]—BRAY v. LANCA-SHIRE JJ., No. 58, ante.

606. ——— Restricted to question before surveyor.]—LONDON COUNTY COUNCIL v. GROVE, No. 281, ante.

607. ——— Over assessment under schedule not under appeal.]—GUNDY v. DUNHAM, No. 586, ante.

608. No appeal on question of fact—What is question of fact—Reasonableness of deduction.]—

NAVIGATION CO. v. INLAND REVENUE, [1919] S. C. 286.—SCOT.

598 i. Power to amend assessment—Income Tax Act, 1842, s. 133.]—RUSSELL v. NORTH OF SCOTLAND BANK, LTD. (1891), 18 R. (Ct. of Sess.) 543; 28 Sc. L. R. 389.—SCOT.

PART IX. SECT. 2, SUB-SECT. 3.—A.

r. Finality of High Ct. decision.]—The liability of a Commonwealth officer to an income tax imposed by a State Act in respect to his salary as such officer, is a question as to the limits *inter se* of the constitutional powers of the Commonwealth & those of a State

within the meaning of sect. 74 of the constitution, & therefore, the decision of the High Ct. as to such liability is final & conclusive unless the ct. certifies that the question is one which ought to be determined by His Majesty in Council.—DEAKIN v. WEBB (1904), 1 C. L. R. 585.—AUS.

t. ———.]—In an action in a N. S. W. District Ct. to recover income tax under Land & Income Tax Act of that State from a federal officer in respect of his salary as such officer:—*Held*: the question raised by the defence was a question as to the limits *inter se* of the constitutional powers of the Commonwealth & a State & the

High Ct. was, by the Constitution, the ultimate arbiter upon all such questions, unless it was of opinion that the question at issue in any particular case was one upon which it should submit itself to the guidance of the Privy Council.—BAXTER v. TAXATION COMRS. (1907), 4 C. L. R. 1087.—AUS.

a. ———.]—FLINT v. WEBB (1907), 4 C. L. R. 1178.—AUS.

b. Decision of Commissioner—Whether final.]—*Held*: as regards a question of fact the finding of comrs. thereon was final.—JARDINE v. GILLESPIE (SURVEYOR OF TAXES) (1906), 5 Tax Cas. 263.—SCOT.

PENINSULAR & ORIENTAL STEAM NAVIGATION CO. v. LESLIE, No. 271, *ante*.

609. ———.]—BRITISH INDIA STEAM NAVIGATION CO., LTD. v. LESLIE, No. 272, *ante*.

610. ———.]—LONDON COUNTY COUNCIL v. EDWARDS, No. 276, *ante*.

611. ——— Whether deduction claimed wholly laid out for purposes of trade.]—SMITH v. INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND & WALES, No. 262, *ante*.

612. ——— Whether business carried on by company or director.]—In 1911 J. S. sold his business as a going concern to a private co., J. S., Ltd. The capital was 2,500 shares of £10 each, of which 2,499 shares were held by S. & one share by H., a former employee, who subsequently in May, 1917, sold that one share to S.'s daughter. S. was the sole governing director, & the whole direction, control, & management of the business & affairs of the co. were in his hands. By its memorandum, the co. had power to lend money to such persons & on such terms as it should think fit. After the outbreak of war the co. made large profits. No dividends were ever declared, but up to 1916 the accumulated profits were put into the business. During 1916 the co. made loans to S. amounting to £3,907 3s. 3d., & during 1917, up to the taxable year ended Apr. 5, 1917, to the amount of £2,624 7s. 6d. These loans were made without either interest or security, & there was no evidence of them beyond entries in the co.'s ledger. S. purchased war stock in his own name with the proceeds of the loans. In Sept. 1917, a resolution was passed to wind up the co. Between Apr. 6, 1917, & the winding up further loans were made to S. In the winding up these loans were treated by the liquidator as part of the co.'s assets, S. not being asked to repay them, but accounting for them in receiving his share of the assets on distribution. S. was assessed to super-tax on the loans made & appealed to the comrs. The comrs. found that the co. was a properly constituted legal entity, with power to make loans to such persons & upon such terms as it should think fit; that it did make such loans to S.; & that such loans did not form part of S.'s income for the purposes of super tax, & they accordingly discharged the assessment. On appeal by the Crown, on a case stated, an order was made that the case should be remitted to the comrs. to determine whether the co. in point of truth & fact carried on the business, or whether S. carried it on; & whether, if the co. carried on the business, it did so as agent for S., or whether it carried it on on its own behalf for the benefit of the corporators. On appeal:—*Held*: the findings of the comrs. being on questions of fact were conclusive & involved the negating of both the questions directed to be put to them, & therefore that it would be wrong to send the case back to them to answer the questions; the order remitting the case to the comrs. must be discharged & their decision affirmed.—INLAND REVENUE COMRS. v. SANSOM, [1921] 2 K. B. 492; 90 L. J. K. B. 627; 125 L. T. 37; 8 Tax Cas. 20, C. A.

613. ——— Existence of partnership.]—HAWKER v. COMPTON, No. 78, *ante*.

614. ——— Whether earnings form one or more employments.]—ELLIOTT v. GUASTAVINO, No. 312, *ante*.

615. ——— If supported by evidence.]—HAWKER v. COMPTON, No. 78, *ante*.

616. ———.]—STOTT & INGHAM v. TREHEARNE, No. 217, *ante*.

617. When case may be stated—What is an appeal—Application for adjustment of liability.]—Where a person who has sustained a loss in any trade, manufacture, profession, or employment, or in the occupation of lands for the purpose of husbandry, only applies, under Customs & Inland Revenue Act, 1890 (c. 8), s. 23, to the comrs. for general purposes of the Income Tax Acts, for an adjustment of his liability by reference to the loss & to the aggregate amount of his income, & for repayment to him of a proportionate part of the income tax paid by him, or applies for exemption or relief under Finance Act, 1896 (c. 28), s. 27, the decision of the comrs. upon such applications is final, & the comrs. have no jurisdiction under Taxes Management Act, 1880 (c. 19), s. 59, to state a case for the opinion of the High Ct. in reference thereto, such applications not being appeals under that sect.—BRUCE v. BURTON (1901), 85 L. T. 227; 65 J. P. 440; 4 Tax Cas. 399, D. C.

Annotation:—*Reid*. Furtado v. City of London Brewery Co., [1914] 1 K. B. 709.

See, now, 1918 Act, s. 34; 1923 Act, s. 29 (3).

618. ——— Application for amendment of assessment.]—An application to the Comrs. for General Purposes under Income Tax Act, 1842 (c. 35), s. 134, for the amendment of an assessment of profits, upon the ground that during the year of assessment appct. has been deprived of or lost the profits or gains on which the computation of duty charged in the assessment was made, is not "an appeal" under the Income Tax Acts & is not within Taxes Management Act, 1880 (c. 19), s. 59, & consequently the Comrs. have no power to state a case under that sect. for the opinion of the High Ct. — FURTADO v. CITY OF LONDON BREWERY CO., [1914] 1 K. B. 709; 83 L. J. K. B. 255; 110 L. T. 241; 30 T. L. R. 177; 58 Sol. Jo. 270; 6 Tax Cas. 382, C. A.

See, now, Miscellaneous Rules applicable to Schedule D., r. 3; 1923 Act, s. 29 (3).

C. Remedies Available.

See, now, 1918 Act, s. 149.

619. When mandamus lies—To compel repayment of amount overpaid—Where assessment amended.]—R. v. INCOME TAX SPECIAL PURPOSES COMRS., No. 580, *ante*.

See, now, 1918 Act, s. 34; Miscellaneous Rules applicable to Schedule D., r. 3 (1).

620. ——— To compel certification of claim under Schedule A., No. V., r. 8—Alternative remedy provided.]—As a result of information disclosed in connection with a claim to relief for the year 1920–21 under Schedule A., No. V., r. 8, the inspector of taxes discovered that the rents of certain properties had been increased during that year & that, by virtue of Schedule A., No. V., r. 7 (2), the owners were not entitled to the deductions in respect of repairs which had previously been granted from the Schedule A. assessments on the properties for that year. Additional assessments to income tax, Schedule A., were accordingly made in respect of the tax undercharged, & the inspector of taxes refused to certify the claim under rule 8 on the ground that relief under that rule applied only to assessments which were reduced for purposes of collection under rule 7 of No. V. Notice of appeal was

PART IX. SECT. 2, SUB-SECT. 3.—C. *against Board of Revenue.*]—Where a person who was assessed to income tax appealed to the Board of Revenue, & the Board while dismissing the appeal refused to refer the matter to the High Ct., though requested to do so. When mandamus lies—Not

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given by the owners against the additional assessments & against the refusal of the inspector to certify the claim under rule 8, but at the owners' request the hearing of the appeals was postponed pending the decision of the ct. on rules *nisi*, which the owners had applied for & obtained, calling upon the general comrs. & the inspector of taxes to show cause why a writ of prohibition should not issue, prohibiting them from proceeding with the additional assessments; & the inspector of taxes to show cause why writs of *certiorari* & *mandamus* should not issue, quashing his refusal to certify the claim under Schedule A., No. V., r. 8, & commanding him to furnish the requisite certificate in connection with the claim:—*Held*: discharging the rules *nisi*, the general comrs. & the inspector of taxes had acted within their jurisdiction, & as 1918 Act prescribed procedure for appealing against the additional assessments & against the inspector's refusal to certify the claim under Schedule A., No. V., r. 8, prohibition, *certiorari* & *mandamus* would not lie.—*R. v. KINGSLAND PARISH, INSPECTOR OF TAXES, Ex p. PEARSON, KINGSLAND ESTATE, R. v. INCOME TAX COMRS. & KINGSLAND PARISH, INSPECTOR OF TAXES (1922), 8 Tax Cas. 327, D. C.*

Annotation:—*Reid. R. v. Swansea Income Tax Comrs., Ex p. English Crown Spelter Co., [1925] 2 K. B. 250.*

See, generally, CROWN PRACTICE, Vol. XVI., pp. 318, 319.

621. When prohibition lies — To prohibit confirmation of assessment—Alternative remedy provided.]—*R. v. CLERKENWELL GENERAL COMRS. OF TAXES, No. 1, ante.*

622. To prohibit assessment by commissioners having no jurisdiction.]—Where a person is resident in one district & is engaged in carrying on trade in another district & is in receipt of profits which, being derived from foreign possessions, are received in that other district, he can only be assessed to income tax under Income Tax Act, 1842 (c. 35), s. 108, in respect of such profits by the Comrs. for the cities of London, Bristol, Liverpool or Glasgow, whichever of these cities is nearest to his residence, & if he does not reside in one of these four cities a writ of prohibition will lie to the Comrs. of the district in which he resides to prohibit them from assessing him in respect of such profits.—*KENSINGTON INCOME TAX COMRS. v. ARAMAYO, [1916] 1 A. C. 215; 84 L. J. K. B. 2169; 113 L. T. 1083; 31 T. L. R. 606; 59 Sol. Jo. 715; sub nom. R. v. KENSINGTON INCOME TAX COMRS., Ex p. ARAMAYO, 6 Tax Cas. 613, H. L.*

Annotations:—*Consd. R. v. Southampton Income Tax Comrs., Ex p. Singer, [1917] 1 K. B. 259. Reid. R. v. Bloomsbury Income Tax Comrs., [1915] 3 K. B. 768; R. v. Kensington Income Tax Comrs., Ex p. de Polignac [1917] 1 K. B. 486. Mentd. R. v. Hertford Union, Ex p. [1925] 1 K. B. 863.*

See, now, Miscellaneous Rules applicable to Schedule D., r. 4.

623. — To prohibit additional assessment—Alternative remedy provided.]—*R. v. BLOOMSBURY INCOME TAX COMRS., No. 588, ante.*

624. — *R. v. KINGSLAND PARISH, INSPECTOR OF TAXES, Ex p. PEARSON, KINGSLAND ESTATE, R. v. INCOME TAX COMRS. & KINGSLAND PARISH, INSPECTOR OF TAXES, No. 620, ante.*

625. — To prohibit assessment — Denial of liability—After time for appeal expired.]—*R. v. SWANSEA INCOME TAX COMRS., Ex p. ENGLISH CROWN SPELTER CO., No. 204, ante.*

See, generally, CROWN PRACTICE, Vol. XVI., pp. 376 et seq.

626. When certiorari lies — Where commissioners consider a wrong question.]—*R. v. CITY OF LONDON INCOME TAX COMRS., Ex p. INLAND REVENUE COMRS., No. 584, ante.*

627. — To quash refusal to certify claim under Schedule A., No. V., r. 8—Alternative remedy provided.]—*R. v. KINGSLAND PARISH, INSPECTOR OF TAXES, Ex p. PEARSON, KINGSLAND ESTATE, R. v. INCOME TAX COMRS. & KINGSLAND PARISH, INSPECTOR OF TAXES, No. 620, ante.*

See, generally, CROWN PRACTICE, Vol. XVI., pp. 417, et seq.

628. Where case will be remitted — Where method of assessment is wrong.]—*CARLISLE & SILLOTH GOLF CLUB v. SMITH, No. 90, ante.*

629. — Where appellant not chargeable at all.]—*FOULSHAM v. PICKLES, No. 131, ante.*

630. When declaratory order will be made—Where right of appeal available—Application in Chancery Division.]—Pltf. was served with a notice under Finance (No. 2) Act, 1915 (c. 89), Part III., requiring him to make a return for the purposes of excess profits duty in respect of his trade or business. As an advising engineer he was engaged in a profession dependent mainly upon his personal qualifications but, since July, 1915, in addition to his private practice, he had negotiated govt. contracts on behalf of a co. making munitions of war & had advised the co. generally as an engineer. For this he received a fixed retaining fee per week & also a fixed payment for each shell & fuse of a certain description supplied by the co. Pltf. claimed to be within the exception (c) to sect. 39 of the Act, exempting him from excess profits duty, denied his liability to furnish a return or supply information to the Comrs., & commenced this action for a declaratory judgment to that effect.

The ct. in the exercise of its discretion, & without expressing any opinion upon the question whether pltf. was carrying on a trade or business which was subject to the provisions of Part III. of the Act, refused to make any declaratory order, being of opinion (1) that the elements of invalidity & public interest present in *Dyson v. A.-G.*, [1912] 1 Ch. 158 & *Burghes v. A.-G.*, [1912] 1 Ch. 173 were absent from this case, in which the real question was whether pltf.'s business was within sect. 39 or not, & (2), that it was not desirable that cases of this character, in which the right of appeal prescribed by the Act was available to pltf. if dissatisfied with his assessment, should be withdrawn from the ct. constituted for the purpose of dealing with revenue cases.—*SMEETON v. A.-G.*, [1920] 1 Ch. 85; 88 L. J. Ch. 535; 122 L. T. 23; 35 T. L. R. 706; 64 Sol. Jo. 20.

D. Procedure.

See, now, 1918 Act, s. 149.

631. Signature of case stated — Appellant proposing to argue own case.]—*UDNEY v. EAST INDIA CO., No. 346, ante.*

632. Service of copy of case stated—Death of party to be charged—Service on executor.]—*SMITH v. WILLIAMS, No. 604, ante.*

so:—*Held*: Govt. of India Act, s. 52, & Income Tax Act, s. 52, led the High Ct. from entering any application in the nature

of a *mandamus* for the purpose of compelling the Revenue Board to refer the matter to the High Ct. under Income Tax Act, s. 51.—*INCOME TAX*

CHIEF COMR. v. NORTH ANANTAPUR GOLD MINES, LTD. (1921), 1 L. R. 44 Mad. 718.—IND.

E. Costs.

633. On appeal by the Crown — Whether given against respondent—Discretion of court.]—BOWERS v. HARDING, No. 571, ante.

SECT. 3.—OTHER REMEDIES OF TAXPAYER.

634. Whether available — Petition of right.]—The proper remedy for persons aggrieved by income tax assessments is by appeal in the manner provided by the Income Tax Acts. A person who neglects that remedy cannot bring a petition of right to recover money paid under assessments alleged to be erroneous.

It makes no difference that the assessments were based on the party's own return.—**HOLBORN VIADUCT LAND CO., LTD. v. R. (1887), 52 J. P. 341; 2 Tax Cas. 228, D. C.**

635. — Application to expunge proof in bankruptcy—Whether court will go behind assessment.]—The rule that on a proof for a judgment debt the ct. will go behind the judgment & ascertain whether there is a provable debt, does not apply to a proof for assessed taxes.

Where therefore a debtor, who had carried in a scheme of arrangement, applied to expunge a proof for an assessment to income tax under Income Tax Act, 1842 (c. 35), Sched. D. (which had not been appealed against), on the ground that he had made no profits assessable to duty,

the application was dismissed, but without prejudice to any application he might be advised to make to the Inland Revenue under the Board of Trade Regulations of May 1888.—**Re CALVERT, Ex p. CALVERT, [1899] 2 Q. B. 145; 68 L. J. Q. B. 761; 47 W. R. 523; 43 Sol. Jo. 480; 6 Mans. 256; sub nom. Re CALVERT, Ex p. DEBTOR v. WALKER, 80 L. T. 504; 4 Tax Cas. 79.**

636. — Application to Inland Revenue—Under Board of Trade Regulations of May, 1888.]—Re CALVERT, Ex p. CALVERT, No. 635, ante.

637. — Damages for unlawful distress—Assessment invalid.]—BERRY v. FARROW, No. 10, ante.

SECT. 4.—REMEDIES OF CROWN FOR NON-PAYMENT OF DUTY.

See, now, 1918 Act, ss. 162, 165, 168–171.

Right of distress.]—See DISTRESS, Vol. XVIII., pp. 422 et seq., 425, 426.

Right of priority—In winding up of company.]—See COMPANIES, Vol. X., pp. 942, 943.

Right of action—Liability of Crown for costs.]—See CONSTITUTIONAL LAW, Vol. XI., p. 534, No. 373.

638. Information — Not brought to trial until appeal on assessment—Assessment held bad.]—ARAMAYO FRANCKE MINES, LTD. v. ECCOTT, No. 140, ante.

Part X.—Penal Provisions.

See, now, 1918 Act, ss. 132, 179–185, 221–223, 225–229.

639. Refusal to permit deduction from annuity—Though annuity free from tax.]—A.-G. v. SHIELD, No. 340, ante.

640. — Liability for acts of attorney—Admissibility of defendant as witness.]—(1) On an information, under Income Tax Acts, 1842 (c. 35), & 1853 (c. 34), against an annuitant for refusing to allow the tenants of premises on which the annuity was charged, the income tax, to be deducted out of their rent, deft. was held liable for the acts of the attorney to whom the tenant had been referred; & the question was held to be, not whether the deduction was in terms refused, but whether it was in fact allowed.

(2) On the trial of such an information, deft. cannot be called as a witness.—**R. v. SHELL (1858), 1 F. & F. 204, N. P.; subsequent proceedings, sub nom. A.-G. v. SHIELD, 3 H. & N. 834.**

Annotations:—Mentd. Festing v. Taylor (1862), 3 B. & S. 217; Brooke v. Price, [1916] 2 Ch. 345.

PART X.

i. Neglect to deliver statement—What amounts to neglect to deliver—Incorrect statement.]—Held: the words "any statement as aforesaid" in Property & Income Tax Act, 1842, s. 55, mean the "true & correct" statement mentioned in sect. 52 & a penalty is incurred & may be recovered under sect. 55 not only for failure to deliver any statement at all, but even when a statement has been delivered if it is not a true & correct statement.—**LORD ADVOCATE v. SAWERS (1897), 25 R. (Ct. of Sess.) 242; 35 So. L. R. 190; 6 S. L. T. 211.—SCOT.**

d. — Proceedings in High Court—Within two years.]—Income Tax Act, 1842, s. 55, applies to a case which an incorrect return has been

made. Proceedings for the penalty of £50 may be taken in the High Ct. within two years of the penalty being incurred.—**LORD ADVOCATE v. A. B. (1897), 3 Tax Cas. 617.—SCOT.**

e. Default in making return—Penalty—Discretion of magistrate.]—Income War Tax Act, 1917, s. 9, enacts that for every default in complying with the provisions of sects. 7 & 8, the taxpayer & person required to make a return shall each be liable on summary conviction to a stated penalty for each day during which the default continues.—Held: no discretion is left to the convicting magistrate to limit the number of days for which the penalty is to be imposed, or to reduce the amount of the penalty for each day's default.—**R. v. THOMPSON MANUFACTURING CO., LTD. (1920),**

641. Neglect to deliver statement — What amounts to neglect to deliver—Incorrect statement.]—

Resp. being required by Income Tax Act, 1842 (c. 35), s. 52, to deliver "a true & correct statement in writing" of his gains & profits under Schedule D, delivered an incorrect statement, not fraudulently, but, as the jury found, negligently, that is to say, not to the best of his judgment & belief according to the rules:—**Held:** the penalty imposed by sect. 55 of the same Act for neglecting "to deliver any statement as aforesaid" is not limited to a case of non-delivery, but is applicable also to the present case.—**A.-G. v. TILL, [1910] A. C. 50; 79 L. J. K. B. 141; 101 L. T. 819; 26 T. L. R. 134; 54 Sol Jo. 132; 5 Tax Cas. 440 H. L.**

Annotation:—Mentd. Edinburgh Life Asscc. v. Lord Advocate, [1910] A. C. 143.

642. False return—Proceedings in respect of—Whether by indictment or by summary procedure.]—Appls. were convicted on indictment under Perjury Act, 1911 (c. 6), s. 5 (b), of knowingly &

47 O. L. R. 103; 17 O. W. N. 460.—**CAN.**

f. — — —.]—Income War Tax Act, 1917 (c. 28), s. 9, prescribes a penalty for each day that a person liable under the Act fails to make his return after notice:—Held: the magistrate before whom the person in default is tried & convicted has no power to reduce the amount of the penalty as prescribed by the statute.—**R. v. SMITH, [1923] 1 D. L. R. 820; 38 Can. Crim. Cas. 327; 56 N. S. R. 72.—CAN.**

g. — — —.]—Income War Tax Act, s. 9 (1), enacts that for every default in complying with certain sections persons in default "shall be liable on summary conviction to a stated penalty for each day during

wilfully making statements false in material particulars in returns of income tax. By the proviso to sect. 16 (3) of the Act where the making a false statement is by any Act passed before the commencement of the Perjury Act made punishable only on summary conviction, it shall remain so punishable. By Finance (1909-10) Act, 1910 (c. 8), s. 94, such offence is made punishable on summary conviction & subject to imprisonment not exceeding six months:—*Held*: as the penalty under sect. 94 exceeded three months' imprison-

ment an offender, under Summary Jurisdiction Act, 1879 (c. 49), s. 17 (1), might elect to be tried on indictment, & consequently the offence was not punishable "only" on summary conviction, & the conviction of appts. was valid.—*R. v. BRADBURY, R. v. EDLIN*, [1921] 1 K. B. 562; 90 L. J. K. B. 133; 125 L. T. 31; 85 J. P. 128; 37 T. L. R. 88; 26 Cox, C. Q. 732; 15 Cr. App. Rep. 76, C. C. A.

See, now, 1918 Act, s. 227.

Part XI.—The Super Tax.

SECT. 1.—IN GENERAL.

See, now, 1918 Act, s. 4; Super Tax Regulations, 1910 & 1922.

643. A variety of income tax.—*ARGYLL (DUKE) v. INLAND REVENUE COMRS.*, No. 544, *ante*.

644. An additional income tax.—(1) A bequest of an annuity "free of income tax & of all deductions" is a bequest of an annuity free of super tax.

Super tax, according to statute, is only additional income tax (*SARGANT, J.*).

(2) In such a case as the above the income of the residuary estate must bear such proportion of the total super tax payable by the annuitant, as the annuity with the income tax thereon added thereto bears to the total amount of the income of the annuitant assessed for super tax.—*Re DOXAT, DOXAT v. DOXAT* (1920), 125 L. T. 60; 64 Sol. Jo. 651.

Annotations:—As to (1) *Distd. Re Bates, Selmes v. Bates*, [1925] Ch. 157. *Folld. Re Bowen, Paddock v. Bowen* (1925), 70 Sol. Jo. 44.

645. —.]—By his will made in 1915 testator directed his trustees out of the income of his

which default continues":—*Held*: the magistrate is not required to impose that penalty for each day but may, in his discretion, impose a less penalty.—*R. v. BELL*, [1924] 2 W. W. R. 616; 3 D. L. R. 307; 42 Can. Crim. Cas. 253; 20 Alta. L. R. 438.—*CAN.*

h. —.]—*R. v. HARRISON & O'KELLY*, [1924] 2 W. W. R. 563; 3 D. L. R. 312; 34 Man. L. R. 271.—*CAN.*

j. —.]—*Jurisdiction of justice of the peace.*—"Summary conviction" in Income War Tax Act, 1917, as amended, s. 9, means summary conviction by a justice of the peace under Part XV. of the Criminal Code; the jurisdiction so conferred is not taken away by sects. 18 & 21 of the Act.—*PANTON v. SPENCER*, [1921] 1 W. W. R. 783; 57 D. L. R. 447; 14 Sask. L. R. 161.—*CAN.*

k. False return—Proceedings in respect of—Whether by indictment or by summary procedure.—Accused made on solemn affirmation a statement before an income tax comr., which statement the accused knew, or had reason to believe, to be incorrect:—*Held*: such statement amounted to the offence of giving false evidence in a judicial proceeding under Penal Code, s. 193, & was therefore not cognisable by a full power magistrate, as it could not be treated as constituting an offence under Penal Code, s. 181, making a false statement to a public servant.—*R. v. DAYALJI ENDARJI* (1871), 8 Bom. Cr. Ca. 21.—

l. Untrue abatement claim.—The words "treble the duty chargeable in respect of all sources" of defender's income mean treble the duty chargeable on defender's whole income for the year of assessment in

question, & not merely treble the duty on defender's income "still chargeable" as not having already borne the tax, & it is not within the competence of the ct. to modify the penalty imposed by the section.—*LORD ADVOCATE v. McLAREN* (1905), 5 Tax Cas. 110.—*SCOT.*

PART XI. SECT. 1.

m. Chargeable on total income from all sources—Liability on annuity "free of income tax".—*Held*: income tax includes super-tax, & the words "free of income tax" attached to a marriage contract annuity entitle the widow to payment of that annuity free also of super-tax.—*WORDIE'S TRUSTEES v. WORDIE*, [1922] S. C. 28; 59 Sc. L. R. 39; [1921] 2 S. L. T. 282.—*SCOT.*

n. —.]—*How calculated—Two declared in one financial year—In respect of separate financial years.*—Applt. held shares in a certain colliery co., in respect of which he had received two dividends, as follows:—on Aug. 28, 1919, a dividend declared on July 30, 1919, in respect of the fourteen months ended Feb. 28, 1918; on Mar. 9, 1920, a dividend declared on Jan. 23, 1920, in respect of the year ended Feb. 28, 1919. In the computation of applt.'s total income for the year ended Apr. 5, 1920, upon which the assessment to super tax made upon him for the year ended Apr. 5, 1921, had been based, both the dividends in question had been included:—*Held*: the dividends were not receivable until they had been declared by the co., & as they had both been declared during the year ended Apr. 5, 1920, they had properly been included in the computation of applt.'s total income for that year, upon which he had been assessed

residuary estate to pay his wife during widowhood the sum requisite to make up her marriage settlement income to "the clear annual sum of £4,000 a year free from income tax":—*Held*: the wife was entitled to the £4,000 a year free from super tax as well as ordinary income tax.

Super tax was an additional income tax.—*Re CROSSE, OLDHAM v. CROSSE*, [1920] 1 Ch. 240; 89 L. J. Ch. 145; 122 L. T. 462; 64 Sol. Jo. 260.

Annotations:—*Consd. Davis v. I. R. Comrs.* (1922), 92 L. J. K. B. 252. *Distd. Re Bates, Selmes v. Bates*, [1925] Ch. 157.

646. —.]—*Re BOWEN, PADDOCK v. BOWEN*, No. 694, *post*.

Whether retrospective.—*See* Sect. 3, sub-sect. 2, *A., post*.

SECT. 2.—JURISDICTION TO CALL FOR RETURN.

See 1918 Act, s. 7; Super Tax Regulations, 1910, 1922.

647. Validity of notice—Served before Act

to super tax for the year ended Apr. 5, 1921.—*HURLL v. INLAND REVENUE COMRS.* (1922), 8 Tax Cas. 292.—*SCOT.*

o. —.]—*Applt.* had been assessed to super tax for the years ending Apr. 5, 1919, Apr. 5, 1920, & Apr. 5, 1921, in the sums of £10,810, £11,387 & £12,119 respectively, on the basis of his own returns of income for super tax purposes, which included in each case a dividend of £10,000, paid under deduction of income tax, on his shares in a co. Subsequently to the payment of the duty under the original super tax assessments, it was ascertained that dividends on the shares had been declared & paid as follows:—(a) On Apr. 27, 1917, for the year to Dec. 31, 1916, £10,000; (b) On Mar. 28, 1918, for the year to Dec. 31, 1917, £10,000; (c) On Apr. 11, 1919, for the year to Dec. 31, 1918, £10,000; & (d) on Apr. 2, 1920, for the year to Dec. 31, 1919, £10,000; £20,000 thus being receivable in each of the years ending Apr. 5, 1918, & Apr. 5, 1920, & no income from this source in the year ending Apr. 5, 1919. The assessment to super tax for the year ending Apr. 5, 1920, was accordingly discharged & additional assessments in the sum of £10,000 each raised for the years ending Apr. 5, 1919, & Apr. 5, 1921:—*Held*: (1) an assessment to income tax covered only such income as was comprehended in the notice of the assessment; (2) there was no assessment to income tax upon applt. *quoad* the dividends, & sub-sect. 2 of sect. 5 of 1918 Act thus being inapplicable, the additional super tax assessments had been rightly made in accordance with the provisions of sub-sect. 3 (c) of that sect.—*DUNCAN v. INLAND REVENUE COMRS.* (1923), 8 Tax Cas. 433.—*SCOT.*

passed—Application of Customs & Inland Revenue Act, 1890 (c. 8), s. 30.]—*BOWLES v. A.-G.*, No. 577, *ante*.

648. — Served abroad.]—Resps. in the first two cases were directors of a British co. & were in receipt of income subject to British income tax by deduction. They were both of foreign nationality, resident in Paris, & had no residence in the United Kingdom, their visits to this country being of very short duration. The special Comrs. served upon each resp. by registered post at his Paris address a notice to make a return of his income for super tax purposes for the year 1917–18. As no returns were received, the Special Comrs. made an assessment to super tax upon each resp. for that year in a sum estimated according to the best of their judgment under the provisions of Finance (1909–1910) Act, 1910 (c. 8), s. 72 (5). Notices of the assessments were sent to resps. by registered post at their Paris addresses. The facts in the third case were similar to the foregoing, except that B., on whom the assessments in dispute, those for 1914–15 & 1915–16, were made before his death, was a British subject resident in Italy. It was contended in each case on appeal before the Special Comrs. that the Special Comrs. had no jurisdiction under Finance (1909–10) Act, 1910 (c. 8), s. 72, to serve outside the United Kingdom either a notice requiring a return of income or a notice of assessment; that the giving of notice of appeal against the assessment did not constitute acquiescence in the Special Comrs.' jurisdiction; that valid service of a notice to make a return had not been effected, that there was consequently no failure to make a return within Finance (1909–1910) Act, 1910 (c. 8), s. 72 (5), & that the power to make an estimated assessment did not therefore arise, & that the assessment was invalid & should be discharged. The Special Comrs. upheld these contentions & discharged the respective assessments:—*Held*: the authority conferred on the Special Comrs. by Finance (1909–10) Act, 1910 (c. 8), s. 72, & the regulations made thereunder, extends to the service abroad of a notice to make a return of income for the purposes of super tax, & of a notice of a valid assessment to super tax, & the assessments in question were validly made.—*INLAND REVENUE COMRS. v. HUNI*, [1923] 2 K. B. 563; 92 L. J. K. B. 618; 129 L. T. 509; 39 T. L. R. 459; 67 Sol. Jo. 707; *sub nom.* *INLAND REVENUE COMRS. v. HUNI*, *INLAND REVENUE COMRS. v. WORMSER*, *INLAND REVENUE COMRS. v. BRODIE'S EXECUTORS*, 8 Tax Cas. 466.

Annotation:—*Apprvd.* *Whitney v. I. R. Comrs.* (1925), 42 T. L. R. 58.

649. — — —.]—An alien non-resident in this country in receipt from British sources of an income exceeding the super tax limit is liable to pay super tax on his British income, & he is bound to comply with a notice sent to him at his residence abroad by registered post requiring him to make a return of his British income for assessment to super tax, & on his failure to do so may be assessed by the Special Comrs. to the best of their judgment.—*WHITNEY v. INLAND REVENUE COMRS.*, [1926] A. C. 37; 95 L. J. K. B. 165; 134 L. T. 98; 42 T. L. R. 58, H. L.; *affg.*, [1924] 2 K. B. 602, C. A.

Annotation:—*Mentd.* *Hunter v. Städtische Hochseefischerel Gesselschaft*, [1925] 2 K. B. 493.

See, now, 1918 Act, s. 210.

SECT. 3.—ASSESSMENT.

SUB-SECT. 1.—IN GENERAL.

See 1918 Act, s. 5 (2).

SUB-SECT. 2.—ON WHAT CHARGEABLE.

A. In General.

See, now, 1918 Act, s. 5; 1920 Act, s. 15, sched. III.

650. Chargeable on previous year's income—Without regard to income in year of assessment.]—Super tax is a retrospective tax on the individual personally in respect of his previous year's income, & provided that he is alive during any part of the year of assessment, is payable without regard to the question what sources of income he had in the year of assessment or whether he had any income or source of income in the year of assessment, subject, however, to a proportionate reduction in the event of his death during the year of assessment.—*FITZGERALD v. INLAND REVENUE COMRS.*, [1919] 2 K. B. 154; 88 L. J. K. B. 1125; 121 L. T. 192; 35 T. L. R. 459; 7 Tax Cas. 284.

Annotation:—*Refd.* *Andrewes v. I. R. Comrs.* (1920), 7 Tax Cas. 627.

651. — — —.]—Applt.'s total income for the year ended Apr. 5, 1915, estimated in the manner prescribed by Finance (1909–10) Act, 1910 (c. 8), s. 66 (2), exceeded £3,000, & he had accordingly been assessed to super tax for the year ended Apr. 5, 1916. Applt. contended that, inasmuch as, for the year to which the super tax assessment related, his total income, estimated in the same manner, amounted only to £2,358, he was not chargeable to super tax for the year ended Apr. 5, 1916:—*Held*: applt. was chargeable to super tax for the year ended Apr. 5, 1916, by reference to his total income for the preceding year, as estimated in the manner prescribed.—*ANDREWES v. INLAND REVENUE COMRS.* (1920), 7 Tax Cas. 627.

652. Chargeable on total income from all sources—Liability on annuity “free from all deductions.”]—(1) Super tax on income arising under a will is not a charge in respect of any particular annuity or sum bequeathed by testator, but is a charge in respect of the recipient's whole income, & is not a matter with which the trustees would be charged or concerned at all.

(2) An annuity given “free of all deductions” does not free the annuitant from liability to pay income tax.

(3) Where an annuity is given, “clear of all deductions, including income tax,” the annuitant must herself pay super tax.—*Re CRAWSHAY*, *CRAWSHAY v. CRAWSHAY* (1915), 60 Sol. Jo. 275.

Annotation:—*As to* (3) *Folld.* *Re Bates*, *Selmes v. Bates*, [1925] Ch. 157.

653. — How calculated.]—*DAVIS v. INLAND REVENUE COMRS.*, No. 685, *post*.

Income how calculated.]—*See* Sub-sect. 3, *post*.

Income of married woman, infants, etc.]—*See* Sect. 4, *post*.

654. Income derived from property in United Kingdom—Taxpayer resident abroad.]—By Finance (1909–10) Act, 1910 (c. 8), s. 66 (1), there shall be charged, levied, & paid in respect of the income of any individual, the total of which from all sources exceeds £5,000, an additional duty of income tax referred to in the Act as a super tax, & by sub-sect. 2 for the purposes of the super tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts. By sect. 72 (6) all provisions of the Income Tax Acts relating to the persons chargeable & the collection & recovery of duty shall, so far as

Sect. 3.—Assessment: Sub-sect. 2, A. & B.]

they are applicable apply to the charge, assessment, collection & recovery of the super tax:—

Held: (1) any individual, although not resident in the United Kingdom, whose total income entirely derived from property in the United Kingdom, when estimated in the prescribed manner, exceeds £5,000 is chargeable with the super tax in respect of that income; (2) in calculating the income for super tax purposes it was immaterial to consider whether or not income tax had been deducted from it at its source.—**BROOKE v. INLAND REVENUE COMRS.**, [1918] 1 K. B. 257; 87 L. J. K. B. 279; 118 L. T. 321; 34 T. L. R. 142; 7 Tax Cas. 261, C. A.

Annotations:—As to (1) *Appld. Crane v. I. R. Comrs.*, [1919] 2 K. B. 616. *Refd. Re Crosse, Oldham v. Crosse*, [1920] 1 Ch. 240; *Whitney v. I. R. Comrs.* (1925), 42 T. L. R. 58. As to (2) *Refd. Samuel v. I. R. Comrs.*, [1918] 2 K. B. 553. *Generally, Mentd. Rover v. South African Breweries*, [1918] 2 Ch. 233; *Patent Castings Syndicate v. Etherington*, [1919] 1 Ch. 306; *Williams v. Singer, Pool v. Royal Exchange Assce.*, [1919] 2 K. B. 108; *I. R. Comrs. v. Brooke, Murray v. I. R. Comrs.*, *I. R. Comrs. v. Leith*, *I. R. Comrs. v. Bell*, *I. R. Comrs. v. Portman*, [1923] 2 K. B. 814; *Sheldrick v. South African Breweries*, [1923] 1 K. B. 173.

655. — Non-resident alien—Power of commissioners to assess where no return.]—INLAND REVENUE COMRS. v. HUNI, No. 648, *ante*.

656. — — — — —.]—WHITNEY v. INLAND REVENUE COMRS., No. 649, *ante*.

B. Income distinguished from Capital.

657. Special dividend—Part payment on sale of shares—Dividend declared before binding agreement for sale.]—Resp. had in July 1916, entered into negotiations with a financial corp'n. for the sale at a price of £3 per share of the whole of his shareholding comprising 79,920 out of the total issued ordinary share capital of 80,552 £1 shares, in a co. of which he was the managing director. One of the conditions attached to the proposed purchase was that, prior to the transfer of the shares, resp., by virtue of his controlling interest in the co., should induce the co. to declare out of the balance of its undivided profits a bonus or special dividend of 10s. per share on its ordinary shares, the proceeds of which should be held by resp. as part of the agreed purchase price. The co. duly declared such bonus or special dividend free of income tax, & free also of super tax up to a sum not exceeding £6,000 should a claim upon any shareholder for the latter tax arise by reason of the receipt of the bonus. Resp. received from the co. in Sept. 1916, a payment of £39,960 in respect of the bonus or special dividend on his shares. The terms of the agreement for sale were first included in a written document in Oct. 1916, in which the purchase price was stated to be £2 10s. per share, but in which resp. was stated also to be entitled to, & to have previously received, the bonus or special dividend of 10s. per share, which had been declared subsequently to July 1916. Upon an appeal by resp. against the assessment to super tax made upon him for the year ended Apr. 5, 1918, the special comrs. held that the sum of £39,960 & the income tax applicable thereto constituted part of the purchase price of the shares & did not form part of resp.'s total income

upon which he was liable to super tax for the year 1917-18:—**Held:** the evidence before the special comrs. did not justify the conclusion of fact that an enforceable agreement for sale had existed between the parties prior to the written agreement of Oct. 12, 1916, & the bonus or special dividend therefore formed part of resp.'s income & had not been received by him on behalf of the purchaser.—**INLAND REVENUE COMRS. v. SANDERSON** (1921), 8 Tax Cas. 38, C. A.; *subsequent proceedings, sub nom. SANDERSON v. INLAND REVENUE COMRS.* (1924), 9 Tax Cas. 80.

658. — — — Reimbursement of super tax as part of purchase price.]—Applt. had in July, 1916, entered into negotiations with a financial corp'n. for the sale of the whole of his shareholding in a co. of which he was managing director & in which he had the controlling interest. One of the conditions attached to the proposed purchase was that, prior to the transfer of the shares, applt. should induce the co. to declare out of the balance of its undivided profits a bonus or special dividend of 10s. per share on its ordinary shares, the proceeds of which should be held by applt. as part of the agreed purchase price. The co. duly declared such bonus or special dividend free of income tax, & further agreed to pay super tax up to £6,000 as a maximum should a claim upon any shareholder for the latter tax arise by reason of the receipt of the dividend. Applt. received from the co. in Sept. 1916, a payment of £39,960 in respect of the special dividend on his shares.

The terms of the sale—including the arrangement for the payment of super tax up to £6,000—were first embodied in a written agreement in Oct. 1916. The question of applt.'s liability to super tax in respect of the special dividend was raised in the case of *Inland Revenue Comrs. v. Sanderson*, No. 657, *ante*, which was decided in favour of the Crown by the K. B. Div. on July 26, 1920—a decision confirmed by the Ct. of Appeal on May 31, 1921. On Dec. 6, 1920, i.e. after the shares had been transferred by applt., the said sum of £6,000 in respect of super tax was duly paid to applt. by the purchasing corp'n. out of the profits of the co.:—**Held:** applt. received the said sum of £6,000 under the agreement of Oct. 1916, as part of the purchase price of the shares sold by him, & not in his capacity as a shareholder, & that the said sum accordingly did not form part of his income for super-tax purposes.—**SANDERSON v. INLAND REVENUE COMRS.** (1924), 9 Tax Cas. 80.

659. — — — Applied to purchase of shares already issued—Distinguished from capitalisation of profits.]—To enable a particular director to withdraw from the management of a co. it was arranged that the greater part of his shareholding should be available for purchase by the remaining shareholders, of whom applt. was one, in proportion to their existing holdings. In order to provide them with funds for this purpose the directors on July 5, 1917, recommended that £45,000 should be distributed out of the profits of the co. by way of special dividend, & the retiring director further agreed to apply the special dividend on his own shares & the cash received for their sale in taking up £45,000 debentures in the co.

On July 16, 1917, at an extraordinary general

PART XI. SECT. 3, SUB-SECT. 2.—B.

p. Income of trust estate—Part retained by trustees—For capital purposes under trust instrument.]—Under his father's will resp. was entitled, in the events which happened, during

the subsistence of the trust of the residuary estate, to occupy a mansion-house & grounds so long as the trustees should find it expedient to retain it in their hands unlet, the trustees being directed to hold it in trust "for the life use" of resp. so long as his

mother should remain alive, subject to his not contravening a certain condition. Resp. had no power to let the property. The residuary estate was to be held in trust until the mtges. on the residuary estate had been reduced to £100,000, the ultimate

meeting of the co. a resolution was accordingly passed declaring, out of accumulated profits, special dividends on ordinary & preference shares amounting to £60,000 in all, or £45,000 after deduction of income tax. Prior to the passing of the resolution applt. signed a letter authorising the directors to use his portion of the special dividend in payment of the consideration money for such of the retiring director's shares as were purchased by him, & similar letters were signed by the other shareholders. With three exceptions the existing shareholders, including applt., duly applied their portion of the dividend to the purchase of shares from the retiring director, who in turn duly took up & paid for £45,000 debentures in the co.:—*Held*: the transaction was in no sense a capitalisation of profits, the special dividend was receivable by the shareholders as income, & the arrangement, whether binding or not, to apply it in the purchase of other shares in the co., could not affect applt.'s obligation under Finance 1909–1910 Act, 1910 (c. 8), s. 66 (2), to include his portion of that dividend in his total income for the purposes of super tax for the year ending Apr. 5, 1919.—*ROE v. INLAND REVENUE COMRS.* (1924), 131 L. T. 255; 8 Tax Cas. 613.

660. — Distribution of reserve fund — Distributable in cash or shares at option of directors.]—Resp. was one of several directors of a limited co. who between them held all the ordinary shares therein. In June of each year from 1911 to 1915 inclusive, the co. in general meeting set aside out of profits certain sums as a reserve fund to be at the complete disposal of the directors for the time being, & in particular as a provision for equalising dividends. On the retirement or death of any director a proportionate share of this "Dividend Equalisation Fund" was payable to him or his legal representatives.

On Mar. 27, 1919, the co. passed a resolution authorising the directors to distribute the fund among the ordinary shareholders "as a funded debt payable at the option of the directors in cash or in fully paid preference shares at par," & four days later the directors resolved to pay the fund in cash & to credit the amount to which each shareholder, director, was entitled to his loan account with the co., but no special arrangement was made as to interest on the amounts so credited or for their redemption by the co. The directors' loan accounts were used for crediting their fees, dividends & interest, & they were in the habit of withdrawing varying amounts therefrom from time to time. Interest was allowed on these accounts at 5 per cent. up to Apr. 1, 1917, & thereafter at 6 per cent.:—*Held*: the Dividend Equalisation Fund was receivable by the directors as income on the passing of the resolutions in Mar. 1919, & resp.'s share of the fund was therefore properly included in computing his total income for super tax purposes for the year 1919–20.—*INLAND REVENUE COMRS. v. DONCASTER* (1924), 93 L. J. K. B. 338; 131 L. T. 317; 40 T. L. R. 433; 68 Sol. Jo. 596; 8 Tax Cas. 623.

661. — Distributable in cash or shares at option of shareholder.]—Resp. was a shareholder in a limited co., which resolved to divide part of its reserve fund by way of bonus dividend,

shareholders being entitled, instead of taking payment wholly in cash, to allow part of the amount coming to them to be applied in satisfying the sum payable in respect of a portion of certain new shares proposed to be issued to shareholders. Resp., in exercise of this option, accepted a number of shares & received cash in respect of the rest of the bonus dividend. Resp. was assessed to super tax in respect of the shares & the rest of the bonus dividend:—*Held*: as resp. had an option whether he would take the bonus dividend in cash or in shares, & as it was resp., & not the co., that had applied a portion of the bonus to payment for shares, the distribution of both cash & shares was a distribution not of capital, but of income, & the assessment was right.—*INLAND REVENUE COMRS. v. COKE* (1926), 42 T. L. R. 329; 70 Sol. Jo. 445.

662. — — — — —.]—*ROBERTS v. HANKS* (1926), 161 L. T. Jo. 169.

663. Distribution of bonus—No option to shareholders to take cash—Distribution by company as capital—Shares authorised but unissued.]—Resp. in each of these cases was a shareholder in a limited co., which, under the authority of its arts. of assocn., had declared a bonus out of its undivided profits, & in satisfaction of such bonus, had allotted to its shareholders as fully paid up certain ordinary shares forming part of the co.'s authorised but unissued capital.

The shareholders had no option to receive cash in lieu of shares in satisfaction of the bonus:—*Held*: the shares credited to resp. in respect of the bonus, being distributed by the co. as capital, were not income in the hands of resp., which he was required to include in his return of total income from all sources for the purposes of super tax assessment.—*INLAND REVENUE COMRS. v. BLOTT, INLAND REVENUE COMRS. v. GREENWOOD*, [1921] 2 A. C. 171; 90 L. J. K. B. 1028; 125 L. T. 497; 37 T. L. R. 762; 65 Sol. Jo. 642; 8 Tax Cas. 101, H. L.

Annotations:—Distd. Pool v. Guardian Investment Trust Co., [1922] 1 K. B. 347. *Consd. Sheldrick v. South African Breweries*, [1923] 1 K. B. 173; 1 R. Comrs. v. Burrell, [1924] 2 K. B. 52. *Expld. & Distd. I. R. Comrs. v. Doncaster* (1924), 93 L. J. K. B. 338. *Appld. Re Speir, Holt v. Speir*, [1924] 1 Ch. 359; 1 R. Comrs. v. Fisher's Exors., [1925] 1 K. B. 451. *Consd. Re Rys. Act, 1921, & Standard Charges Schedule* (1925), 94 L. J. K. B. 364. *Reid. Bradbury v. English Sewing Cotton Co.*, [1923] A. C. 744.

664. Debenture stock.]—A co. which had in its balance sheet a large amount of undistributed profits, including a sum standing to the credit of profit & loss account, reserve fund & suspense account, resolved that part of these profits should be distributed as a bonus & that debenture stock should be issued to the ordinary shareholders, *pro rata*, & accepted by them in satisfaction of the bonus. The debentures, which could be enforced by the shareholders in certain events only, were issued accordingly:—*Held*: the debenture stock was not income to the recipients & was not liable to assessment to super tax, inasmuch as what was received by the shareholder was not something as to which he could exercise his own choice & volition.—*INLAND REVENUE COMRS. v. FISHER'S EXECUTORS*, [1925] 1 K. B. 451; 94 L. J. K. B. 310; 132 L. T.

remainder being to resp. absolutely & in fee, if then living, & in default to his issue.

The assessments to Income Tax under Schedule A. in respect of the house & grounds & under Schedule B. in respect of the grounds were made in the name of resp., but the tax was paid by the trustees.

Under his ante-nuptial marriage contract resp. assigned to trustees his interest in certain shares in a co. on trust to pay the income to himself for life, but, in the event of the yield, from certain of the shares exceeding the rate of 12½ per cent. free of income tax in any year, the trustees were to retain such excess income & apply

it from time to time in reducing two charges on the trust funds created by resp.

Subject to a life interest to resp.'s wife, if she survived him the settled funds were to go to the children & in default of children to attain a vested interest, to revert to resp. Resp. was given power to redeem the trust funds

Sect. 3.—Assessment: Sub-sect. 2, B. & C.; sub-sect. 3,

278; 41 T. L. R. 53; 69 Sol. Jo. 103, C. A.; *affd.*, 42 T. L. R. 340, H. L.

— **Shares held in another company.]—Compare** No. 95, *ante*.

Bonus dividends, generally, see COMPANIES, Vol. IX., pp. 596, 597.

665. Distribution of undivided profits on winding up.]—On the winding up of a limited co. the undivided profits of past years, & of the year in which the winding up occurred were distributed among the shareholders, of whom resp. was one:—Held: super tax was not payable on the undivided profits as income, because in the winding up they had ceased to be profits & were assets only.—INLAND REVENUE COMRS. v. BURRELL, [1924] 2 K. B. 52; 93 L. J. K. B. 709; 131 L. T. 727; 40 T. L. R. 562; 68 Sol. Jo. 594; 9 Tax Cas. 27, C. A.

Annotation:—Consd. I. R. Comrs. v. Fisher's Exors., [1925] 1 K. B. 451.

666. Distribution of profits—Assets of company written up—Loans to directors written off.]—HALL v. INLAND REVENUE COMRS. (1926), 161 L. T. Jo. 236.

Retention of profits by company—Company of limited membership.]—See 1922 Act, s. 21.

667. Annual percentage of profits of invention sold—Distinguished from price payable by instalments.]—J. was the owner with T. of a patent, which prior to Sept. 1913, was by licence worked by a co. of which J. & T. were sole directors & shareholders. On that date the rights in the invention, together with other benefits, were assigned to the co. in consideration of a sum of money & certain other payments described as "royalties" in the assignment. J. was assessed to super tax upon the sum received by him in respect of the so-called royalties for the year ended Apr. 5, 1916, & appealed on the ground (*inter alia*) that the sums received by him were part of the purchase-money & constituted capital & not income:—Held: (1) the sums paid were annual payments within the meaning of the Income Tax Acts, & J. was properly assessed.

(2) It has been urged that the annual payments now in question, being 10 per cent. upon the sales of machines for ten years, is part of the consideration which was paid for the transfer from applt. of his property. So it is; but there is no law of nature or any invariable principle that because it can be said that a certain payment is consideration for the transfer of property it must be looked upon as price in the character of principal. In each case regard must be had to what the sum is. A man may sell his property for a sum which is to be paid in instalments, & when that is the case the payments to him are not income. Or a man may sell his property for an annuity. In that case the Income Tax Act applies (ROWLATT, J.).

(3) He took something which rose or fell with the chances of the business. When a man does that he takes an income; it is in the nature of income, & on that ground I decide this case (ROWLATT, J.).—JONES v. INLAND REVENUE

COMRS., [1920] 1 K. B. 711; 89 L. J. K. B. 129; 121 L. T. 611; 7 Tax Cas. 310.

Annotation:—As to (2) Reid. East Indian Ry. v. Secretary of State in Council of India (1924), 40 T. L. R. 241.

668. Income of trust estate—Accumulated for benefit of infant.]—Testator by his will gave certain real estate to trustees upon trust for the eldest of his sons who should be living at the time of his death absolutely upon his attaining the age of twenty-one years, & failing such son he directed the same to fall into & be held upon the same trusts as were declared concerning his residuary estate. He gave the residue of his property, both real & personal, to his trustees, subject to certain payments to his wife, upon trust for all his children in equal shares which were to be an interest absolutely vested on his death. He empowered the trustees to apply the whole or such part as they thought fit of the income of the property or share to which any infant should be entitled or contingently entitled towards his or her maintenance, education or benefit, & he directed the trustees to accumulate the unapplied surplus income, such accumulation to be added as capital to the property or share whence the same should have arisen. Testator at his death left four children, all of whom were infants. The trustees made certain payments to testator's widow in accordance with the terms of the will & accumulated the surplus income. An assessment to super tax was made upon one of the trustees in respect of the accumulated income arising from the estate specifically bequeathed in trust for the eldest son & from the one-fourth share of the residuary estate to which the eldest son was entitled:—Held: inasmuch as there was a trust in testator's will to accumulate the income subject to a power to the trustees to apply such sums as they thought proper for the maintenance of testator's children, the portion of the income which was accumulated was not the income of the infant eldest son, such accumulations coming to him not as income but as capital, & were therefore not liable to assessment to super tax.—INLAND REVENUE COMRS. v. BLACKWELL, [1924] 2 K. B. 351; 93 L. J. K. B. 1001; 40 T. L. R. 801; *on appeal*, [1926] 1 K. B. 389; 134 L. T. 372, C. A.

669. Share of residuary estate—Income accruing to estate—After residuary account delivered.]—An individual was entitled absolutely under the will of his mother who died in 1912 to one half of her residuary estate, which included her interest in certain surplus rents & profits undisposed of by his grandmother's will until certain events should happen. The exors. of his mother's will delivered a residuary account of her estate on Dec. 19, 1914, including the sums received by them up to that date in respect of the said surplus income from the grandmother's estate, but the value of his mother's interest in that estate was not ascertained for estate duty purposes until Mar. 11, 1919, & under Legacy Duty Act, 1796 (c. 135), s. 11, legacy duty remained to be paid from time to time under his mother's will on the several sums of surplus income as & when received by her exors. Assessments to super tax were

for £100,000 to be held on the same trusts:—Held: neither the annual value, as assessed to Income Tax under Schedules A. & B., of the mansion-house & grounds nor the income under the marriage contract from the shares so far as exceeding 12½ per cent.

q. Surplus of accumulated profits—Not distributed among shareholders—Issue of new shares.]—Where the surplus accumulation of profits of a co. instead of being distributed among its shareholders, was capitalised under a special resolution of the co., & new shares were issued to the shareholders representing their share in the accumulated surplus:—Held: the new shares were not taxable as income, & that the

shareholders were not liable to super-tax on the value of the new shares issued to them.—INCOME TAX COMR. ETC. (MADRAS) v. BINNY & Co. (MADRAS) LTD. (1924), 1 L. L. R. 47 Mad. 837.—IND.

—In H. Co. by resolution decided to increase its capital by £50,000, & towards that end to capitalise the sum

made on the son for the years 1914-15 to 1917-18 inclusive in respect of the share of such surplus income receivable by him for the respective preceding years. On appeal to the Special Comrs., he contended (1) that his share of the said surplus income was receivable by him as capital & not as income; (2) that the residue of his mother's estate could not be ascertained until her interest in the grandmother's estate had determined & that until then the income of the estate was the income of the exors. & not of the residuary legatees; (3) that each payment of the said surplus was a separate legacy chargeable with legacy duty which had in fact been paid thereon & as such was capital & not income; & (4) alternatively that the legacy duty charged & paid on such payments was a proper deduction for super tax purposes. The Special Comrs. decided that the residue of the mother's estate was ascertained not later than the date of the delivery of the residuary account on Dec. 19, 1914, & that as from that date the son's share of the said surplus income was receivable by him as income & should be included in the computation of his income for super tax purposes, subject to deduction of the legacy duty charged thereon:—*Held*: as the mother's estate was still in course of administration up to 1919 at least, the surplus income received up to that date did not belong specifically to the residuary legatees, & the son was accordingly not assessable to super tax for the years in question in respect of any part of such surplus income.—**HERBERT v. INLAND REVENUE COMRS.**, **INLAND REVENUE COMRS. v. HERBERT** (1925), 9 Tax Cas. 593.

670. Reimbursement of super tax—In respect of special dividend—Dividend declared as part consideration for sale of shares.]—**SANDERSON v. INLAND REVENUE COMRS.**, No. 658, *ante*.

Compare No. 506, *ante*.

C. Other Cases.

671. Loans to governing director of "one man" company—Out of profits of company—No dividends declared.]—**INLAND REVENUE COMRS. v. SANSOM**, No. 612, *ante*.

672. Income received by vendor of securities—Securities sold cum interest—Income handed over to purchaser.]—The holder of certain registered notes of a limited co., the interest on which was payable half-yearly on May 31 & Nov. 30, under deduction of income tax, sold them with the accrued interest under a contract of sale dated Nov. 29, 1922. The transfer was not executed until Dec. 14, 1922, & the co.'s books being closed from Nov. 16 to Nov. 30, for the purpose of the paying the interest then due, the half-year's interest on the notes in question was paid, less income tax, to the vendor on or about Dec. 1, & such net amount was handed over by him to the purchaser under the rules of the Stock Exchange. An assessment to super tax was made upon the vendor for the year 1923-24 in respect of the gross amount of the half-year's interest paid on Nov. 30, 1922, but he contended that such interest did not form part of his income for super tax purposes, & the Special Comrs., on appeal, discharged the assessment:—*Held*: for super tax purposes the interest in question was not income of the vendor but of the purchaser.—**WIGMORE v. SUMMERSON (THOMAS) & SONS, LTD., INLAND REVENUE**

of £16,665, being undivided profits, & to distribute the relative shares as a bonus among the shareholders in proportion to their holdings. This resolution was carried into effect & respon-

dents, as shareholders, received a large number of such bonus shares:—*Held*: that the shares so distributed were "receipts or accruals of a capital nature" in terms of sect. 6, Act 41,

COMRS. v. OAKLEY, [1926] 1 K. B. 131; 94 L. J. K. B. 836; 41 T. L. R. 568; 69 Sol. Jo. 679; 9 Tax Cas. 577, 582.

673. Income received by owner of shares—Held on voluntary trust—Intention to transfer shares at future date.]—Resp., who was the principal shareholder & held the controlling interest in a co., set aside a certain number of his shares for transfer to certain employees of the co. on the terms that, until the actual transfer, he was to receive the dividends, & that when the total of the dividends on the shares set aside for an employee amounted to the par value of a share, the share so paid for should be transferred to the employee. Resp. was assessed to super tax on the dividends received by him on the shares so set aside:—*Held*: since the dividends as they accrued were dividends of resp., although he might be under obligations with regard to them in the future, they formed part of his income for the purpose of assessment to super tax.—**INLAND REVENUE COMRS. v. PARSONS** (1925), 41 T. L. R. 572; 69 Sol. Jo. 663.

674. Conversion of firm into company—Apportionment of profits & dividends for assessment.]—Resp. was a partner in a firm on which early in the assessment year 1919-20 an assessment to income tax was made for that year under Schedule D. on the average of the three previous years' trading. On Sept. 3, 1919, the firm sold their undertaking as from Jan. 1, 1919, with all its profits to a limited co., & resp. became the holder of 21,000 shares in the co. For the year ending Dec. 31, 1919, the co. declared a dividend. In computing the assessment of resp. to super tax for the year 1920-21 resp.'s share of the firm's income tax assessment for the year 1919-20, apportioned up to Sept. 2, 1919, was included, & there was also included such portion of resp.'s dividend above mentioned as would be left by excluding the amount that accrued on a *de die in diem* basis from Apr. 6 to Sept. 2, 1919. On an appeal by resp. against the super tax assessment the Special Comrs. held that such proportion of the dividend as was paid out of the profits for the period Jan. 1, 1919, to Sept. 2, 1919, must be excluded, & they reduced the assessment accordingly:—*Held*: as the dividend paid was in respect of the whole year 1919 & not merely in respect of the period from Sept. 3 to Dec. 31, 1919, the original super tax assessment amounted to double taxation, & the decision of the Special Commissioners must be affirmed.—**INLAND REVENUE COMRS. v. ROBERTS** (1925), 41 T. L. R. 623; 9 Tax Cas. 603, C. A.

SUB-SECT. 3.—HOW CALCULATED.

A. In General.

See 1918 Act, s. 5; 1920 Act, sched. III.

675. Income of partner.]—Applt. was a partner in a firm & consequent upon the retirement of another partner on Sept. 30, 1908, became entitled to a further percentage of the profits of the firm. Applt. himself retired from the firm on Sept. 30, 1909. In making the super tax assessment for the year ended Apr. 5, 1910, applt.'s income in respect of the partnership profits was computed by first taking the Schedule D. assessment on the firm for the year ended Apr. 5, 1909, which assessment was based on the average profits of the

1917, & were not therefore assessable for super tax under the provisions of that Act.—**INLAND REVENUE COMRS.** [1923] App. D. 347.—S. AF.

Sect. 3.—Assessment: Sub-sect. 3, A. & B.]

firm for the three years ended Mar. 31, 1908, & then taking applt.'s share of that average to which he was entitled under the two agreements governing the distribution of the partnership profits during the year ended Apr. 5, 1909, that is, the year preceding the year of the super tax assessment. Applt. claimed that, in computing for super tax purposes his income derived from the partnership profits, his share should be computed on the basis of the actual amount received by him either during the year of the super tax assessment or during the previous year:—*Held*: the principles adopted in making the assessment were correct.—**GAUNT v. INLAND REVENUE COMRS.**, [1913] 3 K. B. 395; 82 L. J. K. B. 1131; 109 L. T. 555; 7 Tax Cas. 219.

Annotation:—*Reid*. I. R. Comrs. v. Blott, I. R. Comrs. v. Greenwood (1921), 8 Tax Cas. 101.

676. Income tax assessment—Right of commissioners to adopt.—For the purpose of assessment to super tax, under Finance 1909–10 Act, 1910 (c. 8), s. 66, the amount of the profits derived by the taxpayer from his business during the year preceding the year of assessment to super tax is not to be ascertained by taking the actual amount of the profits made in that year, but by taking the average of the profits for three years preceding; & if, on the hearing of an appeal against an assessment to super tax, it is admitted by the taxpayer that the amount of the profits for the year in question, ascertained in that way, is correctly stated in an assessment to income tax made on the taxpayer under Schedule D., the Special Comrs. are entitled, without taking evidence, to adopt that assessment for the purposes of the super tax assessment.

If the owner of a business sells it to a co., the business is not “discontinued” within Finance Act, 1907 (c. 13), s. 24 (3).—**BARTLETT v. INLAND REVENUE COMRS.**, [1914] 3 K. B. 686; 84 L. J. K. B. 106; 111 L. T. 852; 7 Tax Cas. 229.

Annotation:—*Reid*. I. R. Comrs. v. Roberts (1925), 41 T. L. R. 623.

677. — Whether conclusive against taxpayer.—For the purpose of assessment to super tax under Finance 1909–10 Act, 1910 (c. 8), s. 66, the sum at which the taxpayer had been assessed to income tax under Schedule D. for the year preceding the year of assessment to super tax is not conclusive & binding on the Special Comrs., & the taxpayer may prove what was in fact his income for such preceding year.—**INLAND REVENUE COMRS. v. BROOKS**, [1915] A. C. 478; 84 L. J. K. B. 404; 112 L. T. 523; 31 T. L. R. 89; 59 Sol. Jo. 160; *sub nom.* **BROOKS v. INLAND REVENUE COMRS.**, 7 Tax Cas. 236, H. L.; *affg.* S. C. *sub nom.* **BROOKS v. INLAND REVENUE COMRS.**, [1914] 1 K. B. 579, C. A.

Annotations:—*Consd.* **Davis v. I. R. Comrs.**, [1923] 1 K. B. 370. *Reid*. **Bartlett v. I. R. Comrs.**, [1914] 3 K. B. 686; **I. R. Comrs. v. Massy** (1915), 88 L. J. K. B. 824, n.; **Howe v. I. R. Comrs.**, [1918] 2 K. B. 584; **I. R. Comrs. v. Burrell**, [1924] 2 K. B. 52.

See, now, 1918 Act, s. 5 (2).

678. Whether ascertainable by three years' average—Profits from business.—**BARTLETT v. INLAND REVENUE COMRS.**, No. 676, *ante*.

679. “Total income from all sources”—What must be considered—Whether income tax deducted at source.—**BROOKE v. INLAND REVENUE COMRS.**, No. 654, *ante*.

680. — Dividends paid tax free—Tax added to nominal amount of dividend.—In calculating for the purposes of the super tax the income of a shareholder in a co. which pays dividends on

its shares “free of income tax,” there must be added to the amount of a “tax free” dividend received by the shareholder the amount of the income tax paid by the co. in respect of that dividend.—**SAMUEL v. INLAND REVENUE COMRS.**, [1918] 2 K. B. 553; 88 L. J. K. B. 588; 119 L. T. 542; 34 T. L. R. 552; 7 Tax Cas. 277.

Annotations:—*Reid*. **Davis v. I. R. Comrs.** (1922), 92 L. J. K. B. 252; **Hartland v. Diggines**, [1925] 1 K. B. 372.

681. Annuity to reimburse super tax.—Applt. received under the will of her late husband a certain income & in addition an annuity of such an amount as in each year would reimburse to her all super tax payable by her. She was assessed to super tax for the year 1913–1914, & the trustees under the will paid the tax charged under the assessment out of the trust moneys held by them, from which income tax had been deducted at the source.

An additional assessment to super tax for the year 1914–1915 in respect of the super tax thus paid by the trustees on applt.'s behalf of the income tax applicable thereto was made upon applt.:—*Held*: the additional assessment had been correctly made, & the amount of the super tax paid for applt. plus the income tax applicable to that amount formed part of her total income for the purpose of super tax.—**MEEKING v. INLAND REVENUE COMRS.** (1920), 7 Tax Cas. 603.

Annotation:—*Reid*. *Re* Gretton's Indenture, *Re* Ratcliff & Brinckman's Trusts, *Hood v. Byron*, [1923] 1 Ch. 77.

Income of married woman.—*See* Sect. 4, *post*.

682. Lump sum—Paid as composition for share of annual profits—Distribution over years covered by composition.—In consideration of an advance of £7,000 made by an individual to a co. in 1905, he received (1) from the co., £7,000 5 per cent. debentures repayable by the co. after Dec. 1914, by half-yearly instalments of £500, & (2) from a director of the co., 5,600 £1 ordinary shares, being one-fifth of the total share capital of the co., of which he was to retransfer 400 shares on receiving each payment of £500; subject to certain adjustments he was also to receive one-fifth of the co.'s profits each year up to Dec. 1914, & thereafter a share of the profits corresponding, in effect, to the proportion of the £7,000 debentures remaining unrepaid from time to time. No payment was made by the co. to him in respect of the profits for the years 1915, 1916, & 1917 until Jan. 1920, when, following a resolution in general meeting in June, 1919, a sum of £6,000 was paid to him in settlement of the liability for those three years. He received no further payment in respect of profits until May, 1921, when, following resolutions of the directors & the shareholders in general meeting in Dec. 1920, he was paid £10,000 in full settlement of the liability under the agreement up to Dec. 31, 1921, the prospective date of its termination.

The sums of £6,000 & £10,000 were assessed to super tax for the years 1920–21 & 1921–22 respectively as forming part of his total income for the years 1919–20 & 1920–21 respectively, & on appeal, the special comrs. confirmed the assessments:—*Held*: under the original agreement, he was entitled to have his share of the profits paid to him each year, & for the purpose of computing his income for super tax purposes, the said sums of £6,000 & £10,000 must be spread over the years in respect of the profits of which they were paid, subject, however, to the entire exclusion from liability to super tax of such part of the sum of £10,000 as represented a composition of his right to receive a share of the profits of the year

1921.—**HAWLEY v. INLAND REVENUE COMRS.** (1925), 134 L. T. 502; 9 Tax Cas. 331.

B. Deductions.

See 1918 Act, ss. 27, 207; 1920 Act, ss. 16-18.

683. **Life insurance premiums — Policy mortgaged to insurance company.**—Applt., for the purpose of raising certain sums of money, by a series of deeds granted his life interest in certain estates & assigned an insurance policy on his own life to an insurance co. by way of mtge. & covenanted to pay interest on the sums advanced & to pay the insurance premiums:—*Held*: for the purpose of the calculation of the super tax applt. was not entitled to deduct the premiums from his income.—**HOWE (EARL) v. INLAND REVENUE COMRS.**, [1919] 2 K. B. 336; 88 L. J. K. B. 821; 121 L. T. 161; 35 T. L. R. 461; 63 Sol. Jo. 516; 7 Tax Cas. 289, C. A.

Annotations:—**Consd.** **Rossdale v. Fryer**, [1922] 2 K. B. 303. **Reid. Stocker v. I. R. Comrs.**, [1919] 2 K. B. 702; **Williams v. Singer, Pool v. Royal Exchange Assce.**, [1919] 2 K. B. 108; **Smith v. Smith**, [1923] P. 191; I. R. Comrs. v. Hay (1924), 8 Tax Cas. 636.

Policy on life of & loan to wife.

For benefit of husband.—A wife, in order to render her husband financial assistance, obtained a loan from an insurance co., applied the greater part of it in the purchase of shares from him, & gave the shares & a policy on her own life effected with the insurance co. to the co. as security for the loan. The dividends on the shares were to be received by the co., & applied in paying (a) interest on the loan, (b) premiums on the policy, & (c) an annual sum of £500 in reduction of the principal of the loan, any balance remaining being payable by the co. to the wife. As collateral security she also charged her life interest under her marriage settlement with the amount (if any) by which the dividends fell short of the sum required to cover the interest & premiums, &, as her interest under the settlement was subject to a restraint on anticipation, the sanction of the ct. was obtained to the

whole scheme. In fact the dividends considerably exceeded the payments (a), (b) & (c), & the balances were duly paid to the wife. The husband contended that only the said balances of dividends paid to his wife should be included in the computation of his liability to super tax, while the Revenue contended that the full amount of the dividends should be included, subject only to a deduction of the interest paid on the loan:—*Held*: the full amount of the dividends on the said shares less only the loan interest, was income of the wife, & must be included in the computation of the liability to super tax.—**INLAND REVENUE COMRS. v. PATERSON** (1924), 9 Tax Cas. 163, C. A.

685. **Deductions allowed in assessing income tax.**—Applt. was assessed to super tax for the year ended Apr. 5, 1922, in the sum of £6,001 by reference to his total income for the previous year as assessed to income tax. In the assessment to income tax under Schedule E. for the previous year in respect of a pension of £900 included in the total income, the allowances to which he had proved himself to be entitled under 1920 Act, ss. 16-18, had been duly granted to him. Applt. appealed against the super tax assessment for the year 1921-22 & contended that, inasmuch as a personal allowance of £225 had been granted to him in computing his income tax liability for the year 1920-21, a similar allowance should be made in computing to super tax for the year 1921-22; that super tax, being an additional income tax, was not chargeable on an income greater than that liable to income tax; that income tax ought to be deducted in calculating the amount of income liable to super tax; & that, in view of Schedule E., r. 1, the income tax under Schedule E., payable by him for the previous year in respect of the pension, should be deducted in arriving at the amount of pension income liable to super tax:—*Held*: (1) the liability to super tax is required, by 1918 Act, s. 5, as amended by the Third Schedule to 1920 Act, to be based on

PART XI. SECT. 3, SUB-SECT. 3.—B.

t. **Life insurance premiums—Mortgage interest.**—B. had raised moneys on mtge. of his life estate in settled property, & had further secured the debts by policies of insurance on his life. M. was a party to the mtges., & covenanted to pay the interest on the loans & the premiums on the policies in case of non-payment, by B. B. never made any payment of interest or premiums, & M. had been obliged to pay the same:—*Held*: the gross taxable income of M. for the purposes of super tax was liable to be diminished by the annual sums which he was under a legal obligation to pay, whether in respect of premiums on the policies of insurance or the interest on mtges.—**MASSEY (LORD) v. INLAND REVENUE COMRS.** (1915), [1919] 2 K. B. 354, n.; [1918] 2 K. B. 598, n.—**IR.**

a. **Legacy duty on residuary income—Though trustees primarily liable.**—Applt. was entitled under a will to a share of the net annual income of testator's residuary estate. Legacy duty was chargeable on the sums so payable from year to year, & was duly paid to the Crown by the trustees, who deducted it from their remittances to applt.:—*Held*: although the trustees were primarily accountable for the legacy duty, it was, in effect, a personal obligation of applt., & that the income receivable under the bequest had been rightly included in the computation of his total income for the purposes of super tax in the full amount of his share of the net residuary income, the income tax applicable without deduction of the

legacy duty paid by the trustees on his behalf.—**COLVILLE v. INLAND REVENUE COMRS.** (1923), 8 Tax Cas. 442.—**SCOT.**

b. **Losses in occupation of land for husbandry.**—*Held*: a taxpayer in making a return of his income of the previous year for the purposes of the super tax is entitled to claim as deductions losses sustained in husbandry although these losses had not been claimed as deductions from his income tax & although his claim was not made within 6 months after the year of assessment.—**HILL v. INLAND REVENUE**, [1912] S. C. 1246.—**SCOT.**

c. **Dividend — "Tax free."**—Shares of the nominal value of £1,000 were purchased Nov. 1919, at the price of £1,050, the £50 being expressly stated in the contract as covering dividend accrued to the date of purchase. May 1920 a tax-free dividend of £100 for the year to Feb. 28, 1920, equivalent to £142 with the addition of income tax, was declared & paid. In his return of total income for super-tax purposes, the purchaser sought to deduct a portion of the dividend received, in respect that it represented the capital expended by him in purchasing the accrued dividend:—*Held*: the whole amount of the dividend was income of the purchaser notwithstanding the terms of the contract, & fell to be included by him in his return of total income.—**INLAND REVENUE COMRS. v. FORREST**, [1924] S. C. 450.—**SCOT.**

d. **Annual sums paid out of property or profits.**—By antenuptial marriage contract the heir-apparent to an entailed estate, with the consent of

the heir in possession, appointed an annuity to his wife & made certain provisions for his younger children payable at his death out of the entailed estate. The heir-apparent died in January 1917, predeceasing the heir in possession, upon whose death, in June of the same year, it was found that these provisions made by the heir-apparent exceeded the amounts authorised by the Aberdeen Act. By interlocutor pronounced Nov. 1918 in a petition by the heir then in possession, the Court restricted these charges to the competent amounts, & in the following month the heir made a *comulio* payment equal to two years' annuity & two years' interest on the provisions thus restricted:—*Held*: the payment in question included accumulated annual charges which had in fact become payable from the date of the heir-apparent's death, Jan. 1917, &, accordingly, that it did not fall to be deducted in its entirety from income of the year ending Apr. 5, 1919, but only to the extent of the charges which did not become payable until that year.—**INLAND REVENUE COMRS. v. HADDINGTON (EARL)**, [1924] S. C. 456.—**SCOT.**

e. **Yearly interest on advances.**—A landed proprietor in 1919 obtained advances from his law-agents in connexion with the purchase & sale of certain heritable estates. On these advances, which varied in amount from time to time, interest was charged by the law agents at the rates prevailing in Scottish banks on overdraft accounts, the rate of interest fluctuating with the bank rate. The proprietor's income was collected by

Sect. 3.—Assessment: Sub-sect. 3, B. Sect. 4.]

the total income of the individual from all sources ascertained, subject to the specific provision in 1920 Act, s. 15 (4), in accordance with 1918 Act, s. 27, as amended by 1920 Act; (2) neither income tax nor the deductions referred to 1920 Act, s. 17, are admissible deductions from such income for super tax purposes; (3) the deduction authorised by Schedule E., r. 1, in respect of "duties or other sums payable or chargeable . . . by virtue of any Act of Parliament" does not refer to a tax imposed by virtue of 1918 Act itself.—*DAVIS v. INLAND REVENUE COMRS.*, [1923] 1 K. B. 370; 92 L. J. K. B. 252; 128 L. T. 263; 39 T. L. R. 102; 67 Sol. Jo. 123; 8 Tax Cas. 341, C. A.

Annotation:—As to (1) Rejd. Whitney v. I. R. Comrs., [1924] 2 K. B. 602.

686. Income tax—Tax paid on pension—Whether a duty or other sum payable by virtue of any Act of Parliament.]—*DAVIS v. INLAND REVENUE COMRS.*, No. 685, *ante*.

687. Annual instalments in repayment of loan—Loan to wife for benefit of husband.]—*INLAND REVENUE COMRS. v. PATERSON*, No. 684, *ante*.

688. Interest on loan—Loan to wife for benefit of husband.]—*INLAND REVENUE COMRS. v. PATERSON*, No. 684, *ante*.

689. Allowance by husband to wife—Under separation agreement.]—*EADIE v. INLAND REVENUE COMRS.*, No. 702, *post*.

SECT. 4.—WHO IS CHARGEABLE.

See 1918 Act, ss. 5–8; 1919 Act, s. 26; 1920 Act, Sched. III.; 1923 Act, s. 29 (2).

690. Income of trust funds—Chargeability of trustees—Income arising under a will.]—*Re CRAWSHAY, CRAWSHAY v. CRAWSHAY*, No. 652, *ante*.

691. ———.]—By his will made in 1923 testator gave to his wife "such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of £2,000":—*Held*: the wife was entitled to the £2,000 free of income tax only, & was not entitled to payment of any sum in respect of super tax.—*Re BATES, SELMES v. BATES*, [1925] Ch. 157; 94 L. J. Ch. 190; 132 L. T. 729.

692. ——— Annuity "free from income tax."—*Re CROSSE, OLDHAM v. CROSSE*, No. 645, *ante*.

693. ———.]—*Re DOXAT, DOXAT v. DOXAT*, No. 644, *ante*.

694. ———.]—A direction for an annuity "to be paid without any deduction by equal quarterly payments free from income tax" is a direction to pay free from super tax.

By Finance (1909–10) Act, 1910 (c. 8), s. 66, super tax is called "an additional duty of income tax," & it must be assumed that testator knew that income tax embraced super tax. Therefore the actual bequest standing alone is a bequest

of an annuity of £4,000 free of super tax (*LAURENCE, J.*).

By directing payment of the annuity without any deduction free of income tax, testator drew a distinction between deductions & income tax &, as *SARGANT, J.*, said in *Re Doxat, Doxat v. Doxat*, No. 644, *ante*, where the words were "free of income tax & of all other deductions," it would be curious if the words "all other deductions" should be held to diminish the force of the previous words, so in the present case it would be curious if the words, "without any deduction" should be given the effect of diminishing the force of the subsequent words "free of income tax." The annuitant is therefore entitled to be paid her annuity free of super tax, & following the direction given in *Re Doxat, Doxat v. Doxat*, No. 644, *ante*, the income of the residuary estate must bear such proportion of the total super tax payable by testator's widow as the annuity with the income tax thereon added thereto bore to the total amount of her income assessed for the purposes of super tax (*LAURENCE, J.*).—*Re BOWEN, PADDOCK v. BOWEN* (1925), 70 Sol. Jo. 44.

695. ——— Apportionment of tax chargeable.]—*Re DOXAT, DOXAT v. DOXAT*, No. 644, *ante*.

696. ———.]—*Re BOWEN, PADDOCK v. BOWEN*, No. 694, *ante*.

697. Income of married woman—When living with her husband—Income received before marriage.]—Where a person who separates from her husband, lives apart from him for some years, & then, after divorce proceedings, marries again, is, while living with her second husband, assessed to super tax for a year during the period in which she was living apart from her husband, the period to be regarded is the year for which the assessment is made, & not that in which the assessment is made, & therefore such person is chargeable in her own name to super tax for such year as a married woman living separate from her then husband within Income Tax Act, 1842 (c. 35), s. 45.—*BROOKE v. INLAND REVENUE COMRS.*, [1917] 1 K. B. 61; 86 L. J. K. B. 503; 115 L. T. 715; 33 T. L. R. 54; 7 Tax Cas. 261; *on appeal*, [1918] 1 K. B. 257, C. A.

Annotations:—Rejd. I. R. Comrs. v. Brooke, Murray v. I. R. Comrs., I. R. Comrs. v. Leith, I. R. Comrs. v. Bell, I. R. Comrs. v. Portman, [1923] 2 K. B. 814. *Mentd. Rover v. South African Breweries*, [1918] 2 Ch. 233; *Samuel v. I. R. Comrs.*, [1918] 2 K. B. 553; *Crane v. I. R. Comrs.*, [1919] 2 K. B. 616; *Patent Castings Syndicate v. Etherington*, [1919] 1 Ch. 306; *Williams v. Singer, Pool v. Royal Exchange Assce.*, [1919] 2 K. B. 108; *Re Crosse, Oldham v. Crosse*, [1920] 1 Ch. 240; *Sheldrick v. South African Breweries*, [1923] 1 K. B. 173; *Whitney v. I. R. Comrs.* (1925), 42 T. L. R. 58.

698. ——— Marriage in year preceding year of assessment.]—Under the provisions of 1918 Act, relating to super tax, by one of which for the purposes of that tax the total income of any individual for the year of assessment shall be taken to be the total income of that individual for the previous year:—*Held*: for the purposes aforesaid the total income of a woman married in the previous year & living with her husband during the remainder of that year & the year of assessment includes her income during the part

the law-agents, who from time to time reduced the advances out of this income & out of the proceeds of the sales of heritage. Interest was calculated annually in July, & debited to the proprietor's account. In computing the amount of interest payable by their clients, the agents made the appropriate deductions for income tax. This interest was treated by them as having suffered income tax, & was not again charged to income tax in their

hands. The arrangement, which was not reduced to writing, subsisted continuously until 1923:—*Held*: the interest annually charged on these advances was "yearly interest" within Income Tax Act, 1918, s. 27 (1) (b), & was admissible as a deduction in computing the proprietor's income for the purpose of his assessment to super-tax.—*INLAND REVENUE v. HAY*, [1924] S. C. 521.—*SCOT.*

i. Annuity & interest.]—*INLAND*

REVENUE COMRS. v. HADDINGTON (EARL) (1924), 8 Tax Cas. 711.—*SCOT.*

PART XI. SECT. 4.

g. Company assessed as agent of shareholders.]—Where a co. was assessed with super tax, as the agent of its shareholders under the provisions of the Indian Income Tax Act, because it paid dividends to them:—*Held*: the co. was not an agent for those shareholders, as there was no receipt of

of the previous year which preceded her marriage ; the total income of a woman married in the year of assessment, & formerly since the commencement of the previous year unmarried, includes her income during the previous year ; the total income of a man married in the previous year, whose wife has lived with him during the remainder of that year & the year of assessment, includes his wife's income for the part of the previous year subsequent to, but not for the part prior to, the marriage ; the total income of a woman whose husband has died during the previous year & who during the remainder of that year & the year of assessment has been unmarried, includes her income for the part of the previous year subsequent to, but not for the part prior to, her husband's death.—INLAND REVENUE COMRS. *v.* BROOKE, MURRAY *v.* INLAND REVENUE COMRS., INLAND REVENUE COMRS. *v.* LEITH, INLAND REVENUE COMRS. *v.* BELL, INLAND REVENUE COMRS. *v.* PORTMAN (VISCOUNTESS), [1923] 2 K. B. 814 ; 92 L. J. K. B. 1003 ; 129 L. T. 695 ; 39 T. L. R. 533 ; 67 Sol. Jo. 769 ; 8 Tax Cas. 527.

699. — Marriage during year of assessment.]—INLAND REVENUE COMRS. *v.* BROOKE, MURRAY *v.* INLAND REVENUE COMRS., INLAND REVENUE COMRS. *v.* LEITH, INLAND REVENUE COMRS. *v.* BELL, INLAND REVENUE COMRS. *v.* PORTMAN (VISCOUNTESS), No. 698, *ante*.

700. — On death of husband—In year of assessment—After application for separate assessment.]—A husband & wife were separately assessed to super tax in accordance with the provisions of Finance Act, 1914 (c. 10), s. 9, at the rate applicable for that year based on their combined income. The husband died during the year of assessment. The wife claimed that under Finance Act, 1912 (c. 8), s. 6, she was only liable to pay super tax at the rate applicable to the combined income of herself & her husband for the proportion of the year that had elapsed before the death of the husband :—*Held* : Finance Act, 1912 (c. 8), s. 6, only applied to the super tax which the deceased person was liable to pay. The deceased person & his wife were under Finance Act, 1914 (c. 10), s. 9, to be treated for the purposes of super tax as if they were not married. The wife had therefore taken upon herself liability for super tax at the rate which at the date of the assessment was the correct rate, & that assessment remained in force.—WYNDHAM (LADY) *v.* INLAND REVENUE COMRS., [1920] 3 K. B. 260 ; 90 L. J. K. B. 94 ; 124 L. T. 95 ; 36 T. L. R. 697 ; 7 Tax Cas. 608.

701. — In year preceding year of assessment—Income received after death of husband.]—INLAND REVENUE COMRS. *v.* BROOKE, MURRAY *v.* INLAND REVENUE COMRS., INLAND REVENUE COMRS. *v.* LEITH, INLAND REVENUE COMRS. *v.* BELL, INLAND REVENUE COMRS. *v.* PORTMAN (VISCOUNTESS), No. 698, *ante*.

702. — "Living with her husband"—Inhabiting same house under separation deed.]—Applt. & his wife, between whom differences had arisen, executed an indenture in 1912, which provided that applt. would during their joint lives, & so long as they continued to reside at a certain house, & so long as she observed the covenants therein, pay to her the weekly sum of £30, amounting to £1,560 a year, for her sole & separate use ; that applt. should be at liberty to reside at & have the joint use of the house free of expense ;

that his wife would, so long as he should pay the weekly sum, pay the rates, taxes & assessments, repairs, & household expenses, wages, & tradesmen's bills in respect of the premises, & would indemnify him against these payments & her maintenance, & would not pledge his credit ; that she would not take any steps to compel him to cohabit with her or interfere with him in any manner ; & that the indenture might be determined by either party by six months' notice. Applt. did not since the date of the indenture live maritally with his wife, & in Feb. 1913, he ceased to reside at the house, & since that time they had lived continuously apart & had no direct communication. In 1921 applt. gave notice terminating the indenture. From 1912 to 1921 applt. duly paid the weekly sum to his wife. In the assessment of applt. to super tax for two of the years during which the deed was in operation the respective annual sums of £1,560 each were sought to be included as part of his income :—*Held* : in the circumstances, applt.'s wife was not during these years "a married woman living with her husband" within Schedule D., Rules applicable to all Schedules, r. 16 (1), so that her income could not be assessed in his name instead of her own ; the sums formed part of the income of applt.'s wife & not of the applt. ; & therefore, these sums should not be included as part of applt.'s income for purposes of super tax.—EADIE *v.* INLAND REVENUE COMRS., [1924] 2 K. B. 198 ; 93 L. J. K. B. 914 ; 131 L. T. 350 ; 40 T. L. R. 553 ; 68 Sol. Jo. 667 ; 9 Tax Cas. 1.

703. Person non-resident in United Kingdom—During year of assessment.]—BROOKE *v.* INLAND REVENUE COMRS., No. 654, *ante*.

704. — Resident in previous year.]—A person not a resident in this country in the year of assessment is nevertheless assessable to super tax for that year on the basis of the income for the previous year upon which, by virtue of his having been a resident in this country in that previous year, he was assessed to income tax.—CRANE *v.* INLAND REVENUE COMRS., [1919] 2 K. B. 616 ; 89 L. J. K. B. 12 ; 121 L. T. 387 ; 35 T. L. R. 694 ; 7 Tax Cas. 316.

705. — Allen.]—INLAND REVENUE COMRS. *v.* HUNI, No. 648, *ante*.

706. — Whitney.]—WHITNEY *v.* INLAND REVENUE COMRS., No. 649, *ante*.

707. Limited company—Vendor to company retained as agent—Right of indemnity in respect of super tax.]—Pltf., who was the owner of a stationery business, sold it in Aug. 1919, to defts., a limited co. One of the terms on which the business was sold was that as from Dec. 31, 1918, until Sept. 15, 1919, pltf. should be deemed to have been carrying on the business on account of & for the benefit of the purchasers, & that pltf. should account & be entitled to be indemnified accordingly. For his services until the date of completion pltf. was to be paid a fixed sum monthly. Pltf. was assessed for super tax on the profits of the business from Apr. 6, 1919, to Aug. 22, 1919. He paid the amount demanded & claimed to recover an indemnity from defts. :—*Held* : pltf., as agent of defts., was entitled to be indemnified by them in respect of the amount of super tax paid by him, although defts. as a limited co. would not be liable to pay super tax.—ADAMS *v.* MORGAN & Co., [1924] 1 K. B. 751 ; 93 L. J. K. B. 382 ; 130 L. T. 792 ; 40 T. L. R. 70 ; 68 Sol. Jo. 384, C. A.

income within the terms of s. 31 of Act VII of 1918 ; s. 34 merely defines who may be included as an agent under

s. 31 & therefore there must be receipt of income within the terms of s. 31.—IMPERIAL TOBACCO CO. OF

INDIA *v.* SECRETARY OF STATE FOR INDIA (1922), L. L. R. 49 Calc. 721.—IND.

INCORPOREAL CHATTELS.

See CHUSES IN ACTION ; DESCENT AND DISTRIBUTION ; PERSONAL PROPERTY.

INCORPOREAL HEREDITAMENTS.

See DESCENT AND DISTRIBUTION ; REAL PROPERTY AND CHATTELS REAL.

INCORRIGIBLE ROGUES.

See POOR LAW.

INCUMBENT.

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INCUMBRANCE.

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INDORSEMENT.

See BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.

INDORSEMENT OF CLAIM.

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<i>Friendly Societies</i>	. „ FRIENDLY SOCIETIES.	<i>Shop Clubs</i>	. „ FRIENDLY SOCIETIES.
<i>Incorporated Clubs</i>	. „ CLUBS ; COMPANIES.	<i>Slate Clubs</i>	. „ FRIENDLY SOCIETIES.
<i>Industrial Assurance Companies</i>	. „ COMPANIES ; INSURANCE.	<i>Trade Unions</i>	. „ TRADE AND TRADE UNIONS.

NOTE.—The Act now in force in England is the *Industrial and Provident Societies Act, 1893* (c. 39), as amended by the *Industrial and Provident Societies (Amendment) Acts, 1895* (c. 30) and 1913 (c. 31), referred to in this Title as the 1893, 1895, & 1913 Acts respectively.

Part I.—Nature and Objects.

SECT. 1.—IN GENERAL.

See 1893 Act, ss. 3, 5.

1. **Industrial Societies Act, 1862 (c. 87)**—**Whether benefit building society within.]**—A benefit building society is not within the Industrial & Provident Societies Act, 1862 (c. 87) (TURNER, L.J.).—*Re No. 3 MIDLAND COUNTIES BENEFIT BUILDING SOCIETY* (1864), 4 De G. J. & Sm. 468; 4 New Rep. 536; 33 L. J. Ch. 739; 29 J. P. 613; 11 Jur. N. S. 229; 13 W. R. 399; 46 E. R. 1000, L. JJ.

Annotations:—*Reid. Re Chatham Co-op. Industrial Soc.* (1864), 28 J. P. 532; *Re London & Suburban Bank*, [1892] 1 Ch. 604.

See, generally, BUILDING SOCIETIES, Vol. VII., pp. 454–456.

2. **Lottery Acts—Benefits distributed by ballot among members.]**—A society constituted avowedly for the benefit of its members, making certain of them entitled to particular benefits by the process of periodical drawings, does not come within the Lottery Acts.—*WALLINGFORD v. MUTUAL SOCIETY* (1880), 5 App. Cas. 685; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81, H. L.

Annotations:—*Mentd. Edmunds v. Wallingford* (1885), 14 Q. B. D. 811; *Speers v. Daggers* (1885), Cab. & El. 503; *Purkiss v. Low* (1886), 3 T. L. R. 63; *Gunga Narain Gupta v. Tiluckram Chowdhry* (1888), L. R. 15 Ind. App. 119; *Steadman v. Hakim* (1888), 58 L. J. Q. B. 57; *Manger, etc. (Syndics under Bankruptcy of N. Rodrigues) v. Cash* (1889), 5 T. L. R. 271; *Lawrance v. Norreys*, (1890), 15 App. Cas. 210; *Arnold & Butler v. Bottomley*, [1908] 2 K. B. 151.

See, generally, GAMING & WAGERING, Vol. XXV., pp. 452–459.

3. **Assurance Companies Act, 1909 (c. 49)**—**Power to carry on insurance business.]**—Pltf. was a member of an industrial society, & had received from them a share book, a membership card, a purchase book, in all of which her name & address were given, & a copy of the rules of the society. By the rules as amended it was provided that the objects of the society should include power to carry on the business of insurance as provided in r. 14a. By r. 14a the committee of management were authorised to appropriate money (*inter alia*) “for providing a sum to be paid on the death of a member or the wife or husband of a member, such sum to be proportional to one year’s average purchases of the member from the society during the three years immediately preceding death.” The society advertised “free

life assurance” as an inducement to persons to become members.

Pltf. alleged that the society had paid large sums of money in respect of this life assurance, & that they were carrying on the business of life assurance within above Act, without having paid the deposit of £20,000 required by sect. 2 (1) of that Act, & brought an action to restrain them from doing so:—*Held*: the society had done nothing *ultra vires*; there had been no carrying on of life assurance business within above Act; policies must be in writing & no policy had been issued, no premium had been paid; there was no obligation on the society to appropriate any further sum to the insurance fund, & the arrangement might at any moment be terminated by a general meeting.—*HAMPTON v. TOXTETH CO-OPERATIVE PROVIDENT SOCIETY, LTD.*, [1915] 1 Ch. 721; 84 L. J. Ch. 633; 113 L. T. 62; 31 T. L. R. 314; 59 Sol. Jo. 397, C. A.

See, generally, INSURANCE.

4. **Whether a “company.”]**—*GREAT NORTHERN RY. CO. v. COAL CO-OPERATIVE SOCIETY*, No. 54, *post*.

Legality—Some rules invalid—Whether society illegal.]—See No. 9, *post*.

—**Unincorporated associations as illegal companies.]**—See, generally, COMPANIES, Vol. X., pp. 1209 *et seq*.

SECT. 2.—BANKING SOCIETIES.

See 1893 Act, s. 19.

5. **What amounts to banking.]**—An industrial society, formed & registered under the Industrial & Provident Societies Act, 1862 (c. 87), had by its rules, when founded, power to obtain loans on the security of bonds & subject to certain formalities. In 1877 the society passed a rule that money should not be received on deposit. Notwithstanding these rules the society had from time to time received loans on deposit without any bond, & had entered such loans in a book in the form of an ordinary banking book. These deposits were added to & withdrawn from at will, & carried interest. In 1887 the society passed a rule purporting to render these loans valid, & to make them a first charge upon the assets of the

Sect. 2.—Banking societies. Sect. 3. Parts II., III. & IV. Sects. 1 & 2.]

society. On a petition brought by the liquidator of the society for directions as to the distribution of the assets, the judge held this rule was binding on the society, & entitled such loan-holders to be paid in priority to trade creditors:—*Held*: (1) the rule of 1887 was not binding on the society; (2) it was not competent for the society to secure by way of charge upon the assets of the society loans theretofore unlawfully obtained, so as to entitle the lenders to claim upon the assets of the society in its liquidation in priority to other creditors existing at the time of making such rule; (3) the society, by taking loans on deposit in the manner it had done, had in reality carried on the business of a banker as prohibited by Industrial & Provident Societies Act, 1862 (c. 87), s. 3, & 39 & 40 Vict. c. 45, s. 10 (2) (3).—*Re BOTTOMGATE INDUSTRIAL CO-OPERATIVE SOCIETY* (1891), 65 L. T. 712; 56 J. P. 216; 40 W. R. 139, D. C.

Annotation:—As to (2) & (3) *Refd. Re Birkbeck Permanent Benefit Bldg. Soc.*, [1912] 2 Ch. 183.

See, generally, BANKERS, Vol. III., p. 159.

SECT. 3.—LAND SOCIETIES.

See 1893 Act, s. 4; 1913 Act, s. 1.

6. Distinguished from building society.]—

There is a great distinction between a freehold land society & a benefit building society. A freehold land society buys land with the funds contributed by the members of the society, & then divides it amongst them; but a benefit building society advances to its borrowing members money derived from the subscriptions, & which the borrowing members themselves lay out in the purchase of lands or buildings, & then mortgage

them to the society (*ROMILLY, M.R.*).—*GRIMES v. HARRISON* (1859), 26 Beav. 435; 28 L. J. Ch. 823; 33 L. T. O. S. 115; 23 J. P. 421; 5 Jur. N. S. 528; 53 E. R. 966.

Annotations.—*Consd. Re Kent Benefit Bldg. Soc.* (1861), 1 Drew. & Sm. 417. *Expld. Thompson v. Planet Benefit Bldg. Soc.* (1873), L. R. 16 Eq. 333. *Refd. Laing v. Reed* (1869), 39 L. J. Ch. 3, n.; *Murray v. Scott, Agnew v. Murray, Brimelow v. Murray* (1884), 9 App. Cas. 519. *Mentd. Hughes v. Layton* (1864), 33 L. J. M. C. 89.

7. — No power taken in rules—Effect of alteration of title.]—The Kent Benefit Building Society, so enrolled & certified, superadded the title of “Freehold Land Society,” & borrowed money upon mtge., & purchased land therewith through the intervention of trustees. The society became embarrassed & failing to pay interest, the mtgee. sold the estate, which being insufficient, he brought his action, & recovered the balance against the trustees. On the winding up of the co., the trustees claimed the money recovered from them in the action:—*Held*: (1) the alteration of title did not constitute the society a “Land Society”; (2) they had no power to purchase land except for building, & the claim must be disallowed.—*Re KENT BENEFIT BUILDING SOCIETY* (1861), 1 Drew. & Sm. 417; 30 L. J. Ch. 785; 4 L. T. 610; 25 J. P. 805; 7 Jur. N. S. 1045; 9 W. R. 686; 62 E. R. 439.

See, also, No. 91, post.

See, generally, BUILDING SOCIETIES, Vol. VII., pp. 454–456.

Necessity for registration as company.]—*See COMPANIES, Vol. IX., pp. 73, 74, 75, Nos. 260, 262, 268, 269.*

Title to land.]—*See Part VI., post.*

Rights of members of land society.]—*See Nos. 25–27, post.*

Liabilities of members of land society.]—*See Part V., Sect. 3, post.*

Rules of land society.]—*See Part III., post.*

Part II.—Registration.

See 1893 Act, ss. 4–9; 1895 Act, s. 3; 1913 Act, s. 1; Housing, Town Planning, etc. Act, 1919 (c. 35), s. 18 (2).

8. Certificate of registration—Vesting of property

—Meaning of property.]—*QUEENSBURY INDUSTRIAL SOCIETY v. PICKLES, No. 46, post.*

Necessity for registration as company.]—*See, generally, COMPANIES, Vol. IX., pp. 72 et seq.*

Part III.—Rules.

See 1893 Act, ss. 10, 22.

9. Validity of rules—Rule in restraint of trade—Rule not unreasonable.]—(1) Where the general objects of a society are legal, as in the case of a provident society, the object of which is the relief of members when disabled by age or accident or when out of employment, the fact that some of its rules are illegal as being in restraint of trade does not constitute the society an illegal society,

or prevent a member from recovering a sum of money payable to him under a rule of the society which is not illegal.

(2) Rules made for the *bond fide* purpose of protecting the funds of such a society from claims, which may be avoided, are not illegal because they are incidentally to some extent in restraint of trade, provided that their provisions go no further than is reasonable & necessary for that purpose.—

PART III.

91. Validity of rules—Rule in restraint of trade—Rule not unreasonable.]—A rule of a limited co-operative creamery registered under Industrial & Provident Societies Act, 1893, prohibited members from supplying milk to milk vendors other than the creamery of the society, but did not

prohibit sale of milk direct to the public nor bind the members to supply any milk to the creamery. The rule extended only to the milk of cows kept or grazed by the members within certain town lands. No provision was made by the rules for the withdrawal of members from the society otherwise than by a transfer of their shares with the consent of the committee of the

society:—*Held*: the rules were valid & not in illegal restraint of trade.—*ATHLAOCA CO-OPERATIVE CREAMERY, LTD. v. LYNCH* (1915), 49 I. L. T. 233.—*IR.*

911. OLMOYNE & FETHARD CO-OPERATIVE CREAMERY, LTD. v. BULFIN, [1917] 2 I. R.

SWAINE v. WILSON (1889), 24 Q. B. D. 252; 59 L. J. Q. B. 76; 62 L. T. 309; 54 J. P. 484; 38 W. R. 261; 6 T. L. R. 121, C. A.

Annotations:—As to (1) Consd. Chamberlain's Wharf v. Smith, [1900] 2 Ch. 605; St. Mary, Islington, Grdns. v. Amalgamated Soc. of Engineers (1902), 66 J. P. 665; Cullen v. Elwin (1904), 90 L. T. 840; Burke v. Amalgamated Soc. of Dyers, [1906] 2 K. B. 583. Apld. Gozney v. Bristol, etc. Trade & Provident Soc., [1909] 1 K. B. 901. Expld. & Distd. Russell v. Amalgamated Soc. of Carpenters & Joiners, [1910] 1 K. B. 506. Rejd. Sayer v. Amalgamated Soc. of Carpenters & Joiners (1902), 19 T. L. R. 122; Howden v. Yorkshire Miners' Assocn., [1903] 1 K. B. 308; Osborne v. Amalgamated Soc. of Ry. Servants, [1911] 1 Ch. 540; Kolly v. National Soc. of Operative Printers (1915), 113 L. T. 1055; Evans v. Heathcote, [1918] 1 K. B. 418. As to (2) Consd. Cullen v. Elwin (1904), 90 L. T. 840. Rejd. Chamberlain's Wharf v. Smith, [1900] 2 Ch. 605; Gozney v. Bristol, etc. Trade & Provident Soc., [1909] 1 K. B. 901; Osborne v. Amalgamated Soc. of Ry. Servants, [1911] 1 Ch. 540.

10. Restraint unreasonable.]

v. BALLYMACCELLIGOTT CO-OPERATIVE AGRICULTURAL & DAIRY SOCIETY, No. 57, *post*.

Society registered as trade union.]

See TRADE & TRADE UNIONS.

11. Effect of illegal rule—Whether society rendered illegal.]—SWAINE v. WILSON, No. 9, *ante*.

12. Alteration of rules—Alteration ultra vires—Alteration to validate illegal loans.]—*Re* BOTTOMGATE INDUSTRIAL CO-OPERATIVE SOCIETY, No. 5, *ante*.

13. ——— Effect of alteration on member.]

—DIBBLE v. WILTS & SOMERSET FARMERS, No. 44, *post*.

14. Construction of rules—"Lawful purpose"—"Ejusdem generis" with general purposes of society.]—The application to "any lawful purpose" of the profits of an industrial society, authorised by Industrial & Provident Societies Act, 1876 (c. 45), s. 12 (7), must be taken to mean an application to any lawful purpose *ejusdem generis* with the general purposes of the society.

By the rules of an industrial society established to carry on the business of general dealers, farmers, manufacturers, etc., it was provided that the profits of the society's business should be applied "either to increase the capital, reserve fund, or business of the society, or to any lawful purpose, & the remainder, less any grant that may be made for educational purposes," divided among the members:—*Held*: a subscription to a strike fund was not a lawful purpose within the rules.—WARBURTON v. HUDDERSFIELD INDUSTRIAL SOCIETY, [1892] 1 Q. B. 817; 61 L. J. Q. B. 422; 67 L. T. 43; 56 J. P. 453; 40 W. R. 346; 8 T. L. R. 427; 36 Sol. Jo. 345, C. A.

15. ——— Contribution to strike fund—Society formed as general dealers, farmers, manufacturers, etc.]—WARBURTON v. HUDDERSFIELD INDUSTRIAL SOCIETY, No. 14, *ante*.

16. ——— Land society—"Allotments held by trustees"—Unallotted & forfeited allotments included.]—HILL v. CRANK, No. 43, *post*.

Part IV.—Constitution and Administration.

SECT. 1.—THE NAME.

See 1893 Act, ss. 5 (3) & (5), 12, 52, 66.

SECT. 2.—COMMITTEES AND OFFICERS.

See 1893 Act, ss. 47, 48 & 79.

17. Personal liability of committee—Of unregistered society—On promissory note.]—(1) Defts., who were members of an unregistered society enrolled & certified under the Industrial & Provident Societies Act, 1852 (c. 31), gave a promissory note in the following form for a debt of the society: "Twelve months after date, we, the under-signed, being members of the executive committee, on behalf of the L. & S. W. Railway Co-operative Society, do jointly promise to pay," etc.:—*Held*: that they were personally liable.

(2) After the making of this note the society was registered under the Industrial & Provident Societies Act, 1862 (c. 87), & after action brought, an order was obtained for winding it up under Cos. Act, 1862 (c. 89), & proceedings under that order were taken in the county ct. Cos. Act, 1862 (c. 39), s. 202, enacts that where an order

has been made, winding up an unregistered co., no suit or other legal proceeding shall be commenced or proceeded with against any contributory to the co., in respect of any debt of the co., except with the leave of the ct. Pltf. had not obtained leave to proceed:—*Held*: the omission to obtain such leave could not be taken advantage of by plea to the further maintenance of the action: but only, if at all, by application to the ct. in which the proceedings under the winding-up order were being pursued. *Qu.*: whether the power of amendment at *Nisi Prius* extends to the allowance of such a plea.—GRAY v. RAPER (1866), L. R. 1 C. P. 694; Har. & Ruth. 794; 14 W. R. 780.

Annotations:—As to (1) Rejd. Courtauld v. Saunders (1867), 16 L. T. 562. As to (2) Rejd. Re International Patent Pulp & Paper Co. (1876), 24 W. R. 535; R. v. London (Lord Mayor), Ex p. Boaler, [1893] 2 Q. B. 146.

—.]—See, generally, AGENCY, Vol. I., pp 356 *et seq.*, & compare COMPANIES, Vol. IX., pp 52 *et seq.*

18. Personal liability of secretary—Of land society—On promissory note.]—RICHARDS v. RUEGG (1856), 27 L. T. O. S. 184.

See, generally, AGENCY, Vol. I., pp 628 *et seq.*, BILLS OF EXCHANGE, Vol. VI., pp 112 *et seq.*, & compare COMPANIES, Vol. IX., p 505.

a. Rules of insurance society—Controlled by statute.]—*Held*: the rules of an insurance society, in so far as they were inconsistent with R. S. O. 1887, c. 136, were modified & controlled by it.—MINGAUD v. PACKER (1891), 21 O. R. 267.—CAN.

b. —.]—A benevolent society incorporated under R. S. O. 1877, c. 167, attached to the declaration which they filed under sect. 2 (5), a printed book stated to contain a copy

of the constitution & bye-laws by which the said society was to be governed:—*Held*: the constitution & bye-laws thus included in the declaration became under R. S. O., 1897, c. 211, s. 3 (1), a part of the organic law of the society, & changes made in the bye-laws in accordance with the provisions of such constitution were valid & binding.—*Re* ONTARIO INSURANCE ACT & SUPREME LEGION SELECT KNIGHTS OF CANADA (1899), 31 O. R. —.—CAN.

c. ——— Member bound by agreement to change of rules.]—GRAINGER v. ORDER OF CANADIAN HOME CIRCLES (1915), 33 O. L. R. 116; 26 O. W. R. 373; 7 O. W. N. 649; 21 D. L. R. 110.—CAN.

PART IV, SECT. 2.

d. Personal liability of directors—Implied warranty of society's power to borrow.]—BLACKFORD v. CLIFTON (1910), 12 W. A. L. R. 69.—AUS.

Sect. 2.—Committees and officers. *Sects. 3, 4 & 5.*
Part V. Sects. 1 & 2.]

19. Right of trustee—Of land society—To indemnity from members.]—WILDGOOSE *v.* BOOTHROYD (1888), 5 T. L. R. 68, C. A.
*Annotation:—*Consd. Hill *v.* Crank (1892), 62 L. J. Q. B. 145.

20. ————.]—HILL *v.* CRANK, No. 43, *post.*

SECT. 3.—MEETINGS.

See 1893 Act, ss. 51, 56, 79.

21. Voting—Right of member to vote by proxy.]—There is no common law right on the part of a member of a corp. to vote by proxy. . . . When persons agree to act together in the conduct of a business, the way in which that business is to be carried on must depend on the contract, express or implied, which exists between them. . . . When you come to statutory corpns. you must look at the statute itself & the rules which are created under it to see whether . . . a proxy should be used, & if so in what form it should be used (BOWEN, L.J.).—HARBEN *v.* PHILLIPS (1883), 23 Ch. D. 14; 48 L. T. 741; 31 W. R. 173, C. A.
*Annotations:—*Refd. Briton Medical General & Life Assn. *v.* Jones (1889), 61 L. T. 384. *Mentd.* Browne *v.* La Trinidad (1887), 37 Ch. D. 1; Trevor *v.* Whitworth (1887), 12 App. Cas. 409; Marshall's Valve Gear Co. *v.* Manning, Wardle, [1909] 1 Ch. 267.

See, generally, CORPORATIONS, Vol. XIII., pp. 339 *et seq.*; & compare COMPANIES, Vol. IX., pp. 562 *et seq.*; Vol. X., p. 1155.

SECT. 4.—CONTRACTS, BILLS AND NOTES.

See 1893 Act, ss. 33, 35.

22. Power to contract—Contract of apprenticeship—Though society incapable of giving personal care.]—The contract of apprenticeship is not necessarily a personal one. Where, therefore, an industrial society, registered under Industrial & Provident Societies Act, 1876 (c. 45), entered into a deed of apprenticeship:—*Held*: (1) it was no objection to the validity of the deed that the society was a corp. incapable of giving personal care & instruction to the apprentice; (2) the society, being incorporated by statute for the purpose of carrying on a particular business, had an implied authority to enter into a contract of apprenticeship, as being an act directly incidental to the carrying on of such business.—BURNLEY EQUITABLE CO-OPERATIVE & INDUSTRIAL SOCIETY *v.* CASSON, [1891] 1 Q. B. 75; 60 L. J. M. C. 59; 63 L. T. 652; 55 J. P. 166; 39 W. R. 124; 7 T. L. R. 41, D. C.

23. ———— Incidental to business.]—BURNLEY EQUITABLE CO-OPERATIVE & INDUSTRIAL SOCIETY *v.* CASSON, No. 22, *ante.*

Necessity for seal.]—See, generally, CORPORATIONS, Vol. XIII., pp. 380 *et seq.*

Personal liability of members on contracts bills & notes.]—See Part V., *post.*

SECT. 5.—INSPECTION OF AFFAIRS.

See 1893 Act, ss. 17, 18, 50.

See Cases, *infra.*

Part V.—Membership.

SECT. 1.—RIGHTS OF MEMBERS.

See 1893 Act, ss. 17, 22, 29, 30, 32, 34, 40.

24. Lunatic member—Right of wife to member's fund—Claim by guardians for maintenance.]—GLOUCESTER UNION GUARDIANS *v.* GLOUCESTER INDUSTRIAL & CO-OPERATIVE SOCIETY, LTD., No. 68, *post.*

See, generally, LUNATICS; POOR LAW.

25. Member of land society—Nature of estate in allotment—Before conveyance.]—A building club was formed by subscribers to an indenture, which recited the purpose to be raising a capital stock for erecting dwelling houses; & they agreed to articles, which provided: that every subscriber should pay 6s. 8d. monthly; freehold land was to be purchased by the club for erecting houses; each member to take as many houses as he should have shares; the houses to be built according to a plan annexed, & under the inspection of the agents of the society; the order in which the members should take the houses to be determined by lot,

till all the shares should be drawn; no member to mtge. his house till the conclusion of the society, but each to pay rent to the officers, which was to be deemed a vesting of property in them; no subscriber to have power to let or sell his house till security should be given to the satisfaction of the president; the monthly payments & rents to be placed to the funds of the society till the whole subscriptions should be completed & all the dwelling houses be allotted, & possession of them given to the respective subscribers; the president meanwhile to have the power of distraining for the rent; if a member, after being put in possession of a house, should lock his door, quit the neighbourhood for six months, & neglect to pay his monthly payments & rents, the president & steward might take possession of the house & let or sell it; at the determination of the society, each member was to be fully entitled to his share, & a conveyance thereof at his own expense; the surplus stock to be divided; & meanwhile each

PART V. SECT. 1.

e. Effect of non-payment of dues.]—Defts. were an incorporated union of society of workmen of a particular class, having their head office in a foreign country, with unincorporated branches or lodges in this Province:—*Held*: beneficiary certificates issued by them to members, entitling members or their representatives, upon payment of certain assessments, & compliance with certain conditions, to certain pecuniary benefits, were not subject to Ontario Insurance Act, c. 36, s. 144; even if the Act did apply, a beneficiary certificate not

containing an absolute contract to pay any sum but stating merely that upon compliance with the conditions, & upon payment of the assessments, directed by the constitution the sum authorised by the constitution would be paid, & that any default would render the certificate void, was not within the sect., & the conditions of the constitution must be read into it in determining its validity.—WINTERMUTE *v.* BROTHERHOOD OF RAILROAD TRAINMEN (1900), 27 A. R. 524.—CAN.

i. Benefits only allowed in case of actual loss.]—By the terms of a contract made by an assocn. with its

members it was agreed, in consideration of certain subscriptions to be paid by them, that the assocn. would indemnify any member against & pay him such losses up to a stipulated amount as he might incur from disability by reason of sickness. In an action to recover upon the contract it appeared that pltf. had been disabled by sickness for a considerable period, but it also appeared that he was a person of no occupation, who had lived upon his private means:—*Held*: the contract was one of indemnity, & pltf. could recover nothing for disability from work.—BONE *v.* COLUMBIA LODGE OF

member to pay £1 yearly, & to forfeit his share upon making any default of any of the payments provided for; the society not to be broken up while six members existed, or before all the buildings should be completed. The club contracted for the purchase of land, & commenced building without any conveyance being made to them. The land was afterwards, by deed to which the club was party, mortgaged to A. for money advanced to the club. The whole purchase-money paid by the club amounted to more than £30, but not so much as £30 for each subscriber. In 1824 & 1825, E., a member of the club, drew his share, had a house built for him, & entered into possession; & he paid rent till the mtgee. was paid off, when the mtgee. conveyed the house to E. & the other members severally. The club had shortly before ended, the shares having been paid up & the houses built. At the time when the club ended, E.'s monthly & annual payments, exclusive of rent, exceeded £30; but such payments made before he came into possession did not amount to £30. The house was not of the annual value of £10:—*Held*: E. had not any legal or equitable estate until the time of such conveyance.—*R. v. CARLTON (INHABITANTS) (1849)*, 14 Q. B. 110; 3 New Mag. Cas. 192; 4 New Sess. Cas. 1; 19 L. J. M. C. 100; 13 L. T. O. S. 505; 13 J. P. 604; 14 Jur. 240; 117 E. R. 44.

26. — Whether share an interest in land—Within Charitable Uses Act (c. 36), 1736.]—Shares in the British Land Co., the business of which was purchasing & improving lands, & selling or letting the same, & in the National Freehold Land Society, established for "raising by subscription a fund out of which any member should receive the amount of his share for the erection or purchase of a dwelling-house, or other real or leasehold estate":—*Held*: not to be an interest in land within the above Act.—*ENTWISTLE v. DAVIS (1867)*, L. R. 4 Eq. 272; 36 L. J. Ch. 825; 31 J. P. 708.

Annotations:—*Consd. Re Hollon, Forbes v. Hardcastle (1893)*, 68 L. T. 160. *Refd. Re Dawson, Pattison v. Bathurst, [1915] 1 Ch. 626.*

See, generally, CHARITIES, Vol. VIII., pp. 270 et seq.

27. — Infant purchaser—Payment of instalments when of age—Acting as committee man—Whether ratification.]—An infant's contract in respect of a subject of a permanent character is not void, but merely voidable; & if the infant wishes to repudiate such a contract he must do

so before or within a reasonable time after he attains full age. In May, 1882, an infant purchased a plot of freehold land from the trustees of a building society of which he was a member & a committee man. In July of that year he came of full age. For four & a half years he paid monthly instalments of the purchase-money, & acted as a committee man:—*Held*: he had ratified the contract, & was liable under its provisions.—*WHITTINGHAM v. MURDY (1889)*, 60 L. T. 956.

See, generally, INFANTS, p. 147.

SECT. 2.—PAYMENTS ON DEATH.

See 1893 Act, ss. 27, 30, 31; 1913 Act, ss. 5–7, sched.

28. Rate of allowance payable—When fixed by rules—Power of society to vary.]—A trading corp'n. having by its bye-laws fixed a rate of allowance to be made to the widows of deceased members, subject only to variation upon a defect of funds, cannot exercise a discretionary power as to the rate of allowance, but may be compelled by process in the ordinary cts. of justice (no defect of funds being alleged), to make the allowance fixed in a bye-law in favour of the widow of a free-man, who had entered after the date of the bye-law in question, & paid upon his entry a sum of money to the funds of the corp'n., & made a small annual payment to the time of his death.—*FLESHERS OF GLASGOW v. SCOTLAND (1828)*, 3 Bli. N. S. 384; 4 E. R. 1377, H. L.

Annotation:—*Refd. Tailors Incorporation in Glasgow v. I. R. Comrs. (1887)*, 2 Tax Cas. 297.

29. Payment of allowance—Enforcement.]—*FLESHERS OF GLASGOW v. SCOTLAND*, No. 28, *ante*.

30. To whom payable—Where no nomination made—Discretion of committee.]—(1) By 1893 Act, s. 27, if any member of a society entitled to property therein dies intestate without having made any nomination thereof then subsisting, the committee may without letters of administration distribute the same among such persons as appear to them on such evidence as they deem satisfactory to be entitled by law to receive the same:—*Held*: the power of the committee to distribute the property was entirely discretionary, & they could not be compelled by action to exercise their discretion.

ODDFELLOWS (1888), 1 B. C. R., pt. 2, 349.—*CAN.*

g. Liabilities—Falling due after becoming a member—During suspension—What amounts to notice of.]—The mere fact of a person being a member of a benevolent society incorporated under R. S. O. 1877, c. 167, or of its beneficiary department, raises no implied contract that he will pay the dues & assessment which according to the rules of the society afterwards became due; & in the absence of such a contract on his part, there is no obligation to pay for breach of which an action against him will lie. No such contract is implied in an agreement by an appot. for a beneficiary certificate, contained in his application, that compliance on his part with all the laws, regulations, & requirements which were or might be thereafter enacted by the order was the express condition on which he was to be entitled to participate in the beneficiary fund.

Liabilities may be imposed upon members by changes in the constitution & bye-laws of the society, which did not exist when they became members.

R. S. O. 1897, c. 203, s. 164, does not create a personal liability to pay assessments where none exists apart from it; a suspended member is none the less a member of the society; & where there is a personal liability on his part to pay dues or assessments, that liability continues notwithstanding the suspension, not only as to dues & assessments payable at that time, but also as to those which become payable during the suspension, & before, by the operation of the rules, his default results in his ceasing to be a member; all conditions prescribed by the constitution in order to withdraw from membership must be rigorously observed. Notice to members of an assessment is not sufficiently proved by the fact that the official paper of the society was distributed by a distributing agency, without proof of delivery by the latter to the individual members.—*Re ONTARIO INSURANCE ACT & SUPREME LEGION SELECT KNIGHTS OF CANADA (1899)*, 31 O. R. 154.—*CAN.*

h. Expulsion of member—For arrears

of contributions—Not entitled to prior notice.]—ST. JOSEPH UNION DE MONTREAL v. LAPIERRE (1879), 4 S. C. R. 164.—*CAN.*

PART V. SECT. 2.

k. Validity of nomination.]—The rules of an unregistered mutual assurance assocn. provided that every member should execute a written nomination in favour of some person to whom the benefits payable on his death should be paid. A member of the assocn. executed a nomination in favour of his sister, & on the member's death she received payment of the amount of the benefits. The member had executed a will, later in date than the nomination, disposing of his whole estate. The exor. acting under the will having brought an action against the nominee to recover, as part of the deceased's estate, the sum paid to her:—*Held*: on a construction of the rules of the assocn., the nomination merely conferred a title to collect the amount of the benefits payable on the death of the member, & the nominee was

Sect. 2.—Payments on death. Sect. 3.]

(2) Such committee may, in the absence of such evidence as they may deem satisfactory, refuse to presume the death of a nominee who has not been heard of for upwards of seven years.—*ESCRITT v. TODMORDEN CO-OPERATIVE SOCIETY*, [1896] 1 Q. B. 461; 65 L. J. Q. B. 358; 74 L. T. 350; 44 W. R. 544; 40 Sol. Jo. 298, D. C.

See, now, 1913 Act, s. 12 (3), sched.

31. Validity of nomination — Where amount payable exceeds one hundred pounds.]—*BARNES v. ST. CRISPIN PRODUCTIVE SOCIETY* (1901), Report of Chief Registrar of Friendly Societies, etc., 23; cited in Halsbury's Laws of England, Vol. XVII., p. 18, n.

32. — Admissibility as will.]—A nomination paper, executed by the nominator under 1893 Act, s. 25, in the presence of two witnesses, who signed it in his presence, invalid as a nomination by reason of the amount it purported to dispose of being in fact over £100:—*Held*: to be testamentary & admitted as a will.—*In the Goods of BAXTER*, [1903] P. 12; 72 L. J. P. 2; 87 L. T. 748; 51 W. R. 302.

Annotations:—*Reid. Griffiths v. Eccles Provident Industrial Co-op. Soc.*, [1911] 2 K. B. 275. *Mentd. Godman v. Godman*, [1919] P. 229.

33. Date when amount is to be reclaimed.]—1893 Act, s. 25 (1), empowers a member of a society registered under that Act to nominate any person to whom his property in the society shall be transferred at his decease "provided the amount credited to him in the books of the society does not then exceed one hundred pounds sterling":—*Held*: the word "then" referred to the date of the nomination & not to the date of nominator's decease, & the power of nomination related only to property in the society existing at the time of the nomination; (2) a nomination made by a member in respect of all his property in the society at a time when the amount credited to him in the books of the society did not exceed £100 was good as to the amount then standing to his credit, notwithstanding that the amount so credited to him at his decease exceeded £100.—*ECCLES PROVIDENT INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. GRIFFITHS*, [1912] A. C. 483; 81 L. J. K. B. 594; 106 L. T. 465; 28 T. L. R. 299; 56 Sol. Jo. 359, H. L.; *affg. S. C. sub nom. GRIFFITHS v. ECCLES PROVIDENT INDUSTRIAL CO-OPERATIVE SOCIETY, LTD.*, [1911] 2 K. B. 275, C. A.

As to nominations after 1913.]—

1913 Act, s. 5 (1) i.

34. Revocation of nomination—Effect of subsequent will.]—*FIELDING & LORD v. ROCHDALE EQUITABLE PIONEERS SOCIETY* (1892), 92 L. T. Jo. 431.

See, now, 1913 Act, s. 5 (1) ii.

Power of society to carry on insurance business.]—See No. 3, ante.

bound to account to the exor. therefore.—*YOUNG v. WATERSON*, [1918] S. C. 9; 55 Sc. L. R. 24.—*SCOT.*

1. Rules of society — Member in good standing.]—Where the rules of a benevolent society give to a member dissatisfied with a decision as to sick benefits, a right of appeal to a domestic forum, the widow of a member, whose appln. for sick benefits has in his lifetime been refused, & who has acquiesced in that decision & has not appealed, cannot recover sick benefits. Where, however, the widow of "a member in good standing" is entitled to certain pecuniary benefits & the

status of the member has not been passed upon by the society in his lifetime, an action by the widow will lie, & the status of the deceased member at the time of his death is a question of law to be determined in the usual way. In the present case the fact that the deceased member was at the time of his death in arrear for dues was held, having regard to the constitution & rules of the society, not to deprive him of his status, & the widow was held entitled to recover.—*DALE v. WESTON LODGE* (1897), 24 A. R. 351.—*CAN.*

m.

—Action to recover

SECT. 3.—LIABILITIES OF MEMBERS.

See 1893 Act, ss. 22, 23.

35. Forfeiture of shares—For non-payment of subscriptions—Whether in discretion of directors—Construction of rules.]—Clause 45 [of the rules of a building co.] provided that, if any member shall from any cause whatever permit any monthly subscription on any share or shares held by him or her to be in arrear for six months, such share or shares, & all moneys paid in respect thereof, shall, at the expiration of such six months become absolutely forfeited to the co.:—*Held*: the neglect of a member to pay his subscriptions & fines for six months, operated a forfeiture of his share or shares, at the option of the directors.—*MOORE v. RAWLINS* (1859), 6 C. B. N. S. 289; 28 L. J. C. P. 247; 33 L. T. O. S. 205; 23 J. P. 566; 5 Jur. N. S. 941; 141 E. R. 467.

Annotations:—*Consd. Re East Kongsberg Co.*, Bigg's Case (1865), L. R. 1 Eq. 309. *Reid. Re Asiatic Banking Corp.*, *Ex p. Collum* (1869), 39 L. J. Ch. 59. *Mentd. Crowther v. Thorley* (1883), 48 L. T. 644; *Re Jones, Clegg v. Ellison*, [1898] 2 Ch. 83; *Re Russell Institution, Figgins v. Baghino*, [1898] 2 Ch. 72.

Validity of provision for—On non-acceptance of increased liability.]—See No. 44, post.

36. For debts due from society.]—A *sci. fa.* may be issued against the individual members of an Industrial & Provident Society, after judgment recovered against the registered officers or trustees, under Industrial & Provident Societies Act, 1854 (c. 25).—*MYERS v. RAWSON* (1860), 5 H. & N. 99; 29 L. J. Ex. 217; 24 J. P. 392; 8 W. R. 417; 157 E. R. 1116; *sub nom. MEYERS v. RAWSON*, 1 L. T. 405.

Annotations:—*Reid. Dean v. Mellard* (1863), 32 L. J. C. P. 282; *Re Sheffield & Hallamshire Ancient Order of Foresters Co-op. & Industrial Soc.*, *Fountain's Case*, *Swift's Case* (1865), 34 L. J. Ch. 593; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352.

37. — By Industrial & Provident Societies Acts, 1851 (c. 31), & 1854 (c. 25), the officers or trustees of a society registered under the first of these Acts, are the persons to be sued for a debt due from the society. These Acts are repealed by Industrial & Provident Societies Act, 1862 (c. 87), which incorporates the society on its being registered, & makes provision for the prosecution of actions pending against the trustees or officers at the time of the society obtaining its certificate of registration, but omits to provide for pending claims:—*Held*: the members of a society registered under Industrial & Provident Societies Acts, 1851 (c. 31), & 1854 (c. 87), might, in an action brought after the last Act, be sued individually for a debt, due from the society before such last Act, & for which no action had been ever brought against the trustees or officers.—*DEAN v. MELLARD* (1863), 15 C. B. N. S. 19; 2 New Rep. 392; 32 L. J. C. P. 282; 10 Jur. N. S. 346; 11 W. R. 913; 143 E. R. 689.

Annotations:—*Appld. Linton v. Blakeney Joint Co-op. Industrial Soc.* (1865), 3 H. & C. 853. *Distd. Queensbury Industrial Soc. v. Pickles* (1865), L. R. 1 Exch. 1. *Reid.*

amount of benefit certificate issued by debts to the deceased. All assessments had been paid, but he was not, as required by certificate, in good standing at his decease in Loyal Orange Association:—*Held*: *pltf.* could not recover.—*MOKECHNIE v. GRAND ORANGE LODGE OF BRITISH AMERICA* (1909), 18 O. W. R. 413; 18 O. L. R. 555.—*CAN.*

n. Presumption of death of insured.]—*LINKE v. CANADIAN ORDER OF FORESTERS* (1914), 7 O. W. N. 516, 795; 8 O. W. N. 399; 33 O. L. R. 169.—*CAN.*

Henderson v. Bamber (1865), 19 C. B. N. S. 540; *Gray v. Raper* (1866), Har. & Ruth. 794; *Re West London & General Permanent Benefit Bldg. Soc.*, [1894] 2 Ch. 352.

38. Before registration.]—*HENDERSON v. BAMBER*, No. 80, *post*.

39. — Unincorporated society.]—In the case of an unincorporated industrial society, which is much more like an ordinary trading partnership than building societies are, there seems no doubt that the members would be liable individually & without limit, although such liability could be enforced only by means of a judgment against the trustees or other persons prescribed for that purpose & *sci. fa.* against particular members (*WRIGHT, J.*).—*Re WEST LONDON & GENERAL PERMANENT BENEFIT BUILDING SOCIETY*, [1894] 2 Ch. 352; 63 L. J. Ch. 506; 70 L. T. 796; 42 W. R. 535; 10 T. L. R. 280; 38 Sol. Jo. 273; *sub nom. Re WEST LONDON & GENERAL PERMANENT BUILDING SOCIETY, ALSOP'S CASE, SPELLER'S CASE*, 8 R. 764.

40. To have share capital set off—Against debt to society.]—*Re GWAWR-Y-GWEITHYR INDUSTRIAL & PROVIDENT SOCIETY, DOVEY v. MORGAN*, No. 94, *post*.

41. Whether terminated by death—Distinguished from building societies.]—*Re UNITED SERVICE SHARE PURCHASE SOCIETY, LTD.*, No. 92, *post*.

42. In land society—To indemnify trustees—For purchase of land.]—*WILDGOOSE v. BOOTHROYD* (1888), 5 T. L. R. 68, C. A.

Annotation:—*Consd. Hill v. Crank* (1892), 62 L. J. Q. B. 145.

43. — To contribute to expenses—Of land held by trustees—Whether unallotted or forfeited.]—A land society was formed for the purchase of an estate to be sold in lots to the members, each of whom covenanted to abide by the rules of the society. The estate was purchased by trustees for the society, & the purchase money was secured by mtges. on which the trustees were liable. The estate was divided into numbered allotments, & a price set opposite each number to be paid by monthly instalments, & such allotments were to be allotted at that price unless previously sold by auction. By r. 35 members were required, in addition to the price of their allotments, to pay a proportionate part of the price, expenses, & interest payable in respect of allotments held from time to time by the trustees. The rules further provided for the forfeiture of allotments in case of default, & declared that the rights of the defaulting member in respect of such allotments should absolutely cease; they empowered the trustees to sell such forfeited allotments, & required them in the event of a sale, after deducting all moneys payable under the rules by the defaulting member, to pay him the surplus of the proceeds:—*Held*: unallotted & forfeited allotments were allotments held from time to time by the trustees within r. 35, & members were liable for contributions in respect thereof.—*HILL v. CRANK* (1892), 62 L. J. Q. B. 145; 68 L. T. 551; 9 T. L. R. 112, C. A.

44. Provisions for increase of—Whether ultra vires.]—The W. & S. Society was registered under 1893 Act, & under the rules its shares were transferable with the consent of the committee, but were not withdrawable, & the rules could be altered by the resolution of a three-fourths majority of the members. R. 12 required members to hold one share for every twenty acres farmed by them up to five hundred acres, & one share for every forty

acres above five hundred, & by r. 13 the total number of shares held by any member was not to exceed £200 in nominal value. By r. 23, if the number of shares held by a member became less than the number required by r. 12, the amount paid up on the shares was to be repaid & the shares cancelled, & the member ceased to be a member. In Nov. 1921, r. 12 was amended by requiring members to hold five shares for every twenty acres farmed up to five hundred acres, & three shares for every forty acres above five hundred; & r. 23 was amended by providing that members holding less than the required number of shares should only be entitled to repayment, & to have their shares cancelled if the committee thought fit. In Dec. 1920, by amendment the nominal value of the shares was reduced to 6s. 8d. by cancelling the sum of 13s. 4d. on each share. Subsequently r. 12 was further amended so that members were required to hold shares of the nominal value of five pounds instead of five shares of 6s. 8d. each. The amendments were registered in accordance with the provisions of 1893 Act, s. 10 (2):—*Held*: (1) the law restricting the liability of members of a limited co. to the amount unpaid on their shares is applicable to industrial & provident societies, & therefore r. 12, both in its original form & as amended, was *ultra vires* & void; (2) although the rules of the society became, by 1893 Act, s. 22, a contract by each member with the society, they could not affect the liability of the members as limited by that statute to the amount unpaid upon their shares, & consequently the rules did not constitute or involve any contract as between pltf. & the society to take up from the society or pay to the society for any shares in addition to the shares held by him; (3) the reduction of capital, in the circumstances of this case, was *ultra vires* & void, since it was made as part of the scheme for imposing upon the members a liability for a larger sum than the amount unpaid on their shares, or to evade the provisions of 1893 Act, s. 4 (a).—*DIBBLE v. WILTS & SOMERSET FARMERS, LTD.*, [1923] 1 Ch. 342; 92 L. J. Ch. 168; 128 L. T. 643; 39 T. L. R. 174; 67 Sol. Jo. 297.

Annotation:—As to (1) *Overd. Agricultural Wholesale Soc. v. Biddulph & District Agricultural Soc.*, [1925] Ch. 769.

45. — — —.]—A collateral obligation imposed by the rules of a society registered under 1893 Act, or by the arts. of assocn. of a limited co. registered under Cos. Act, 1908 (c. 69), upon a member of the society or co., which in certain events involves a liability on the part of that member to take further shares in the society or co., can be enforced notwithstanding that the liability of the member to contribute in a winding up is limited by the Act under which the society or co. is registered. The limitation of liability in respect of shares held is distinct from an obligation collaterally imposed upon a member in certain events to take up further shares which will themselves, when taken up, be entitled to a similar limitation of liability. There is nothing in such a collateral obligation which is *ultra vires* or repugnant to the system of limited liability.—*AGRICULTURAL WHOLESALE SOCIETY v. BIDDULPH & DISTRICT AGRICULTURAL SOCIETY*, [1925] Ch. 769; 94 L. J. Ch. 397; 133 L. T. 274; 41 T. L. R. 470; 69 Sol. Jo. 557, C. A.

On dissolution.]—See Part X., *post*.

Offence of & proceedings against.]—See Nos. 50–52, *post*.

Part VI.—Property and Funds.

SECT. 1.—PROPERTY.

See 1893 Act, ss. 24, 36, 39, 42, 46.

46. What is property—Choses in action included.]—The word “property,” in Industrial & Provident Societies Act, 1862 (c. 87), s. 6, by which the certificate of registration vests in the society all the “property” that may at the time be vested in any person in trust for the society, includes “choses in action.”

Therefore an industrial society, formed under Industrial & Provident Societies Act, 1852 (c. 31), but incorporated under the Industrial & Provident Societies Act, 1862 (c. 87), may sue in its corporate name upon a bond given to trustees in trust for the society before the passing of the Act of 1862.—*QUEENSBURY INDUSTRIAL SOCIETY v. PICKLES* (1865), L. R. 1 Exch. 1; 3 H. & C. 857; 35 L. J. Ex. 1; 13 L. T. 295; 29 J. P. 792; 11 Jur. N. S. 877; 14 W. R. 30; 159 E. R. 771.

47. Power of committee—To raise rent—Construction of rule.]—The rules of a society provided that a tenant should be charged a fair & usual rent for his occupancy:—*Held*: the committee of management could raise the rent.—*TENANT CO-OPERATORS, LTD. v. JAMES* (1902), 18 T. L. R. 237.

48. Position of trustees—Of land society—Right of indemnity.]—*WILDGOOSE v. BOOTHROYD* (1888), 5 T. L. R. 68, C. A.

Annotation:—*Consd. Hill v. Crank* (1892), 62 L. J. Q. B. 145.

49. ——— Expenses of allotments held by trustees—Forfeited allotments.]—*HILL v. CRANK*, No. 43, *ante*.

50. Larceny of societies' property by member—Indictment—In whom property laid.]—If a part owner of property steals it from A., in whose sole custody it is, & who is solely responsible for its safety, he is guilty of larceny; & the property is well laid in A. alone, although he is also a part owner of the property stolen.

H. was in possession of a shop where goods were sold for the benefit of a society called the S. Co-operative Industrial Society. Each member of this society partook of the profit, & was subject to the loss, arising from the shop. H., being himself a member, had the sole management, & was answerable for the safety of all the property & money coming to his possession in the course of such management. Prisoner, also a member of the society, assisted in the shop, without salary:—*Held*: prisoner was properly convicted of stealing money from the till in the shop.—*R. v. WEBSTER* (1861), Le. & Ca. 77; 31 L. J. M. C. 17; 5 L. T. 327; 26 J. P. 212; 7 Jur. N. S. 1208; 10 W. R. 20; 9 Cox, C. C. 13; 169 E. R. 1311, C. C. R.

Annotation:—*Reid. R. v. Lowrie* (1867), 36 L. J. M. C. 24.

51. ———.]—B., a servant of a co-operative society, duly enrolled, but without trustees, sold goods at a shop of the society, & received payments, & was accountable for the money. Prisoner, a member of the society, & one of the committee of management, stole some money from the till in the shop:—*Held*: he might be convicted on an indictment charging him with stealing the moneys of B.—*R. v. BURGESS* (1863), Le. & Ca. 299; 2 New Rep. 85; 32 L. J. M. C. 255; 27 J. P. 388; 9 Jur. N. S. 582; 10 W. R. 602; 9 Cox, C. C. 302; 169 E. R. 1403,

R. v. Bren (1863),
46 L. T. 347.

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52. Larceny by members of unregistered trading club—Club requiring registration as company.]—Deft. was convicted on an indictment, drawn under Larceny Act, 1868 (c. 116), s. 1, & charging him with having, whilst one of a number of beneficial owners consisting of himself, J., & others, embezzled money belonging to such beneficial owners. It was proved at the trial that prisoner was the treasurer & a member of a trading club, which was an unregistered association of more than twenty persons such as is prohibited from being formed by Cos. Act, 1862 (c. 89), & that he received money belonging to the assocn. & failed to pay over or account for it:—*Held*: prisoner was properly convicted.—*R. v. TANKARD*, [1894] 1 Q. B. 548; 63 L. J. M. C. 61; 70 L. T. 42; 58 J. P. 300; 42 W. R. 350; 38 Sol. Jo. 130; 17 Cox, C. C. 719; 10 R. 149, C. C. R.

Annotations:—*Consd. Marrs v. Thompson* (1902), 18 T. L. R. 565. *Reid. Jeffrey v. Bamford*, [1921] 2 K. B. 351.

See, generally, CRIMINAL LAW, Vol. XV., pp. 901, 902, 932.

As to land societies.]—See, further, Part I., Sect. 3, *ante*.

Vesting of property on dissolution.]—See Part X., *post*.

SECT. 2.—BORROWING AND LENDING.

See 1893 Act, ss. 40, 43, 44.

53. Mortgage by member—Condition of redemption—Other money embezzled by member.]—H., a member of deft. society, mortgaged to the society certain property to secure principal money by certain instalments, with interest & subscriptions, & “other moneys becoming due from the mtgor. to the deft. society.” H. was also secretary of the society & in that capacity had received & misapplied moneys belonging to the society. He had conveyed the equity of redemption in the mortgaged property to pltf. who claimed to redeem, on payment of the mtge. debt with interest, subscriptions, fines & other payments due from H. as member. The society claimed in addition to this the amount which H. had embezzled, contending that it came within the words “other moneys”:—*Held*: the words applied to debts, *ejusdem generis* with what had been mentioned before, & the sums which H. had embezzled were not *ejusdem generis* with the mtge. debt, interest, & subscriptions, but were due from H., on a totally different contract, & the society could not insist upon pltf. paying such sums before redeeming the property.—*BAILES v. SUNDERLAND EQUITABLE INDUSTRIAL SOCIETY, LTD.* (1886), 55 L. T. 808; 51 J. P. 310; 3 T. L. R. 97.

54. Debentures—Whether registration as bill of sale necessary.]—(1) Inasmuch as there is not in the case of societies registered under the Industrial & Provident Societies Acts a statutory provision requiring their securities to be registered, debentures given by societies registered under these Acts are not, like the debentures of cos. under Cos. Act, 1862 (c. 89), exempted by Bills of Sale Act, 1882 (c. 43), s. 171, from the statutory requirements in respect of bills of sale.

(2) An industrial society formed under Industrial & Provident Societies Acts, is not a “company” within any of the legal meanings of that word.—*GREAT NORTHERN RY. CO. v. COAL CO-OPERATIVE*

SOCIETY, [1896] 1 Ch. 187; 65 L. J. Ch. 214; 73 L. T. 443; 44 W. R. 252; 12 T. L. R. 30; 40 Sol. Jo. 52; *sub nom.* *Re COAL CO-OPERATIVE SOCIETY, GREAT NORTHERN RY. CO. v. COAL CO-OPERATIVE SOCIETY*, 2 Mans. 621.

Annotations :—*As to* (1) *Consd. Clark v. Balm, Hill*, [1908] 1 K. B. 667. *As to* (2) *Folld. Re North Wales Produce & Supply Soc.*, [1922] 2 Ch. 340.

55.

Assets charged partly chattels.]

—Upon a claim by a debenture holder in the winding up of a society incorporated under 1893 Act, to be declared a secured creditor, the question arose whether the debenture, by which the property of the society present & future was charged to secure the repayment of the principal sum & interest, was void by reason of the Bills of

Sale Acts, as to all or any of the assets of the society thereby charged :—*Held* : (1) the society was not an incorporated co. within the exception from Bills of Sale Act, 1882 (c. 43), mentioned in sect. 17 of that Act; (2) the property charged by the debenture, although described in general terms, was severable; & accordingly, the debenture was a valid charge upon such of the assets of the society as did not consist of personal chattels within Bills of Sale Act, 1878 (c. 31), s. 4.—*Re NORTH WALES PRODUCE & SUPPLY SOCIETY*, [1922] 2 Ch. 340; 91 L. J. Ch. 415; 127 L. T. 288; 38 T. L. R. 518; 66 Sol. Jo. 439; [1922] B. & C. R. 12.

See, generally, *BILLS OF SALE*, Vol. VII., pp. 29–31.

Part VII.—Disputes.

See 1893 Act, s. 49.

56. “**Dispute**”—**Claim that resolution ultra vires.]**—The rules of an industrial & provident society, which substantially followed the terms of 1893 Act, s. 49, provided for the reference of all disputes between the society & its members to arbn. A member of the society commenced an action against the committee of management of the society for a declaration that certain resolutions passed by them were *ultra vires* the society, & for consequential relief :—*Held* : pltf.’s claim was a dispute within the arbn. rule & sect. 49, & the proceedings in the action must be stayed.

Where the rules of a registered society contain a provision for the reference of disputes between a member & the society & its officers to arbn. it is not an answer to an application for a stay of proceedings that the question at issue is whether or not the act complained of is *ultra vires*.—*Cox v. HUTCHINSON*, [1910] 1 Ch. 513; 79 L. J. Ch. 259; 102 L. T. 213; 26 T. L. R. 263; 54 Sol. Jo. 271.

Annotations :—*Reid. Heard v. Pickthorne*, [1913] 3 K. B. 299; *Winter v. Wilkinson* (1914), 79 J. P. 241.

57. — **Claim that rules ultra vires.]**—A co-operative society registered under 1893 Act, carried on the business of manufacturing for sale cheese & butter from milk supplied by certain of its members. By its amended rules the society bound itself to take all milk produced by members’ cows kept on any lands within a defined area, comprising some eighty townships, at the current price fixed by the committee, & r. 6 (2) provided that no member having milk to sell, the produce of cows kept within the defined area, should, without the previous consent of the committee, sell any such milk to any creamery other than the creamery of the society, or to any co., society or person who sold milk or manufactured butter for sale. Under r. 16 a member whose shares had been transferred or cancelled thereupon ceased to be a member, but a member was not otherwise entitled to withdraw from the society. R. 21 required the consent of the committee to any transfer of shares, but the committee were not bound to assign any

reason for their refusal. The rules contained an arbn. clause providing for the reference of all disputes between the society & its members to the Irish Agricultural Organisation Society, whose award was to be final.

In an action by a member impeaching the validity of the rules :—*Held* : (1) a dispute whether certain rules of the society were *ultra vires* was not a dispute between a society & its members within 1893 Act, s. 49, & the action was competent.

(2) R. 6 (2), read in combination with r. 16, 21, imposed upon members a greater restraint than was reasonably required for the protection of the society, & was illegal as in restraint of trade & *ultra vires* the society.—*McELLISTRIM v. BALLY-MACCELLIGOTT CO-OPERATIVE AGRICULTURAL & DAIRY SOCIETY*, [1919] A. C. 548; 88 L. J. P. C. 59; 120 L. T. 613; 35 T. L. R. 354, H. L.

Annotations :—*As to* (1) *Consd. Agricultural Wholesale Soc. v. Biddulph & District Agricultural Soc.*, [1925] Ch. 769. *Reid. Re Quinn & National Catholic Benefit & Thrift Soc.’s Arbitration*, [1921] 2 Ch. 318.

58. **How decided—Rules providing for arbitration—Whether question of ultra vires included.]**—*Cox v. HUTCHINSON*, No. 56, *ante*.

59. — **Whether within jurisdiction of arbitrator—Question for county court judge.]**—By one of the rules of an industrial society it was provided that disputes between the society & its members should be settled by arbn. Deft., a member of the society, who had filled the office of salesman, having resigned his post, disputes between him & the society, in respect of his accounts with them, arose, & were referred to arbitrators, who found that the sum of £18 was due from deft. to the society; & payment of the said sum was then sought to be enforced by the society by plaint in the county ct., under 18 & 19 Vict. c. 63, s. 41. Deft. thereupon, & before the matter came before the county ct. judge, applied for a prohibition, upon the ground that the matters in difference between himself & the society were not the subject of arbn. :—*Held* : the question of jurisdiction was one for the county ct. judge, &

PART VII.

o. How decided—Rules providing for arbitration.]—S. brought an action against an assocn. & six of its directors who had personally acted in the matter to recover damages for the breach of an agreement for purchase. The defts. moved to dismiss the action on the ground that its subject-matter was a

“dispute” within the rules, & must be settled by arbitration :—*Held* : the matter was a “dispute” within the rules, & the jurisdiction of the ct. was ousted.—*McSEVENY v. CANTERBURY CO-OPERATIVE FREEHOLD LAND ASSOCN., LTD.* (1890), 8 N. Z. L. R. 534.—N.Z.

p. — Whether within jurisdiction

of arbitrator.]—The rules of a provident soc. provided that in the event of any dispute between a member of the soc. or any person claiming through a member & the soc., it must be referred to a committee of the soc. In an action against the soc. at the instance of the executor dative of a member to recover a sum alleged to be due by the soc. to the deceased,

the application, being made before the judge had an opportunity of deciding the question, was premature.—*Re SKIPTON INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. PRINCE* (1864), 33 L. J. Q. B. 323; 11 Jur. N. S. 11.

60. Appointment of arbitrators—Who can compel.]—When deposits are made in a savings bank by a benefit society, of whom a part have since been expelled by an order of magistrates who had no authority to interpose, the managers of the bank are not compellable, upon the application of the members so illegally expelled, to appoint an arbitrator to settle disputes as between such managers & the depositors. Nor, in any case, where deposits have been made on behalf of a society, are the managers compellable to appoint an arbitrator upon the application of individual members, not being the representatives of the whole or of a majority of such society. Magistrates have no authority, under 49 Geo. 3, c. 125, to make orders enforcing rules of a benefit society which have not been duly enrolled.—*R. v. WITHAM SAVINGS BANK* (1834), 1 Ad. & El. 321; 3 Nev. & M. K. B. 416; 2 Nev. & M. M. C. 294; 3 L. J. M. C. 85; 110 E. R. 1228.

61. Jurisdiction of magistrates—To enforce unregistered rules.]—*R. v. WITHAM SAVINGS BANK*, No. 60, *ante*.

62. Jurisdiction of county court—To enforce award of arbitrators—Jurisdiction of arbitrator disputed.]—*Re SKIPTON INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. PRINCE*, No. 59, *ante*.

63. decision by society in forty days.
—J., a member of an industrial society, nominated his daughter to receive his interest in the society, & died on May 19, 1898, without having revoked the nomination. Both his widow & the daughter claimed the amount standing to his credit in the books of the society. On Sept. 20, the daughter wrote a letter to the society nominating an arbitrator, & asking the society to name an arbitrator to act on their behalf in accordance with one of their rules. The society took no notice of this application, & on Oct. 10, the daughter gave notice that the arbitrator named in her former letter had been appointed by her as sole arbitrator under Arbitration Act, 1889 (c. 49), s. 6 (b). The society replied that they would refuse to be bound by the decision of an arbitrator so appointed. On Nov. 1, the sole arbitrator gave an *ex p.* award in favour of the daughter. On Nov. 17, a plaint was taken out by the daughter in the county ct. under 1893 Act, s. 49, & the judge enforced the award in favour of the daughter. The society appealed on the ground that Arbitration Act, 1889 (c. 49), could not apply, as sect. 6 (b) of that Act was inconsistent with 1893 Act, s. 49 (5):—*Held*: it was not necessary to decide whether Arbitration Act, 1889, was or was not applicable, since the plaint in the county ct., as the forty days mentioned in 1893 Act, s. 49 (5), had elapsed, might be regarded as an application under that subsect.—*JESSOP v. HUDDERSFIELD INDUSTRIAL SOCIETY* (1899), 80 L. T. 598, D. C.

Part VIII.—Offences, Penalties and Legal Proceedings.

SECT. 1.—OFFENCES AND PENALTIES.

See 1893 Act, ss. 63–70; 1913 Act, ss. 10, 11.

Larceny of society's property by members.]
See Nos. 50–52, *ante*.

SECT. 2.—LEGAL PROCEEDINGS.

See 1893 Act, ss. 69, 70, 75; 1915 Act, s. 11.

64. Proceedings against society—Who may be sued.]—The members of a society registered under Industrial & Provident Societies Act, 1852 (c. 31), are not liable to be sued individually for the debts of the society. The only persons liable to be sued are the officers of the society appointed under Industrial & Provident Societies Act, 1854 (c. 25), or, if no such officer, the trustees.—*BURTON v. TANNAHILL* (1856), 5 E. & B. 797; 25 L. J. Q. B. 135; 26 L. T. O. S. 214; 20 J. P. 501; 2 Jur. N. S. 184; 4 W. R. 205; 119 E. R. 678.

Annotations:—*Consd. Myers v. Rawson* (1860), 5 H. & N. 99. *Reid. Alexander v. Worman* (1860), 30 L. J. Ex. 198.

65. ——— Effect of Industrial Societies Act, 1862 (c. 87).]—*DEAN v. MELLARD*, No. 37, *ante*.

66. ——— On unregistered society.]—The trustees of a provident society formed under Industrial & Provident Societies Act, 1852 (c. 31),

defenders averred that in consequence of an arrangement made by the next of kin of deceased, pursuer was not entitled to claim the sum in question as his representative. They founded on the rule above mentioned & pleaded that the ct. had no jurisdiction:—*Held*: as defenders denied pursuer's right to represent deceased member, the question raised was not a dispute

within the meaning of the rule & the jurisdiction of the ct. was not ousted.—*SYMINGTON'S EXECUTOR v. GALASHIELS CO-OPERATIVE STORE, Co., LTD.* (1894), 21 R. (Ct. of Sess.) 371.—*SCOT.*

PART VIII. SECT. 1.

Failure to notify transfer of who was insured with

but not registered under Industrial & Provident Societies Act, 1862 (c. 87), cannot be sued in an action commenced after the passing of the latter Act, as the previous Act is absolutely repealed by it without any saving clause.—*TOUTILL v. DOUGLAS* (1863), 33 L. J. Q. B. 66; 8 L. T. 426.

Annotation:—*Consd. Dean v. Mellard* (1863), 15 C. B. N. S. 19.

67. ——— ———.]—An industrial society, formed before the passing of Industrial & Provident Societies Act, 1862 (c. 87), which provided for the incorporation of previously existing societies on registration, & enacted that legal proceedings then pending against a trustee or public officer might be prosecuted against the society in its registered name, but omitted to provide for pending claims, cannot, although subsequently registered under that Act, be sued as a corp'n. in an action commenced after the passing of the Act for a debt incurred previously thereto.—*LINTON v. BLAKENEY JOINT CO-OPERATIVE INDUSTRIAL SOCIETY* (1865), 3 H. & C. 853; 6 New Rep. 238; 34 L. J. Ex. 211; 13 L. T. 39; 29 J. P. 472; 13 W. R. 843; 159 E. R. 770.

Annotations:—*Reid. Queensbury Industrial Soc. v. Pickles* (1865), L. R. 1 Exch. 1; *Gray v. Raper* (1866), Har. & Ruth. 794.

68. ——— Parties—Necessary action by guardians for maintenance of pauper lunatic—Share of lunatic paid out to wife.]—(1) At the time of the

A., an industrial assurance co. in Sept. 1906, applied for & obtained a policy of insurance from B., another industrial assurance co. F. paid the weekly premium on both down to Dec. 19, 1906. F., thereafter applied for & obtained from B. a policy on the same terms as he got from A. The provisions of the new policy were more favourable to the assured than the

removal of a pauper lunatic to an asylum there was standing to his credit in the books of a co-operative & industrial society the sum of £70. Upon the application of the lunatic's wife, who had also a fund standing to her credit in the books of the society, various payments were made to her out of the lunatic's fund. The society then received notice from the guardians of a claim against this fund for the maintenance of the lunatic; but, notwithstanding this notice, the society, purporting to act under 1893 Act, ss. 29, 30, transferred the balance of £55 to the wife's account in their books. Thereupon the guardians presented a petition in the county ct. against the society under Lunacy Act, 1890 (c. 5), s. 300, for reimbursement out of the £55 of the cost of removal of the lunatic to the asylum, & of the expenses of his past & future maintenance:—*Held*: the transfer by the society of the £55 to the wife's account was not a good payment on the lunatic's behalf within 1893 Act, s. 29, & the guardians were entitled to be reimbursed the expenses in question.

(2) Although the wife ought to have been made a party to the petition, inasmuch as the objection as to want of parties had not been taken in the county ct., & was not put forward as a ground of appeal in the notice of appeal to the Div. Ct., the point was not open to the society in the Ct. of Appeal.—*GLOUCESTER UNION GUARDIANS v. GLOUCESTER INDUSTRIAL & CO-OPERATIVE SOCIETY, LTD.* (1907), 96 L. T. 168; 71 J. P. 169; 5 L. G. R. 498, C. A.

69. *Proceedings by society*—In what name brought—Chose in action acquired before registration.]—*QUEENSBURY INDUSTRIAL SOCIETY v. PICKLES*, No. 46, *ante*.

70. — *Jurisdiction of county court*—Action against former member.]—By 1893 Act, s. 23, "All moneys payable by a member to a registered society shall be a debt due from such member to the society, & shall be recoverable as such either in the county ct. of the district in which the registered office of the society is situate, or in that of the district in which such member resides, at the option of the society":—*Held*: where a member has contracted a debt to the society of an amount in excess of the ordinary jurisdiction of the county ct., the society may recover it in the county ct. under the above sect., although the debtor had ceased to be a member at the time of action brought.—*GWENDOLEN FREEHOLD LAND SOCIETY v. WICKS*, [1904] 2 K. B. 622; 73 L. J. K. B. 815; 91 L. T. 440; 53 W. R. 219; 20 T. L. R. 593; 48 Sol. Jo. 574, D. C.

71. — *Stay of proceedings*—Grounds for—Whether insolvency of society.]—*CALDWELL v. ERNEST* (No. 1), No. 89, *post*.

72. — *Against contributory*—Necessity for leave of court.]—*GRAY v. RAPER*, No. 17, *ante*.

Personal liability of officers.]—See Part IV., Sect. 2, *ante*.

Personal liability of members.]—See Part V., Sect. 3, *ante*.

Part IX.—Amalgamation, Transfer and Conversion.

See 1893 Act, ss. 53–55; 1913 Act, s. 8.

73. *Power to amalgamate*—Limited company taking friendly society.]—(1) A limited co. had power by its memorandum to make & carry into effect "such arrangements with respect to the union of interests or amalgamation, either in whole or in part, or working arrangements with any other cos. or persons of a similar nature to that of this co.":—*Held*: the taking over bodily the stock, assets, & liabilities of the N. S. A., a friendly society, which had the same objects, & giving a new class of shares in the co. to the shareholders of the N. S. A., was an amalgamation within the power of the co.

(2) The co. having also power to attach to any new shares to be created any special privilege or condition:—*Held*: (3) the provision that the dividends on the new class of shares given to the shareholders of the N. S. A. in priority to the original preference shareholders of the co. was not *ultra vires*; (4) the charging of the dividends on the new shares on the "profits & assets" of the co. was not *ultra vires*; (5) Industrial & Provident Societies Act, 1876 (c. 45), gave the N. S. A. power to carry out the proposed amalgamation.—*PULBROOK v. NEW CIVIL SERVICE CO-OPERATION, LTD.* (1877), 26 W. R. 11.

Part X.—Dissolution.

SECT. 1.—WINDING UP BY THE COURT.

SUB-SECT. 1.—IN GENERAL.

See 1893 Act, ss. 58–60; 1913 Act, s. 8.

74. *Grounds for ordering.*]—An industrial society had, under a rule, suspended the right of withdrawal for about two years; & three shareholders petitioned for a winding up. The society had no outside creditors, & the majority of shareholders opposed the winding up:—*Held*: as it was not shown that it was impossible to carry on business, the winding up would not be just &

equitable within Cos. Act, 1862 (c. 89), s. 79 (5).—*Re HORSHAM INDUSTRIAL & PROVIDENT SOCIETY, LTD.* (1894), 70 L. T. 801; 58 J. P. 639; 10 T. L. R. 441, D. C.

75. *Application of Companies Acts*—Society established under Industrial Societies Act, 1852 (c. 31).]—Societies established under the above Act:—*Held*: to be within the provisions of the winding-up Acts.—*Re NATIONAL INDUSTRIAL & PROVIDENT SOCIETY* (1861), 30 L. J. Ch. 940; 25 J. P. 726; 9 W. R. 774.

provisions of the general tables of B., & the insurance required to be sanctioned by the directors of B. The directors were not, but the agent who negotiated with F. was, aware that F. had been insured with A. F.'s insurance with A. did not lapse for about

two months after he had ceased paying his contributions. No notice was sent by A. to B.:—*Held*: that the transaction was a transfer of F.'s insurance from A. to B. & that B., not having given notice in terms of Collecting Societies & Industrial Assurance Co.'s

Act, 1896, s. 4 (2), had committed an offence under sect. 14 (1).—*SALVATION ARMY ASSURANCE SOCIETY v. BRITISH LEGAL LIFE ASSURANCE CO.*, [1908] S. C. 1138; 45 Sc. L. R. 843; 16 S. L. T. 276.—SCOT.

Sect. 1.—Winding up by the court: Sub-sects. 1, 2

76. — Meaning of "business."—Cos. Act, 1862 (c. 89), s. 199, which deals with the winding up of unregistered cos., is only applicable to trading assocns., inasmuch as such unregistered cos. are to be wound up at their "place of business," & "business" must ordinarily be trading under the Act.—*Re BRISTOL ATHENÆUM* (1889), 43 Ch. D. 236; 59 L. J. Ch. 116; 61 L. T. 795; 38 W. R. 396; 6 T. L. R. 83; 1 Meg. 452.

Annotations:—Consd. Re Jones, Clegg v. Ellison, [1898] 2 Ch. 83; *Re Russell Institution, Figgins v. Baghino*, [1898] 2 Ch. 72.

77. ——*Re LONDON & SUBURBAN BANK*, No. 81, *post*.

Winding up under Cos. Acts, generally, *see COMPANIES*, Vol. X., pp. 814 *et seq.*

SUB-SECT. 2.—JURISDICTION OF THE COURT.

See 1893 Act, ss. 58, 60; 1913 Act, s. 8.

78. Jurisdiction of High Court—Society registered under Industrial & Provident Societies Act, 1852 (c. 31)—Not registered under Industrial & Provident Societies Act, 1862 (c. 87).—The Ct. of Ch. has no jurisdiction to wind up an industrial society under Cos. Act, 1862 (c. 89), even though there has been an omission to register it under Industrial & Provident Societies Act, 1862 (c. 87).

An industrial society was duly registered under Industrial & Provident Societies Act, 1852 (c. 31); which Act was repealed by Industrial & Provident Societies Act, 1862 (c. 87). In Nov. 1862, before the society had been re-registered, an order for winding up the society was made by the Ct. of Ch. under Cos. Act, 1862 (c. 89). In June, 1864, the society was registered under Industrial & Provident Societies Act, 1862 (c. 87). On motion to discharge the order for winding up:—*Held*: the Ct. of Ch. had no jurisdiction to make the order, & it must be set aside accordingly.

The two winding up Acts of 1862, c. 87, & c. 89 were intended to apply each to a different class of co., the former to industrial & provident societies exclusively, & the other to joint-stock cos. The Ct. of Ch. has no jurisdiction in the winding up of the former class of cos., which must be carried on by the county ct.—*Re CHATHAM CO-OPERATIVE INDUSTRIAL SOCIETY* (1864), 4 New Rep. 481; 33 L. J. Ch. 737; 10 L. T. 842; 28 J. P. 532; 10 Jur. N. S. 983; 12 W. R. 1053.

Annotation:—Refd. Re London & Suburban Bank, [1892] 1 Ch. 604.

79. — — — — ——*SHEFFIELD & HALLAMSHIRE CO-OPERATIVE SOCIETY'S CASE* (1863), cited in 4 New Rep. at p. 481; 33 L. J. Ch. at p. 738; 10 L. T. at p. 842; 28 J. P. at p. 532; 10 Jur. N. S. at p. 984; 12 W. R. at p. 1053, L. C.; *subsequent proceedings, sub nom. Re SHEFFIELD & HALLAMSHIRE ANCIENT ORDER OF FORESTERS' CO-OPERATIVE & INDUSTRIAL SOCIETY, LTD., FOUNTAIN'S CASE, SWIFT'S CASE* (1865), 4 De G. J. & Sm. 699, L. C.

Annotation:—Folld. Re Chatham Co-operative Industrial Soc. (1864), 4 New Rep. 481.

80. — By way of appeal—From order of county court.—By Industrial & Provident Societies Act, 1862 (c. 87), s. 17, any society registered under that Act may be wound up in

the same manner as any co. may be wound up under any Act for winding up cos., & all the provisions of such Act with respect to winding up are to apply to such society, except that the ct. having jurisdiction in the winding-up is to be the county ct.; & by Cos. Act, 1862 (c. 89), s. 124, appeals from any order by any ct. having jurisdiction in the winding-up may be had in the same manner as appeals from any order of the same ct. in cases within its ordinary jurisdiction.

The judge of a county ct. in which a society registered under Industrial & Provident Societies Act, 1862 (c. 87), was being wound up, having made an order to stay proceedings in an action [in the Liverpool Ct. of Passage] against a member of such society for a debt of the society incurred before such registration, & for which the member was therefore individually liable:—*Held*: no appeal against such order would lie to any of the superior cts. of common law. *Qu.*: whether the judge had power to make such order.—*HENDERSON v. BAMBER* (1865), 19 C. B. N. S. 540; 35 L. J. C. P. 65; 144 E. R. 898.

Annotation:—Consd. Andrew v. Swansea Cambrian Benefit Bldg. Soc. (1880), 50 L. J. Q. B. 428.

—*Re The London & Suburban Bank, Ltd.*, which was registered under Industrial & Provident Societies Act, 1876 (c. 45), had its registered office in London, & its paid-up capital did not exceed £10,000. Industrial & Provident Societies Act, 1876 (c. 45), s. 17 (1) provides that the provisions of Cos. Act, 1862 (c. 89), shall apply to societies registered under this Act, but the ct. having jurisdiction shall be the county ct. Cos. (Winding-up) Act, 1890 (c. 63), provides that the cts. having jurisdiction to wind-up cos. shall be the county ct. where the paid-up capital does not exceed £10,000, but gives the Lord Chancellor power to exclude a county ct. from having jurisdiction, & the rules made by the Lord Chancellor exclude the jurisdiction of county cts. in the London district. On a petition for winding-up:—*Held*: Cos. (Winding-up Act), 1890 (c. 63), applies only to cos. within the previous Cos. Acts, & does not overrule Friendly Societies & Industrial & Provident Societies Acts, & the High Ct. has no jurisdiction to wind-up societies registered under those Acts, even if they come within a general definition of cos.—*Re LONDON & SUBURBAN BANK*, [1892] 1 Ch. 604; 61 L. J. Ch. 316; 66 L. T. 716; 40 W. R. 326; 8 T. L. R. 357; 36 Sol. Jo. 292.

Annotations:—Refd. Re Real Estates Co., [1893] 1 Ch. 398; *Re Ferndale Industrial Co-operative Soc.*, [1894] 1 Q. B. 828.

82. — Effect of 1893 Act—Transfer of pending proceedings.—In the winding up in a county ct. of an industrial society under Industrial & Provident Societies Act, 1876 (c. 45), the county ct. judge has jurisdiction to make an order for the examination of the officers of the society under Cos. (Winding-up) Act, 1890 (c. 63), s. 10, which Act applies to the winding up of an industrial society under Industrial & Provident Societies Act, 1876 (c. 45). Where such a winding up was pending on Jan. 1, 1894, the jurisdiction of the county ct. is not interfered with by 1893 Act, unless an application under sect. 59 of that Act has been granted.—*Re FERNDAL INDUSTRIAL CO-OPERATIVE SOCIETY*, [1894] 1 Q. B. 828; 70 L. T. 448; 42 W. R. 430; 10 T. L. R. 325; 38 Sol. Jo. 309; 1 Mans. 303; 10 R. 199, D. C.

PART X. SECT. 1, SUB-SECT. 2.

r. Jurisdiction of High Court—Effect of 1893 Act—Unregistered company.—*Re IRISH MERCANTILE LOAN*

SOCIETY, [1907] 1 I. R. 98; 41 I. L. T. 9.—*IR.*

t. — — — — ——*Re BELFAST TAILORS' CO-PARTNERSHIP*, [1909] 1 I. R. 49; 43 I. L. T. 24.—*IR.*

a. — Extension of objects—Unregistered rules—Ultra vires.—*Re LONDONDERRY EQUITABLE CO-OPERATIVE SOCIETY*, [1910] 1 I. R. 69.

83. Jurisdiction of county court—Society registered under Industrial Societies Act, 1852 (c. 31).]—This ct. stayed the drawing up of an order for winding-up a society, which was registered under the above Act, being of opinion that the county ct. of the district in which the society was situated now had the jurisdiction over it; but directed the society to be registered under Industrial & Provident Societies Act, 1862 (c. 87).—*Re ROTHERHITHE, ETC. INDUSTRIAL SOCIETY* (1862), 32 Beav. 57; 7 L. T. 305; 55 E. R. 22.

Annotation:—Apld. Re Midland Counties Benefit Bldg. Soc. (1864), 33 L. J. Ch. 520.

84. — Whether registration condition precedent under Industrial Societies Act, 1862 (c. 87).]—*Re ROTHERHITHE, ETC. INDUSTRIAL SOCIETY*, No. 83, *ante*.

85. — Effect of Industrial & Provident Societies Act, 1862 (c. 87)—Society registered after winding-up order.]—*Re CHATHAM CO-OPERATIVE INDUSTRIAL SOCIETY*, No. 78, *ante*.

86. — To stay proceedings against member—Proceedings in Liverpool Court of Passage.]—*HENDERSON v. BAMBER*, No. 80, *ante*.

87. — Order for examination of officers under Companies Act, 1890 (c. 63).]—*Re FERNDAL INDUSTRIAL CO-OPERATIVE SOCIETY*, No. 82, *ante*.

88. — Effect of 1893 Act on pending winding-up proceedings.]—*Re FERNDAL INDUSTRIAL CO-OPERATIVE SOCIETY*, No. 82, *ante*.

SUB-SECT. 3.—EFFECT OF ORDER.

89. Effect on pending proceedings.]—The trustees of a freehold land society instituted a suit against deft., & pending the proceedings the society became insolvent, & a winding-up order having been obtained, the official manager was substituted as pltf. by an order of ct.; but he was refused leave, by the ct. making the winding-up order, to prosecute the suit. Upon a motion by the official manager to the ct. which had substituted him as pltf., asking that the suit might be stayed on terms, or that some order might be made for its future prosecution:—*Held*: insolvency was no ground for staying a suit or preventing its being dismissed, & the official manager must pay the costs of the motion personally.—*CALDWELL v. ERNEST* (No. 1) (1859), 27 Beav. 39; 28 L. J. Ch. 810; 33 L. T. O. S. 25; 54 E. R. 16.

90. —.]—*GRAY v. RAPER*, No. 17, *ante*.

91. Who are contributories—Liability for debts incurred before registration—Application of Companies Act, 1862 (c. 89).]—A society was formed in 1861, under the Acts then in force for the regulation of industrial & provident societies, & carried on business as a co. with unlimited liability till Mar. 1863, when it was registered, under Industrial & Provident Societies Act, 1862 (c. 87), with limited liability; & it was subsequently ordered to be wound up:—*Held*: persons who had been members of the society before its liability was limited, but whose shares were fully paid up, could not be made contributories in respect of debts incurred previous to the registration.

Cos. Act, 1862 (c. 89), s. 194, has no application

to a case of pure contribution between the members of a co., whose liability, *inter se*, must be wholly regulated by the contract of partnership.—*Re SHEFFIELD & HALLAMSHIRE ANCIENT ORDER OF FORESTERS' CO-OPERATIVE & INDUSTRIAL SOCIETY, LTD.*, FOUNTAIN'S CASE, SWIFT'S CASE (1865), 4 De G. J. & Sm. 699; 6 New Rep. 75; 34 L. J. Ch. 593; 12 L. T. 335; 29 J. P. 677; 11 Jur. N. S. 553; 13 W. R. 667; 46 E. R. 1090, L. C.; *previous proceedings, sub nom. SHEFFIELD & HALLAMSHIRE CO-OPERATIVE SOCIETY'S CASE* (1863), cited in 4 New Rep. at p. 481, L. C.

Annotation:—Refd. Re West London & General Permanent Benefit Bldg. Soc., [1894] 2 Ch. 352.

92. Extent of member's liability—Building societies distinguished.]—The rules of a society registered under the Provident & Industrial Societies Acts provided that its capital should be raised by shares of £5 each: that the subscription should be not less than 2s. 6d. on each share per month, but that a member should not be bound to pay any subscription after the first unless required by the directors; & that a member might withdraw all or any part of his subscriptions. They also provided that a member whose interest in the society was less than £100 might nominate persons to whom his shares were to be paid on his death, but in default of such nomination, or if a member whose interest exceeded £100 should die, his interest was to be payable or transferable only to his exors. Certain members had paid up the subscriptions on their shares in full, & then withdrawn part, & in some cases afterwards paid up part of the subscriptions so withdrawn. All these transactions were entered in the pass books of members & the books of the co. as payments & withdrawals on account of their shares. Some members had subscribed for one share only in order to obtain an advance & paid the first subscription of 2s. 6d. & had repaid the whole of the advance, but had not formally withdrawn their shares or obtained repayment of the 2s. 6d. Other members had died, having at the date of their death some subscriptions to their credit in respect of shares, & their exors. had not withdrawn the whole. The society was being wound up compulsorily. 1893 Act, requires that the rules should make provisions as to withdrawal of shares & provides that a member shall cease to be a member on withdrawal: *Held*: (1) so long as a member left any subscriptions standing to his credit in respect of shares, he was liable to pay, on calls made by the directors, or in a winding-up, the difference between the amount so standing to his credit & the nominal amount of the shares including subscriptions which he had paid up & then withdrawn; (2) the liability of a member was not terminated by his death: in this respect societies under this Act are to be distinguished from building societies; (3) the advanced members were liable for the difference between the £5 nominal amount of their share & the 2s. 6d. paid notwithstanding that they had repaid their advances.—*Re UNITED SERVICE SHARE PURCHASE SOCIETY, LTD.*, [1909] 2 Ch. 526; 78 L. J. Ch. 713; 101 L. T. 273.

Annotation:—As to (2) Refd. Dibble v. Wilts & Somerset Farmers, [1923] 1 Ch. 342.

93. —.]—AGRICULTURAL WHOLESALE SOCIETY v. BIDDULPH & DISTRICT AGRICULTURAL SOCIETY, No. 45, *ante*.

PART X. SECT. 1, SUB-SECT. 3.

b. Effect on functions of directors.]—A claim for total disability was made after an order for the winding-up of a society:—*Held*: the effect of the order was to destroy the functions of the

directors & officers & practically to determine the contract; & as the conditions upon which the total disability benefit was to become payable were impossible of fulfilment, the claimant was not entitled to prove in the winding-up proceedings; but the

denial of his claim was to be without prejudice to his proving for damages or otherwise on his policy.—*Re MASSACHUSETTS BENEFIT LIFE ASSOCN.*, JUNKIN'S CASE, BABCOCK'S CASE, PALFRAMAN'S CASE (1899), 30 O. R. 309.—CAN.

INDUSTRIAL,

AND SIMILAR SOCIETIES.

Sect. 1.—Winding up by the court: Sub-sect. 3. Sect. 2.]

94. Creditor—Whether member indebted to society included.]—By the rules of a co-operative society for supplying goods to its members, which was registered under 1893 Act, each member was required to hold a certain number of shares in the society, & was at liberty to withdraw his share capital under certain conditions upon giving notice to the manager. Applt., a member of the society, being unable owing to a strike to pay for goods supplied to him, the managing committee on four occasions debited the amount standing to his credit as a shareholder with sums due from him to the society for goods, the total amount so debited being about equal to the amount of his share capital; no notice under the rules to withdraw his capital had been given by applt. The society was in financial difficulties, & was at the date of the last two transactions hopelessly insolvent to the knowledge of the managing committee; but the committee, who had adopted the same course with other shareholders, acted *bona fide* & without intent to prefer any particular shareholder. Upon a summons taken out by the liquidator of the society to set aside the transactions:—*Held*: (1) the transactions were not to be treated as withdrawals of capital by applt., but were valid under 1893 Act, s. 23 (2), which gives to a society registered under the Act a lien upon the shares of a member & a right to set off any sum credited to a member upon his shares towards the payment of any debt due from him to the society; (2) the last transaction, although within three months of the passing of a resolution for winding up the society, was not void under Cos. Act, 1862 (c. 89), s. 164, as an undue or fraudulent preference of a creditor, applt. not being a creditor of the

society within the meaning of that sect.—*Re GWAWR-Y-GWEITHYR INDUSTRIAL & PROVIDENT SOCIETY, DOVEY v. MORGAN*, [1901] 2 K. B. 477; 70 L. J. K. B. 614; 84 L. T. 824; 49 W. R. 655; 45 Sol. Jo. 522, D. C.

—*Priority of—Loans secured under invalid rule.]—Re BOTTOMGATE INDUSTRIAL CO OPERATIVE SOCIETY, No. 5, ante.*

96. — Fraudulent preference—Whether set-off of share capital against debt included.]—*Re GWAWR-Y-GWEITHYR INDUSTRIAL & PROVIDENT SOCIETY, DOVEY v. MORGAN, No. 94, ante.*

—*Secured creditor—Validity of debenture.]—See Nos. 54, 55, ante.*

SECT. 2.—DISSOLUTION BY INSTRUMENT.

See 1893 Act, ss. 58, 61; 1913 Act, s. 8.

97. Vesting of property—Power of court to appoint new trustee.]—The property of an incorporated industrial or provident society dissolved by instrument of dissolution under 1893 Act, ss. 58 & 61, is subject to a trust for appropriation & division, after providing for the claims of creditors, in accordance either with the provisions of the instrument or with the award of the chief registrar. Where dissolution took place before the society had handed over some of its property to the person nominated by the instrument of dissolution to realise its assets, the ct., the Crown not claiming the property as *bona vacantia*, appointed him a trustee in the place of the society, & made an order vesting the property in him on the trusts applicable thereto under the instrument.—*Re RUDDINGTON LAND*, [1909] 1 Ch. 701; 78 L. J. Ch. 378; 100 L. T. 648.

INDUSTRIAL SCHOOLS.

See EDUCATION.

INEBRIATES.

See CRIMINAL LAW AND PROCEDURE; INTOXICATING LIQUORS.

INFANTS AND CHILDREN.

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<i>Children's Courts</i>	„ MAGISTRATES.	<i>Receivers</i>	„ RECEIVERS.
<i>Contributory Negligence</i>	„ NEGLIGENCE.	<i>Reformatories</i>	„ CRIMINAL LAW.
<i>County Court Practice</i>	„ COUNTY COURTS.	<i>Testamentary Capacity</i>	„ WILLS.
<i>Criminal Offences against Children</i>	„ CRIMINAL LAW.	<i>Trusts</i>	„ TRUSTS AND TRUS- TEES.
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<i>Domicil</i>	„ CONFLICT OF LAWS.		
<i>Education</i>	„ EDUCATION.		
<i>Evidence of Children</i>	„ CRIMINAL LAW ; EVI- DENCE.		
<i>Income Tax</i>	„ INCOME TAX.		
<i>Industrial Schools</i>	„ EDUCATION.		
<i>Limitation, Periods of</i>	„ LIMITATION OF AC- TIONS.		

Part I.—In General.

SECT 1.—DEFINITIONS.

1. **Infant—Of mature & of tender years—Not distinguished.]**—The wife of a minor having committed adultery whilst her husband was abroad in the East Indies, the father procured himself to be appointed *prochein ami*, & commenced an action for crim. con. in his son's name, without his knowledge or authority, & recovered a verdict. On motion to set aside the proceedings, on the ground of there being no authority from the son to bring the action:—*Held*: (1) as deft. had reason to believe long before the trial, that the authority of the son could not have been obtained, he ought to have made inquiries then, & the application was now too late; (2) no authority from the son was necessary to enable the father to sue as *prochein ami*; & there being nothing to show that he was not properly appointed *prochein ami*, it must be assumed to have been properly done, & the son would be bound by the judgment in this action.

(3) The law knows of no distinction between infants of tender & of mature years; & as no special authority to sue is requisite in the case of an infant just born, so none is requisite from an infant on the very eve of attaining his majority. It appears perfectly clear that every *prochein ami* is to be considered as an officer of the ct., specially appointed by them to look after the interests of the infant, on whom the judgment in the action is consequently binding, & who cannot be allowed, on attaining his age, to commence fresh proceedings founded on the same cause of action (PARKE, B.). —MORGAN v. THORNE (1841), 7 M. & W. 400; H. & W. 149; 10 L. J. Ex. 125; 5 Jur. 294.

Annotations:—As to (3) Folld. Sinclair v. Sinclair (1845), 13 M. & W. 640. *Apld.* Re Royal Naval School, Seymour v. Royal Naval School, [1910] 1 Ch. 806. *Refd.* R. v. Newmarket Income Tax Comrs., *Ex p.* Huxley, [1910] 1 K. B. 788. *Generally*, *Mentd.* Cumberland v. Copeland

(1861), 7 H. & N. 118; Butcher v. Henderson (1868), L. R. 3 Q. B. 335; Mount v. Taylor (1868), 37 L. J. C. P. 325.

2. **Child—Legitimate child presumed.]**—We must take the "child" referred to by the certificate to be a legitimate child then in being (*per CUR.*).—R. v. WYKE (1746), Burr. S. C. 264.

Annotation:—*Mentd.* R. v. Basingstoke (1850), 14 L. T. O. S. 372.

3. ———.]—The law does not contemplate illegitimacy. The proper description of a legitimate child is "child." We think therefore that the description here did import that the paupers were the children of married parents (DENMAN, C.J.).—R. v. TOTLEY (INHABITANTS) (1845), 7 Q. B. 596; 2 New Sess. Cas. 42; 14 L. J. M. C. 138; 5 L. T. O. S. 196; 9 J. P. 583; 9 Jur. 595; 115 E. R. 614.

Annotation:—*Refd.* R. v. Birmingham (1846), 2 New Sess. Cas. 283.

4. ———.]—The order, dated Aug. 26, 1844, purported to adjudicate on the settlement of "A. B., widow, & four of her children, viz. Henry, aged nine & a half years, James," etc. By the examinations it appeared that Henry was illegitimate, & of the age mentioned:—*Held*: the word "children," standing alone, meant legitimate children; & Henry was therefore misdescribed, & the order, as to him, was bad.—R. v. BIRMINGHAM (INHABITANTS) (1846), 8 Q. B. 410; 1 New Mag. Cas. 451; 2 New Sess. Cas. 283; 15 L. J. M. C. 65; 6 L. T. O. S. 479; 10 J. P. 295; 10 Jur. 406; 115 E. R. 930.

Annotations:—*Mentd.* R. v. Watford (1846), 9 Q. B. 626; R. v. St. Mary in Bungay (1849), 12 Q. B. 38; R. v. Ruyton (1861), 1 B. & S. 534.

—.]—*See, also*, WILLS.

— **Regulation of employment.]**—*See* Part XVI., *post*.

— **Sale of intoxicating liquors to.]**—*See*

Sect. 1.—Definitions. Sect. 2. Part II.]

Licensing Consolidation Act, 1910 (c. 24), s. 68 ; & generally, INTOXICATING LIQUORS.

— Prevention of cruelty to.]—See Prevention of Cruelty to Children Act, 1904 (c. 15) ; & Part XVII., Sect. 2, *post*.

— Under Summary Jurisdiction Acts.]—See MAGISTRATES.

— Commission of crimes by.]—See Part XVIII., *post*.

— Offences in respect of.]—See Part XVII., Sect. 2, *post*.

— Who included—Fatal Accidents Act, 1846 (c. 98).]—See NEGLIGENCE.

— Workmen's Compensation Act, 1906 (c. 58).]—See MASTER & SERVANT.

— In interpretation of deed.]—See BASTARDY, Vol. III., pp. 378 *et seq*.

— In interpretation of will.]—See BASTARDY, Vol. III., pp. 377 *et seq*. ; WILLS.

—.]—See, also, Children's Act, 1908 (c. 67), s. 131.

Young person—General definition.]—See Children's Act, 1908 (c. 67), s. 131.

SECT. 2.—ATTAINMENT OF FULL AGE.

5. Lawful age—Meaning of.]—The term "lawful age" must, unless it be in a particular case, as guardian in socage, be construed & taken twenty-one years.—HARTWELL v. FORD (1635), 1 Rep. Ch. 99 ; Toth. 109 ; 21 E. R. 519.

6. Full age—Attainment of—On day preceding twenty-first anniversary of birth.]—An infant, born Feb. 16, 1608, comes of age on Feb. 15, 1629, & it is not material at what hour he was born.—HERBERT v. TURBALL (1663), 1 Keb. 589 ; 1 Sid. 162 ; 83 E. R. 1129 ; *sub nom.* HERBERT v. TUCKAL (1662), T. Raym. 84.

Annotations :—Reid. Anon. (1704), 1 Salk. 44. Mentd. Roe d. Brune v. Rawlings (1806), 7 East, 279 ; Haines v. Guthrie (1884), 13 Q. B. D. 818 ; Re Smith, Bilke v. Roper (1890), 45 Ch. D. 632.

7. —.]—In a devise the question was whether a testator born the first day of Jan. in the afternoon of that day & died in the morning of the last day of Dec. was of age :—

PART I. SECT. 2.

a. Full age—Attainment of.]—Deft. was sued upon a promissory note executed by him when nineteen years of age. A guardian of his person & property had been appointed, but had been discharged, & at the time of the execution of the note sued on there was no guardian in existence either of his person or property :—*Held* : having regard to Indian Majority Act, IX of 1875, s. 3, deft. was still a minor at the date of the note.—GORDHANDAS JADOWJI v. HARIVALUBHDAS BHAIKAS (1896), I. L. R. 21 Bom. 281.—IND.

b. —.]—Where a guardian has once been validly appointed or declared, the minority does not cease till the attainment of 21 years by the ward, & it is immaterial whether the guardian dies or is removed, or otherwise ceases to act.—JAGON RAM MARWARI v. MAHADEO PROSAD

c. —.]—According to Mahomedan Law the occurrence of puberty determines minority & the mother's right to custody, but for the purpose of Penal Code, s. 363, regard

must be had only to the definition of minority in Majority Act, IX of 1875, s. 3.—Re MUTHU IBRAHI (1913), I. L. R. 37 Mad. 567.—IND.

d. —.]—The word "child" in Criminal Procedure Code, Act V of 1898, s. 488, means a person who has not attained the age of majority. The attainment of puberty cannot be taken as the age when childhood ceases.—KRISHNASWAMI AYYAR v. CHANDRAVADANA (1914), I. L. R. 37 Mad. 565.—IND.

e. — Proof of.]—By decree of Sept. 18, 1878, in a partition action, it was directed that the share of an infant deft., J. F. M., should remain in ct., & the interest thereon should be paid to his father, a co-deft., as tenant by the curtesy. On Sept. 24, 1900, J. F. M. & his father moved for payment out of J. F. M.'s share upon the father's affidavit identifying the infant deft. as his son, J. F. M., & stating that J. F. M. was of age, having reached the age of twenty-one years on Feb. 5, 1899, & that the father consented to payment out & released all his rights in the fund :—*Held* : the proof of the age was not sufficient, the father not having stated his reasons

Held : he was of full age.—ANON. (prior to 1677), cited 2 Mod. Rep. 281 ; 86 E. R. 1072.

Annotation :—Reid. Nichols v. Ramsel (1677), 2 Mod. Rep. 280.

8. —.]—If A. be born on Sept. 3, & on Sept. 2, 21 years afterwards, he makes his will, this is a good will ; for the law will make no fraction of a day, & by consequence he was of age (HOLT, C.J.).—HOWARD'S CASE (1699), 2 Salk. 625 ; Holt, K. B. 195 ; 91 E. R. 528 ; *sub nom.* ANON., 1 Ld. Raym. 480.

Annotations :—Consd. Pugh v. Leeds (1777), 2 Cowp. 714. Fold. Re Shurey, Savory v. Shurey, [1918] 1 Ch. 263. Reid. Tomlinson v. Bullock (1879), 43 J. P. 508.

9. —.]—If a man were born Feb. 1, & lived to Jan. 31, twenty-one years after five o'clock in the morning, & then makes his will & dies by six at night, that will is good, & the deviser is of age (HOLT, C.J.).—FITZHUGH v. DENNINGTON (1704), 2 Ld. Raym. 1094 ; Holt, K. B. 68 ; 2 Salk. 585 ; 3 Salk. 309 ; 6 Mod. Rep. 259 ; 92 E. R. 1094 ; *sub nom.* ANON., Holt, K. B. 53 ; 1 Salk. 44.

Annotations :—Consd. Roe d. Wrangham v. Hersey (1771), 3 Wils. 274 ; Ackland v. Lutley (1839), 9 Ad. & El. 879. Fold. Re Shurey, Savory v. Shurey, [1918] 1 Ch. 263. Reid. Godson v. Sanctuary (1832), 4 B. & Ad. 255. Mentd. Beswick v. Swindells (1835), 3 Ad. & El. 868.

10. —.]—A. was born on Aug. 16, 1725, & died on Aug. 15, 1746 :—*Held* : he lived to attain his full age of twenty-one.—TODER v. SANSAM (1775), 1 Bro. Parl. Cas. 468 ; 1 E. R. 695, H. L.

Annotation :—Consd. Re Shurey, Savory v. Shurey, [1918] 1 Ch. 263.

11. —.]—BISHOP'S CASTLE CASE (1820), Rogers on Elections, 16th ed., Vol. I., 193.

12. —.]—A person attains the age of twenty-one years, or of twenty-five years, or any specified age, on the day preceding the anniversary of his twenty-first or twenty-fifth birthday, or other birthday as the case may be (SARGANT, J.).—Re SHUREY, SAVORY v. SHUREY, [1918] 1 Ch. 263 ; 87 L. J. Ch. 245 ; 118 L. T. 355 ; 34 T. L. R. 171 ; 62 Sol. Jo. 246.

13. — Whether by filing bankruptcy petition.]—Re JONES, *Ex p.* JONES, No. 373, *post*.

— Presumption of—Infant party to conveyance.]—See Law of Property Act, 1925 (c. 20), s. 15.

for believing that the son was of age or referred to any family or other records in support of his statement, & the fact that the son was named as a party in the decree of Sept. 18, 1878, was not conclusive proof that he was now of age.—TOLTON v. MACGREGOR, 20 C. L. T. 391.—CAN.

f. —.]—In an action in the Straits Settlements to recover the amount due upon certain mtges., deft. pleaded that he was an infant when he executed them. As evidence in support of this plea there was tendered at the trial an entry recording the date of deft.'s birth made by deft.'s deceased father in a book in which he made similar entries with regard to his family :—*Held* : under Straits Settlements Evidence Ordinance, 1893, s. 32 (5), & having regard to Indian Evidence Act, s. 32, the entry was admissible in evidence.—MAHOMED SYEDOL ARIFFIN v. YEOH OOI GARK (1916), L. R. 43 Ind. App. 256.—IND.

g. Female minor—Effect of marriage.]—Pltf., who was divorced & not living with her husband, assumed to be emancipated & not a minor.—Re SLAUGHENWHITE'S ESTATE (1906), 38 N. S. R. 47.—CAN.

Part II.—The Crown as parens patriæ.

Wards of court.]—See Part XV., *post*.

Appointment of guardians by court.]—See Part XIII., Sect. 5, *post*.

14. Protection of infants by sovereign.]—

(1) The Crown has another jurisdiction, & that is as *pater patriæ*, as a father over his children. The king has a right to take care of infants, lunatics, & idiots, that cannot take care of themselves; & this case cannot be exercised otherwise than by appointing them proper curators or committees (*per CUR.*).

(2) It has been argued that the guardianship is a naked authority, & so cannot survive, but it is agreed that if it be an authority coupled with an interest, it will survive. Indeed, in the civil law they looked upon it as a naked authority, but yet where there were several guardians, & only one gave security, it was executed by him alone. . . . But if it were an authority, it is not like an authority to do a single act, where it must be done by them all; because it is the will of the party that authorises them all & so one alone can't execute it. But in this case the authority must, from the nature of the thing, be joint & several, for one alone must receive the money of the infant, & not meet all together for that purpose. . . . It is to be construed joint & several; else the more guardians were appointed for the security of the infant, he would be the less secure, because upon the death of any one of them the guardianship would be at an end. But no doubt with us it must be reckoned an interest (*per CUR.*).

(3) The guardian in socage has no interest of profit; it is an interest of honour . . . & can't be assignable (*per CUR.*).

(4) When the child is by the guardian put under the protection of this ct., it will be contempt even of the mother to marry him without the consent of the guardian (*per CUR.*).—SHAFTSBURY (EARL) *v.* SHAFTSBURY (1725), Gilb. Ch. 172; 25 E. R. 121; *sub nom.* EYRE *v.* SHAFTSBURY (COUNTESS), 2 P. Wms. 102; 2 Eq. Cas. Abr. 710, 755.

Annotations:—As to (1) *Consd.* De Manneville *v.* De Manneville (1804), 10 Ves. 52. *Refd.* A.-G. *v.* Downing (1767), Wilm. 1; A.-G. *v.* Magdalen College, Oxford (1854), 18 Beav. 223. As to (2) *Appld.* Bell *v.* Holtby (1873), L. R. 15 Eq. 178. As to (4) *Refd.* Raymond's Case (1734), Cas. temp. Talb. 58; R. *v.* Green (1781), 3 Doug. K. B. 36. Generally, *Mentd.* Mansell *v.* Mansell (1757), Wilm. 36.

15. —.]—(1) A mother petitioned, that B. might be restrained from marrying her daughter, being an infant, & a ward of this ct.:—*Held*: as he was likewise an infant, his guardian should not permit him to marry the young lady, without the leave of the ct.

(2) The care of infants reverted to this ct. on the cessure of the ct. of wards. Exercised sometimes by way of punishment on such as have done an act to the prejudice of infants, but more usefully to restrain persons from doing an act to disparage them where it has not yet been completed.

This care of infants has been exercised by the ct. in different degrees & instances. Upon the cessure of the ct. of wards, the care of the government of infants reverted to this ct., to whom it originally belonged, & in respect of lunatics, idiots, & infants, the king is bound to take care of them; it is not a profitable jurisdiction of the Crown, but for the benefit of infants themselves, who must have some common parent. . . . The Crown therefore acts by way of analogy to the

care & prudence of the natural parent, & for this reason, when infants under the care of this ct. are upon a treaty of marriage, the ct. refers it to a master to see, whether the settlement proposed is proper? If improper, the ct. will not give the infant leave to marry (LORD HARDWICKE, C.).—SMITH *v.* SMITH (1745), 3 Atk. 304; 26 E. R. 977, L. C.

16. Foundation of jurisdiction of courts.]—This ct. may give extra-judicial directions for an infant; as on a stranger's application & undertaking to pay costs.

There are several things this ct. may do *ex officio* for infants. The ct. often gives extra-judicial directions for an infant, & hears a person as *amicus curiæ* (LORD HARDWICKE, C.).—POMFRET (EARL) *v.* WINDSOR (LORD) (1752), 2 Ves. Sen. 472; 28 E. R. 302, L. C.

Annotations:—*Refd.* Hervey *v.* Dinwoody (1703), 4 Bro. C. C. 257. *Mentd.* Dou d. Atkyns *v.* Horde (1777), 2 Cowp. 689; Stackhouse *v.* Barnston (1805), 10 Ves. 453; Goodright d. Fowler *v.* Forrester (1807), 8 East, 552; Hughes *v.* Thomas (1811), 13 East, 474; Chalmer *v.* Bradley (1819), 1 Jac. & W. 51; Lake *v.* Skinner (1819), 1 Jac. & W. 9; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Brown *v.* Claxton (1829), 3 Sim. 225; Peacock *v.* Burt (1834), 4 L. J. Ch. 33; Bugdon *v.* Bignold (1843), 2 Y. & C. Ch. Cas. 377.

17. —.]—*Ex p.* SKINNER, No. 1163, *post*.

18. —.]—WELLESLEY *v.* WELLESLEY, No. 1178, *post*.

19. —.]—FIELD *v.* MOORE, FIELD *v.* BROWN, No. 437, *post*.

20. —.]—MARTIN *v.* GALE, No. 330, *post*.

21. —.]—Whether confined to infants possessing property.]—WELLESLEY *v.* BEAUFORT (DUKE), No. 2098, *post*.

22. —.]—*Re* SPENCE, No. 1251, *post*.

23. —.]—The jurisdiction of the Lord Chancellor as *parens patriæ* is not affected by the circumstance that the infant has no property.—*Re* A. B. (AN INFANT) (1885), 1 T. L. R. 657.

24. —.]—Concurrent jurisdiction of courts—Judicature Act, 1873 (c. 66).]—Since the passing of Jud. Act, 1873 (c. 66), the cts. of common law have concurrent jurisdiction with the cts. of equity with regard to the care & custody of infants; but, in the exercise of that jurisdiction, the rules of equity are to prevail. Before, however, the jurisdiction of the ct. to deprive a father of the guardianship of his children can be called into action, the ct. must be satisfied that he has so conducted himself, or placed himself in such a position, as to render it not merely better for the children, but essential for their safety & welfare in some very serious & important respect, that the father's acknowledged rights should be interfered with. Mere incontinence, or habits of intemperance, will not of itself justify the interference of the ct.

The affidavits of the mother & others, in answer to a rule for a *habeas corpus* by a father to remove his child, a boy of nine years, from the custody of the child's maternal grandfather, disclosing facts which showed appet. to be a person of intemperate & vicious life, & in the habit of using gross & disgusting language as well as personal violence to his wife, the ct. declined to interfere, the present custody of the child being unobjectionable.—*Re* GOLDSWORTHY (1876), 2 Q. B. D. 75; *sub nom.* *Re* GOLDSWORTHY (AN INFANT), *Ex p.* GOLDSWORTHY, 46 L. J. Q. B. 187.

25. —.]—The Q. B. Div. has jurisdiction under Jud. Act, 1873 (c. 66), on an

application by *habeas corpus* by a parent for the custody of an infant, to apply the rules of the ct. of Ch. with regard to the custody of infants; & therefore where a mother, the legal guardian of an infant, a female child of about the age of fifteen, applies by *habeas corpus* for the custody of such infant, the ct., if of opinion that it will not be for the welfare of the child that she should be given into the custody of the mother, will refuse to grant the application, even though the mother may not have been guilty of any misconduct disentitling her to the custody of her child.—*R. v. GYNGALL*, [1893] 2 Q. B. 232; 9 T. L. R. 471; 4 R. 448; *sub nom. Re GYNGALL*, 62 L. J. Q. B. 559; 57 J. P. 773; *sub nom. R. v. GYNGALL, Re HAUSHERR* (OTHERWISE AUSTEN), 69 L. T. 481, C. A.

Annotations.—*Consd. Thomasset v. Thomasset*, [1894] P. 295. *Foll. Re Mathieson* (1918), 87 L. J. Ch. 445. *Reid. Re Newton*, [1896] 1 Ch. 740.

26. ———.]—(1) The [Divorce] Ct. has power to make orders respecting the custody, maintenance, & education of children during the whole period of their infancy, that is, till they attain the age of twenty-one years.

The father's right to such custody exists until the child attains twenty-one (LINDLEY, L.J.).

(2) The jurisdiction of the Ct. of Ch. over infants is twofold. In so far as it depends on the law relating to writs of *habeas corpus*, the power of the ct. appears to have been the same as that of

the cts. of common law. But, quite independently of those writs, the Ct. of Ch. exercised the powers of the Crown as *parens patriæ* over infants, & in exercise of this jurisdiction the power of the ct. has always been much more extensive than that possessed by cts. of common law under a writ of *habeas corpus* (LINDLEY, L.J.).

As regards maintenance, the parents' obligations were measured both at law & in equity by the Poor Laws. I know of no case in which a father has been ordered by a ct. of equity to maintain his child. Cts. of equity ordered children to be maintained out of their own property, but the jurisdiction as to maintenance & education was limited to such property. Jud. Act, 1873 (c. 66), s. 25 (10) . . . enables all Divisions of the High Ct., even on *habeas corpus*, to regard something more than the strict rights of fathers & guardians, & requires all the Divisions to recognise the cardinal principle on which the Ct. of Ch. always proceeded, namely, that in dealing with infants the primary consideration is their benefit (LINDLEY, L.J.).—*THOMASSET v. THOMASSET*, [1894] P. 295; 63 L. J. P. 140; 71 L. T. 148; 42 W. R. 658; 10 T. L. R. 591; 38 Sol. Jo. 630; 6 R. 637, C. A.

Annotations.—*As to* (1) *Reid. Bishop v. Bishop, Judkins v. Judkins*, [1897] P. 138; *B. v. B.*, [1924] P. 176. *As to* (2) *Consd. Stark v. Stark & Hitchins*, [1910] P. 190. *Foll. Re Mathieson* (1918), 87 L. J. Ch. 445.

Part III.—Civil and Legal Capacity and Disabilities.

SECT. 1.—GENERAL PRINCIPLES.

27. Capacity to do binding acts for own benefit.]

—First the common rule is, that an infant in all things which found to his benefit shall have favour & preferment in law as well as another man, but shall not be prejudiced by anything to his disadvantage.—*BASSET'S CASE* (1557), 2 Dyer, 136 a; 73 E. R. 297, Ex. Ch.

Annotations.—*Reid. Markal's Case* (1593), 6 Co. Rep. 3 a; *Conny's Case* (1611), 9 Co. Rep. 84 b. *Mentd. Daniel's v. Uply* (1625), Lat. 39; *Bushell v. Burland* (1708), Holt, K. B. 733.

28. ———.]—(1) Conveyance of an infant mtgee. is binding & cannot be avoided by entry during infancy.

The law, at the same time as it protects their [infants'] imbecility & indiscretion from injury through their own imprudence, enables them to do binding acts, for their own benefit; & without prejudice to themselves, for the benefit of others (LORD MANSFIELD).

(2) "All such gifts, grants or deeds made by infants, which do not take effect by delivery of his hand are void; but all gifts, grants or deeds made by infants, by matter in deed or in writing, which do take effect by delivery of his hand, are voidable by himself, by his heirs, & by those who have his estate." The words "which do take effect" are an essential part of the definition; & exclude letters of attorney, or deeds which delegate a mere power & convey no interest (LORD MANSFIELD).

(3) "The acts of an infant, which do not touch his interest, but take an effect from an authority which he is trusted to exercise, are binding," as

where an infant patron presents (LORD MANSFIELD).

(4) What seems decisive is "that the lessee can, in no case, avoid the lease, on account of the infancy of the lessor," which shows it not to be void, but voidable only; & it is better for infants that they should have an election (LORD MANSFIELD).—*ZOUCH d. ABBOT & HALLET v. PARSONS* (1765), 3 Burr. 1794; 1 Wm. Bl. 575; 97 E. R. 1103.

Annotations.—*As to* (1) *Consd. — v. Handcock* (1810), 17 Ves. 383; *Baylis v. Dineley* (1815), 3 M. & S. 477. *Reid. Maddon v. White* (1787), 2 Term Rep. 159. *As to* (2) *Consd. Burnaby v. Equitable Reversionary Interest Soc.* (1885), 28 Ch. D. 416. *Apld. Carter v. Silber, Carter v. Hasluck*, [1892] 2 Ch. 278. *Reid. — v. Handcock* (1810), 17 Ves. 383; *Thurstan v. Nottingham Permanent Benefit Bldg. Soc.*, [1902] 1 Ch. 1; *Leslie v. Sheill*, [1914] 3 K. B. 607. *Generally, Reid. Nelson v. Stocker* (1859), 32 L. T. O. S. 368. *Mentd. Doe d. Egremont v. Forwood* (1842), 3 Q. B. 627; *Skottowe v. Williams, Williams v. Skottowe* (1860), 7 Jur. N. S. 118; *Spackman v. Evans* (1868), L. R. 3 H. L. 171.

29. Protection against prejudicial acts.] — *BASSET'S CASE*, No. 27, *ante*.

30. ———.]—*GRANGE v. TIVING*, No. 103, *post*.

31. ———.]—*ZOUCH d. ABBOT & HALLET v. PARSONS*, No. 28, *ante*.

See, also, Sects. 2, 5, 14, *post*.

32. No protection in fraud or misconduct.]—Infants & married women have, incidental to their position, certain disabilities, but those disabilities have never been held to protect them in case of misconduct or fraud on their part.—*BREWER v. SWIRLES* (1854), 2 Sm. & G. 219; 2 Eq. Rep. 493; 23 L. J. Ch. 542; 24 L. T. O. S. 57; 18 Jur. 1069; 2 W. R. 339; 65 E. R. 373.

Annotation.—*Mentd. Hanchett v. Briscoe* (1856), 22 Beav. 496.

PART III. SECT. 1.

h. Capacity to contract.]—Having regard to the provisions of Contract Act, IX of 1872, s. 11, a minor in this country cannot contract at all.—

FATIMA BIBI v. DEBNAUTH SHAH (1893), I. L. R. 20 Calo. 508.—IND.

land, the question of the capacity of a person to enter into a contract is

decided by the law of his domicile. This principle of English law is adopted by Contract Act, s. 11.—*KASHIBA v. SHRIPAT NARSHIV* (1894), I. L. R. 19 Bom. 697.—IND.

33. Liability to penalty.]—Infants, on account of the imbecility of their age, shall not be amerced.—**BEECHER'S CASE** (1608), 8 Co. Rep. 58 a; 77 E. R. 559, Ex. Ch.

*Annotations:—***Reid**, *Cotton v. Westcott* (1617), Cro. Jac. 441; *Coan v. Bowles* (1691), 1 Show. 165. *Mentd.* *Hussey v. More* (1617), Cro. Jac. 413; *Darcy v. Jackson* (1622), Palm. 224; *Eardley v. Turnock* (1622), Cro. Jac. 629; *Mason v. Fox* (1622), Cro. Jac. 632; *Langham's Case* (1641), March, 179; *Threadneedle v. Linum* (1674), Freem. K. B. 179; *Walwin v. Smith* (1691), 4 Mod. Rep. 86; *Grenville v. College of Physicians* (1700), 12 Mod. Rep. 386; *Warner v. Green* (1701), 12 Mod. Rep. 580; *Kent v. Kent* (1733), 7 Mod. Rep. 187; *R. v. York Sheriffs* (1832), 3 B. & Ad. 770; *Douglas v. R.* (1848), 12 Jur. 974; *London Corp'n. v. R.* (1848), 13 Q. B. 30; *Kemp v. Neville* (1861), 10 C. B. N. S. 523.

34. —.]—An infant cannot be made liable for a penalty for breach of contract.—**FARMERS & CLEVELAND DAIRIES CO. v. RILEY** (1893), 9 T. L. R. 260, D. O.

*Annotation:—***Reid**, *Morrison, Fleet v. Fletcher* (1900), 17 T. L. R. 95.

— **Penalty annexed to bond.]—**See Nos. 75-78, 703, *post*.

Criminal capacity.]—See CRIMINAL LAW, Vol. XIV., pp. 53-55, Nos. 189-217.

Capacity as to contracts.]—See Part V., *post*.

Capacity to trade.]—See Part V., Sect. 8, *post*.

Capacity in relation to torts.]—See Part VII., *post*.

Capacity as to property.]—See Part VIII., *post*.

Capacity in reference to legal proceedings.]—See Part XIV., *post*.

Capacity to consent—To prove contents of lost will.]—See EXECUTORS, Vol. XXIII., p. 113, No. 1074.

— **To consent to compromise in legal proceedings.]—**See Part XIV., Sect. 3, *post*.

As shareholder in company—Transfers of shares to infants.]—See COMPANIES, Vol. IX., pp. 399, 400, Nos. 2546-2561; & Sect. 10, *post*.

Capacity of infant to elect.]—See EQUITY, Vol. XX., pp. 396, 446, Nos. 1338-1345, 1712-1724.

Capacity to be admitted solicitor.]—See SOLICITORS.

Capacity to practice pharmacy.]—See MEDICINE & PHARMACY.

SECT. 2.—AGENCY.

SUB-SECT. 1.—TO ACT AS AGENT.

See, generally, AGENCY, Vol. I., pp. 267-699.

35. General rule.]—(1) An infant cannot by settlement or otherwise give himself a power.

By a marriage settlement made in the name of a lady, then an infant, it was agreed that the intended husband & infant, & all other necessary parties would, as soon as the case would admit, assign unto the trustees of the settlement certain personal estate to which the infant became, under her father's will, entitled upon her marriage, upon trust for investment, with the consent of the husband & wife, & to pay the income to the wife for her separate use, & on her death to her husband for life, or until bkpcy. or alienation, & in trust for the issue of the marriage, & in default of issue becoming absolutely entitled in trust for such person or persons as the wife should by deed, with or without power of revocation & new appointment, or by will appoint, & in default of such appointment, if the wife should survive the husband, for the wife absolutely, but if he should survive her, in trust for the persons who, under Statute

of Distribution, 1670 (c. 10), should be her next of kin. The infant by a deed-poll exercised the power of appointment by appointing the property, subject to the trusts in the settlement in favour of herself, husband & issue, to the husband absolutely, reserving to herself a power of revocation & new appointment. The wife died an infant without issue. Her interest in the fund agreed to be settled was at the date of the settlement, & at her death still remained reversionary, & no further settlement was made by the husband. The husband went into liquidation, & pltf. was appointed his trustee, & brought an action claiming the settled property against the next of kin, who also claimed it:—*Held*: (2) a power in gross to appoint personalty by deed can be exercised by an infant, & the settlement showed an intention that the power should be exercised during infancy.

(3) An infant may be an agent. An infant may be the donee of a power . . . in a will or other settlement as well as the donee of an ordinary power of attorney (*JAMES, L.J.*).—*Re D'ANGIBAU, ANDREWS v. ANDREWS* (1880), 15 Ch. D. 228; 49 L. J. Ch. 756; 43 L. T. 135; 28 W. R. 930, C. A.

*Annotations:—*As to (2) **Reid**, *Shipway v. Ball* (1881), 16 Ch. D. 376; *Re Newcastle's Estates* (1883), 24 Ch. D. 129; *Pouey v. Hordern*, [1900] 1 Ch. 492; *Re Wernher, Wernher v. Beit*, [1918] 2 Ch. 82; *Re Sutton, Boscawen v. Wyndham*, [1921] 1 Ch. 257. *Generally, Mentd.* *Re Baker, Collins v. Rhodes, Re Seaman, Rhodes v. Wish* (1881), 44 L. T. 414; *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89; *Re Plumtre's Marriage Settlement, Underhill v. Plumtre*, [1910] 1 Ch. 609; *Pullan v. Koe*, [1913] 1 Ch. 9; *Re Torrington*, [1913] 2 Ch. 623; *Re Pryce, Nevill v. Pryce*, [1917] 1 Ch. 234.

36. Infant agent's liability to account—As factor.]—Though an infant may be an exor. & shall be charged because the law enables him; so he may be charged in trover, because a tort, yet neither on a contract, nor as bailiff, nor for goods to carry on a trade, can he be charged; & therefore when they are made factors, security ought to be taken from their friends, for their accounting (*per CUR.*).—*SMALLY v. SMALLY* (1700), 1 Eq. Cas. Abr. 283; 21 E. R. 831.

37. Bill of exchange—Signed for father.]—Evidence that the son of deft., a minor, has in three or four instances signed bills of exchange for his father, is sufficient in an action against the father on a guarantee, to warrant the reading of an instrument, purporting to a guarantee by the father in the handwriting of the son.—*WATKINS v. VINCE* (1818), 2 Stark. 368, N. P.

38. Donee of power of attorney.]—*Re D'ANGIBAU, ANDREWS v. ANDREWS*, No. 35, *ante*.

As to principal's rights in regard to accounts generally, see AGENCY, Vol. I., pp. 437 *et seq.*

SUB-SECT. 2.—TO APPOINT AGENT OR ATTORNEY.

39. General rule—Agent.]—A next friend cannot bind an infant because an infant cannot appoint an agent. If an infant makes a feoffment by letter of attorney, *nil operatur* (*PARKE, B.*).—*DOE d. THOMAS v. ROBERTS* (1847), 16 M. & W. 778; 153 E. R. 1404.

*Annotation:—***Mentd.** *Cope v. Mooney* (1863), 10 L. T. 854.

40. — Attorney.]—An infant *feme covert* cannot appear by attorney, for no infant can appoint an attorney.—*DARCY v. JACKSON* (1621), Palm. 224; 81 E. R. 1053.

*Annotations:—***Reid**, *Foxwith v. Tremain* (1670), 1 Mod.

PART III. SECT. 2, SUB-SECT. 2.

39 i. General rule—Agent.]—The appointment by an infant of an agent to act for him is not void but only voidable if it is to his advantage.—*JOHANNSON v. GUDMUNDSON* (1909), 19 Man. L. R. 83.—**CAN.**

Sect. 2.—Agency: Sub-sect. 2. Sects. 3, 4 & 5.]

Rep. 296. *Mentd. Stone v. Newman* (1835), Cro. Car. 427; *Adams v. Savage Tertenants* (1703), 2 Salk. 601; *Zouch d. Abbot & Hallet v. Parsons* (1765), 3 Burr. 1794.

41. —.]—A *cognovit* was given by a minor, authorising an attorney to appear for him & confess an action brought against him for a precise sum for the necessities provided for him by pltf., with an undertaking "not to bring any writ of error, nor do any act to prevent pltf. from entering up judgment or suing out execution":—*Held*: bad on three grounds: (1) an infant cannot appoint nor appear by attorney, but only by guardian; (2) he cannot state an account; (3) he cannot deprive himself of his right to bring a writ of error, or any other right to which he was entitled.—*OLIVER v. WOODROFFE* (1839), 4 M. & W. 650; 7 Dowl. 166; 1 Horn & H. 474; 8 L. J. Ex. 105; 3 J. P. 85; 3 Jur. 12, 59; 150 E. R. 1581.

Annotations:—*Mentd. Barnes v. Pendry* (1839), 3 Jur. 506; *Poole v. Hobbs* (1839), 3 Jur. 1151.

42. —.]—An appearance entered by pltf. for an infant deft. is not a nullity, but error. The ct., however, will set aside same without costs, to save the necessity of bringing error. In an action against an infant, he must appear only by guardian, for he has not knowledge of his own affairs, or to choose a man to plead well for him, & may have an action against his guardian if he loses by mispleading; if he appears otherwise, error may be brought.—*STEPHENS v. LOWNDES* (1845), 14 L. J. C. P. 229; 5 L. T. O. S. 200.

43. *Feoffment by letter of attorney.*—(1) If there be lord & infant tenant, & the infant makes a feoffment in fee, & executes it by livery of seisin by his own hands, & afterwards dies without heir, the lord shall not take benefit of any escheat in that case. But if the feoffment be executed by letter of attorney, it is void, & the land shall escheat.

(2) There is a difference between a title of entry by reason of a condition & a right of entry by reason of infancy. None shall take benefit of the infancy of his ancestor, but he who has a right descended to him from the same ancestor; but the heir may take benefit of a condition, although no right descends from the same ancestor.

As to the condition in law which is founded upon skill & confidence, as the offices of parkership, stewardship, etc., in fee, which descend to an infant or a *feme covert*, if the condition in law annexed to the offices be broken, it shall bar the infant & *feme covert* for ever (*per CUR.*).

(3) If an infant be a gaoler & suffers an escape, there an action lies (*per CUR.*).—*WHITTINGHAM'S CASE* (1603), 8 Co. Rep. 42 b; 77 E. R. 537.

Annotations:—As to (1) *Consd. Zouch d. Abbot & Hallet v. Parsons* (1765), 3 Burr. 1794. *Refd. Smaleman v. Eighurrow* (1616), 3 Bulst. 272; *Burgess v. Wheate* (1759), 1 Eden, 177; *Keane v. Boycott* (1795), 2 Hy. Bl. 511. As to (2) *Refd. Fry's Case* (1672), 1 Vent. 199; *King v. Dilliston* (1688), 1 Show. 83.

44. —.]—*RAMES v. MACHIN* (1608), Noy, 130; 74 E. R. 1094.

45. —.]—*ZOUCH d. ABBOT & HALLET v. PARSONS*, No. 28, *ante*.

46. —.]—*DOE d. THOMAS v. ROBERTS*, No. 39, *ante*.

47. *Warrant of attorney—Joint warrant given by infant & another—Void as against infant.*—Joint warrant of attorney, to confess judgment by

an infant & another, may be vacated against the infant only.—*MOTTEUX v. ST. AUBIN* (1777), 2 Wm. Bl. 1133; 96 E. R. 669.

Annotations:—*Folld. Ashlin v. Langton* (1834), 4 Moo. & S. 719. *Consd. Gillow v. Lillie* (1835), 1 Scott, 597.

48. —.]—Where a joint warrant of attorney is given by two or more persons, one of whom is an infant, the ct. will order it to be vacated as against the latter, & to stand against the other parties.—*ASHLIN v. LANGTON* (1834), 4 Moo. & S. 719; 3 L. J. C. P. 264.

49. —.]—*Given for purpose of collusion.*—A warrant of attorney given by an infant is absolutely void & the ct. will not confirm it though the infant appear to have given it, knowing that it was not valid, for the purpose of collusion.—*SAUNDERSON v. MARR* (1788), 1 Hy. Bl. 75; 126 E. R. 46.

Annotation:—*Expld. & Distd. Wilkins v. Wetherill* (1802), 3 Bos. & P. 220.

50. —.]—*WEAVER v. STOKES*, No. 342, *post*.

51. —.]—As this was the warrant of attorney of an infant, we set aside the judgment of execution, & the warrant of attorney also (*LORD DENMAN, C.J.*).—*TAPRELE v. O'BRIEN* (1837), 1 Jur. 53.

52. *Power to authorise doing of specific lawful act.*—To a declaration in trespass *quare clausum fregit*, deft. pleaded that the *locus in quo* was the soil & freehold of T.; & justified as servant, & by command, of T. Replication, traversing the command. T. was a minor & ward in Chancery, & deft. the receiver & general agent for the estate:—*Held*: from this the jury might infer a general authority to do the act, & if they so inferred, ought to find for deft.; & upon this issue, pltf. was not entitled to show that he held under a lease, & to insist that the act was therefore such as an infant could not authorise.—*EWER v. JONES* (1846), 9 Q. B. 623; 16 L. J. Q. B. 42; 10 Jur. 965; 115 E. R. 1412; *sub nom. URE v. JONES*, 8 L. T. O. S. 135.

SECT. 3.—ARBITRATION.

53. *Validity of submission.*—*RUDSTON & YATES CASE* (1641), March, 111, 141; 82 E. R. 434, 448.

Annotations:—*N.F. Roberts v. Newbold* (1694), Comb. 318. *Refd. R. v. Grant* (1849), 14 Q. B. 43.

54. —.]—*CAVENDISH v. —* (1676), 1 Cas. in Ch. 279; 22 E. R. 800, L. C.

Annotation:—*Refd. Biddell v. Dowse* (1827), 6 B. & C. 255.

55. —.]—*By guardian.*—*BATH & WELLS (BP.) v. HIPPESELEY* (1676), cited in 3 Atk. at p. 614, L. C.

Annotation:—*Refd. Harvey v. Ashley* (1748), 3 Atk. 607.

56. —.]—(1) One of the parties to a submission to arbn. was an infant:—*Held*: though by law an infant cannot submit, his guardian may submit for him, & bind himself that the infant shall perform the award.

(2) The submission of an infant is not void but voidable.—*ROBERTS v. NEWBOLD* (1694), Comb. 318; 90 E. R. 501.

57. —.]—*BIDDELL v. DOWSE*, No. 58, *post*.

PART III. SECT. 3.

53 i. *Validity of submission.*—*LAKSHMANA CHETTI v. CHINNATHAMBI CHETTI* (1900), 1 L. R. 24 Mad. 326.—IND.

53 ii. —.]—Where a man has a

life interest in personal property, remainder to his son a minor, the tenant for life cannot by referring to arbitration, bind the infant's interest in such personal property.—*SINGLETON v. SINGLETON* (1809), 2 Mol. 520.—IR.

53 iii. —.]—In an action on an

award, one of the pltf. being an infant:—*Held*: his submission to arbitration was valid, as it might be for his benefit.—*HENERY v. HENERY* (1826), Batt. 125.—IR.

1. —.]—*By attorney.*—J., a pltf., by his next friend, in the second of

58. — By attorney—Power to authorise attorney.]—(1) Declaration stated, that before the making of the promise therein mentioned, certain differences had arisen, & a certain suit was depending in Chancery between D. & divers infants plffs., & P., B. since deceased, & R. defts.; & it was ordered, with the consent of the attorneys of the parties in the suit, that the several matters in question in the suit, & all disputes & differences then subsisting between the pltf. D. & the infants, & P. & B. since deceased, should be referred to the arbitrament of C. who was to make one or more awards, and in case either of the parties died, the death was not to abate the reference; that B. afterwards died, before the making of the award; that the arbitrator awarded that defts., as exor. & extrix. of B. should pay to pltf. £225 out of B.'s assets, & that being so liable, defts., exor. & extrix., promised to pay:—*Held*: no sufficient authority to refer on behalf of the infant plffs. was shown, the attorneys in the suit having no such authority, & therefore the submission was not mutual, & consequently, the award was bad.

(2) *Qu.*: whether an infant can be bound by a submission to arbitration entered into on his behalf by his guardian. But a submission to arbitration entered into by himself alone, or by any other person than his guardian on his behalf, is clearly void.—*BIDDELL v. DOWSE* (1827), 6 B. & C. 255; 9 Dow. & Ry. K. B. 404; 108 E. R. 447; *sub nom.* COXE & BIDDELL *v.* DOWSE, 5 L. J. O. S. K. B. 128; *reusg.* S. C. *sub nom.* Dowse *v.* COXE (1825), 3 Bing. 20.

Annotations:—*As to* (1) *Consd.* Macdougall *v.* Robertson (1827), 2 Y. & J. 11; Thorp *v.* Cole (1835), 2 Cr. M. & R. 367. *Reid.* Clarke *v.* Crofts (1827), 4 Bing. 143; Ferrer *v.* Owen (1827), 7 B. & C. 427; Wrightson *v.* Bywater (1838), 6 Dowl. 359; Faviell *v.* Eastern Counties Ry. (1848), 2 Exch. 344; Swinfen *v.* Swinfen (1857), 1 C. B. N. S. 364; Farhall *v.* Farhall (1871), 7 Ch. App. 123. *As to* (2) *Reid.* Faviell *v.* Eastern Counties Ry. (1848), 2 Exch. 344; Swinfen *v.* Swinfen (1857), 1 C. B. N. S. 364.

Compare Sect. 2, *ante*.

— **Time for objection by adult.]—**See ARBITRATION, Vol. II., p. 553, No. 1850.

59. — Whether void or voidable.]—The question was if a submission by an infant be void or voidable, for if void then an obligation made by him & his father of the one part is also void:—*Held*: voidable only, the infant might waive the arbitrament if it be to his prejudice & disadvantage during his minority, but at his full age if he makes any note which amounts to an agreement that shall bind him.—*STONE v. KNIGHT* (1627), Lat. 207; Noy, 93; 82 E. R. 348; *sub nom.* KNIGHT *v.* STONE, W. Jo. 164.

Annotations:—*Reid.* Rudston & Yates Case (1641), March, 141; Holt *v.* Clarencieux (Ward) (1732), 2 Stra. 937; Warwick *v.* Bruce (1813), 2 M. & S. 205.

60. — —.]—ROBERTS *v.* NEWBOLD, No. 56, *ante*.

— *See, also*, ARBITRATION, Vol. II., p. 329, Nos. 123–126.

61. Costs of reference—Order for infant to pay—Validity of order.]—Three causes were referred to arbitration, in one of which the infant sued by his next friend; the other two being actions in which he was the substantial, though not the nominal pltf. The costs of the causes were to abide the event, & the costs of the reference & award were to be in the discretion of the arbitrator. The arbitrator decided all the causes in favour of deft., & ordered that the infant should

pay all the costs of the reference & award:—*Held*: this was no excess of authority.—*PROUDFOOT v. BOYLE* (1846), 15 M. & W. 198; 3 Dow. & L. 524; 6 L. T. O. S. 395; 153 E. R. 820.

SECT. 4.—BANKRUPTCY.

See BANKRUPTCY, Vol. IV., p. 28, Nos. 218 *et seq.*

SECT. 5.—BILLS OF EXCHANGE, ETC.

See Infants Relief Act, 1874 (c. 62), s. 2; Bills of Exchange Act, 1882 (c. 61), s. 22 (2).

62. Liability as drawer—Ratification after full age—Infants Relief Act, 1874 (c. 62), s. 2.]—Above sect. which enacts that no action shall be brought on any ratification made after full age of a contract made during infancy, applies to ratifications made after the passing of the Act, of contracts made before that time. An infant before the passing of the Act gave a bill of exchange, payable after his majority, to a jeweller in payment for jewelry. After his majority, & after the Act came into operation, the creditor obtained judgment by default against him in an action on the bill of exchange, & then took out a debtor's summons, & on his failing to comply with it, filed a petition for adjudication against him:—*Held*: the Ct. of Bkpcy. would look into the consideration for the judgment; & if the conduct of the debtor, in allowing judgment to go by default against him, operated as a ratification of the bill of exchange, such ratification was rendered void by above sect.; & the petition for adjudication was consequently dismissed.—*Re ONSLOW, Ex p. KIBBLE* (1875), 10 Ch. App. 373; 44 L. J. Bcy. 63; 32 L. T. 138; 23 W. R. 433, L. JJ.

Annotations:—*Distd.* *Re* Lynch, *Ex p.* Lynch (1876), 2 Ch. D. 227. *Expld.* *Re* Lennox, *Ex p.* Lennox (1885), 16 Q. B. D. 315. *Appld.* Smith *v.* King, [1892] 2 Q. B. 643. *Reid.* *Re* Jones, *Ex p.* Jones (1881), 18 Ch. D. 109; Duncan *v.* Dixon (1890), 44 Ch. D. 211; *Re* Leavesley, [1891] 2 Ch. 1. *Mentd.* *Re* Andrew (1875), 1 Ch. D. 358; *Re* Blythe, *Ex p.* Banner (1881), 44 L. T. 908; *Re* Tolle-mache (No. 1), *Ex p.* Revell (1884), 13 Q. B. D. 720; *Re* Manchester, Middleton & District Tram. Co., [1893] 2 Ch. 638; *Re* Hawkins, *Ex p.* Troup, [1895] 1 Q. B. 404; *Re* G. E. B., [1903] 2 K. B. 340; *Re* Debtor (1915), 113 L. T. 704.

63. Liability as acceptor—Acceptance after full age—For debt contracted during infancy—Infants Relief Act, 1874 (c. 62).]—Deft., during infancy became jointly with two others, indebted to a firm of brokers who brought an action against them after deft. had attained his majority to recover the amount of the debt. The action was compromised on terms that deft. should give two acceptances for £50 each, & one of his co-defts. an acceptance for £80, the other deft. being discharged from the action. One of the bills given by deft. to the brokers was indorsed by the latter to pltf., who had acted as their solr. in the action, & who took the bill with notice of the circumstances under which it was given:—*Held*: the transaction merely amounted to a promise made by deft. after full age to pay a debt contracted during infancy, or to a ratification made by him after full age of a promise or contract made during

two causes, referred by consent to arbitration, was a minor. The consent was signed by J.'s attorney, but not by his next friend. *Semble*: the submission did not bind J.—*FAGAN v.*

FAGAN (1849), 12 I. Eq. R. 483.—*IR.*

PART III. SECT. 5.

*m. Liability as drawer.]—*A cheque

drawn by an infant upon a bank entitles the holder to receive payment & so constitutes a discharge.—*FREEMAN v. BANK OF MONTREAL* (1912), 26 O. L. R. 451.—*CAN.*

Sect. 5.—Bills of exchange, etc. Sects. 6, 7, 8, 9, 10, 11 & 12.]

infancy; & was, therefore, avoided by the operation of sect. 2 of above Act.—**SMITH v. KING**, [1892] 2 Q. B. 543; 67 L. T. 420; 56 J. P. 775; 40 W. R. 542; 36 Sol. Jo. 489, D. C.

Annotation:—*Folld. Hutley v. Peacock* (1913), 30 T. L. R. 42.

64. — Acceptance during infancy.]—Infancy is a good plea to an action on a bill of exchange.—**WILLIAMS v. HARRISON** (1691), 3 Salk. 197; Carth. 160; Holt, K. B. 359; 91 E. R. 774.

Annotations:—*Reid. Gibbs v. Merrill* (1810), 3 Taunt. 307; *Green v. Greenbank* (1816), 2 Marsh. 485.

65. — Evidence of infancy.]—**BLYTH v. ARCHBOLD** (1835), Chitty's Precedents, 2nd ed., p. 330, n.

Annotation:—*Consd. Roberts v. Bethell* (1852), 12 C. B. 778.

— — — — —.]—The declaration stated, that pltf. drew his bill of exchange, to wit, on Feb. 16, 1846, which deft. afterwards accepted, to wit, on the day & year aforesaid. The plea stated, that deft. accepted the bill whilst he was an infant, being at the time of its acceptance without a date; that pltf. afterwards altered the bill by writing a date thereon, & that there never was any licence or ratification given by deft. to such alteration, after he attained the age of twenty-one years; verification:—**Held**: the plea was a good plea, & it disclosed only a single defence, infancy.—**HARRISON v. COTGREAVE** (1847), 4 C. B. 562; 5 Dow. & L. 169; 16 L. J. C. P. 198; 136 E. R. 627.

67. — — — — —.]—A declaration by an indorser against the acceptor of a bill of exchange stated, that the bill was drawn on Sept. 20, 1847, payable four months after date, & that deft. then accepted the bill. Plea, infancy of deft. It was proved that deft. became of full age on Dec. 24, 1847:—**Held**: this was no evidence of deft.'s being an infant at the time of his accepting the bill.—**HARRISON v. CLIFTON** (1848), 17 L. J. Ex. 233.

Annotation:—*Reid. Levy v. Bulkeley* (1850), 14 L. T. O. S. 378.

68. — — — — —.]—A bill of exchange drawn by pltf. & dated Feb. 6, 1849, payable at four months after date, upon deft., who had accepted it. Deft. became of age on May 5, 1849, a month before it became due:—**Held**: there was evidence to go to the jury that such bill was given before deft. became of age, notwithstanding there was no direct proof of the fact.—**LEVY v. BULKELEY** (1850), 14 L. T. O. S. 378.

Annotation:—*Reid. Roberts v. Bethell* (1852), 22 L. J. C. P. 69.

69. — — — — —.]—*Assumpsit* by indorsee against acceptor on six bills of exchange, five of which became due on or before Feb. 5, & one on Mar. 12, 1851. Plea, that deft. was an infant at the time of accepting the bills. Issue being joined upon the replication to this plea, it was proved, that the drawer, the acceptor, & the indorsee, all resided in London, & that deft. attained his majority on Mar. 11, 1851:—**Held**: upon this evidence, the jury were warranted in finding that the bills were accepted by deft. whilst he was an infant, a bill of exchange, in the absence of proof to the contrary, being presumably accepted within a reasonable time after its date, & before its maturity.—**ROBERTS v. BETHELL** (1852), 12

C. B. 778; 22 L. J. C. P. 69; 20 L. T. O. S. 80; 16 Jur. 1087; 1 W. R. 80; 138 E. R. 1111.

Annotations:—*Mentd. Mountague v. Perkins* (1853), 1 W. R. 437; *Wetton v. Hodd* (1854), 2 C. L. R. 848.

Bills given for necessaries.]—See Part V., Sect. 6, sub-sect. 5, *post*.

Bills drawn by infant partners—Liability of partners inter se.]—See No. 352, *post*.

70. Promissory note—Given by infant as agent for adult—Not binding on adult—Repairs to ship.]—**GARNUM v. BENNET** (1728), 1 Barn. K. B. 96; 2 Stra. 816; 94 E. R. 67.

71. — Given after full age—Debt contracted during infancy—Cancellation.]—A schoolboy contracts a debt of £59 for burgundy, champagne, claret, etc., with G., a victualler, in five months time; in a few days after he came of age, G. prevailed on him to give a note for the £59, without producing any account, or delivering him a bill. **LORD HARDWICKE, C.**, upon the circumstance of the case, decreed the note to be delivered up to be cancelled.

The infant had no occasion to run any score at all, being allowed 7s. a week by his guardian. . . . Every item in the bill is for meat & drink for himself & a dog. Some items of this bill are the most gross I ever saw . . . claret, champagne & burgundy . . . Barbados water . . . 15s. for keeping the infant's dog (**LORD HARDWICKE, C.**).—**BROOKE v. GALLY** (1740), 2 Atk. 34; Barn. Ch. 1; 26 E. R. 417, L. C.

72. — Contract for infant's benefit.]—**VALENTINI v. CANALI**, No. 207, *post*.

73. — Misrepresentation as to age.]—**LEVENE v. BROUGHAM**, No. 366, *post*.

— — — — —.]—See, further, **BILLS OF EXCHANGE**, Vol. VI., pp. 50, 95, 96, Nos. 374, 678, 679.

74. Liability of indorser—Drawer an infant.]—Indorsee of a note may recover against an indorser, though the original drawer was an infant.—**HALY v. LANE** (1741), 2 Atk. 181; 26 E. R. 513.

— — — — —.]—See, further, **BILLS OF EXCHANGE**, Vol. VI., pp. 302, 303, 307, Nos. 2018, 2027, 2054.

SECT. 6.—BONDS.

75. Bond with penalty annexed—Void.]—An infant may bind himself in a single bond, for necessaries; but if a penalty be annexed it is void.—**AYLIFF v. ARCHDALE** (1603), Cro. Eliz. 920; 78 E. R. 1142.

Annotations:—*Reid. Keane v. Boycott* (1795), 2 Hy. Bl. 511; *Walter v. Everard*, [1891] 2 Q. B. 369.

76. — — — — —.]—**BLACKSTONE'S CASE** (1619), cited in Noy, at p. 85; 74 E. R. 1052.

77. — — — — —.]—An infant can on no account bind himself in a bond with a penalty conditioned for payment of interest as well as principal.—**FISHER v. MOWBRAY** (1807), 8 East, 330; 103 E. R. 369.

Annotations:—*Reid. Baylis v. Dineley* (1815), 3 M. & S. 477; *Re King & King, Ex p. Unity Joint Stock Mutual Banking Asscn.* (1857), 30 L. T. O. S. 246.

78. — — — — —.]—(1) Debt on bond with a penalty; plea, infancy; replication, that after the making of the bond & before commencement of the suit he attained his full age, & afterwards, & before the suit, assented to & ratified & confirmed the bond; upon special demurrer:—**Held**: the replication was ill, for an infant cannot give a bond with a penalty for the payment of interest;

PART III. SECT. 6.

1 rule.]—A minor cannot be sued on a bond executed by him during minority, & not ratified by him after.—**KASHIBA v. SHRIPAT NARSHIV** (1894), 1 L. R. 19 Bom. 697.—**IND.**

& unless he be estopped by some act at full age of as high authority as the bond, he shall avoid it.

But how do these authorities affect a case like the present, where it is clear upon the face of the instrument that it is to the prejudice of the infant, for it is an obligation with a penalty & for payment of interest? . . . In *Zouch d. Abbot & Hallet v. Parsons*, No. 28, *ante*, where this subject was much considered I find nothing to show that an infant may bind himself to his prejudice. It is the privilege of the infant that he shall not, & we should be breaking down the protection which the law has cast around him, if we were to give effect to a confirmation by parol of a deed like this made by him during infancy (LORD ELLENBOROUGH, C.J.).

(2) In the case cited of the infant lessee it was equivocal in the constitution of that estate whether it was not for his benefit; a possession was given him & a right to the estate, therefore it was equivocal whether it might not be for his benefit, & then he continues after full age & adopts it. In the case of the infant lessor, that being a lease rendering rent, imported on the face of it a benefit to the infant & his accepting the rent at full age was conclusive that it was for his benefit (LORD ELLENBOROUGH, C.J.).—*BAYLIS v. DINELEY* (1815), 3 M. & S. 477; 105 E. R. 689.

Annotations:—As to (1) Rehd. Thornton v. Illingworth (1824), 4 Dow. & Ry. K. B. 545; *Re King & King, Ex p. Unity Joint Stock Mutual Banking Asscn.* (1857), 30 L. T. O. S. 246; *Walter v. Everard*, [1891] 2 Q. B. 369. *As to (2) Rehd. N. W. Ry. v. M'Michael, Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher* (1851), 5 Exch. 114.

79. ———.]—*VIDITZ v. O'HAGAN*, No. 703, *post*.

Bonds for necessities supplied.]—See Part V., Sect. 6, sub-sect. 5, *post*.

Grant of rentcharge.]—See Real Property Act, 1925 (c. 20).

SECT. 7.—COMPROMISE OF ACTIONS.

*See Part XIV., Sect. 3, sub-sect. 1, *post*.*

SECT. 8.—EXECUTORS AND ADMINISTRATORS.

See, generally, Administration of Estates Act, 1798 (c. 87), s. 6; Administration of Estates Act, 1925 (c. 23).

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 165.

Administration durante minore aetate.]—See EXECUTORS, Vol. XXIII., pp. 195 *et seq*.

Liability to account as executor de son tort.]—See EXECUTORS, Vol. XXIV., p. 681, Nos. 7076, 7077.

Capacity to hold land—As executor.]—See Administration of Estate Act, 1925 (c. 23), s. 1 (6).

Actions by & against infant executors.]—See EXECUTORS, Vol. XXIV., pp. 717, 729, Nos. 7450, 7451, 7571–7575; & generally, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 165 (2).

SECT. 9.—MARRIAGE.

*See Part IV., *post*.*

SECT. 10.—MEMBERSHIP OF CORPORATIONS, COMPANIES AND SOCIETIES.

80. Of corporation—Construction of act of incorporation.]—The question whether an infant

is capable of being a member of a corpn. is a question of construction, & depends upon whether the Act of incorporation authorises or prohibits such membership.

Where a corpn. was created by Act of Parliament for the purpose of establishing a school for the education of children of officers in the Royal Navy & Royal Marines:—*Held*: an infant drawn from the class of minors for whose benefit the school was established was not eligible to be a member of the corpn.—*Re ROYAL NAVAL SCHOOL, SEYMOUR v. ROYAL NAVAL SCHOOL*, [1910] 1 Ch. 806; 79 L. J. Ch. 366; 102 L. T. 490; 26 T. L. R. 382; 54 Sol. Jo. 407.

— **As mayor or burgess.]—See Sect. 13, *post*.**

81. Of company—As transferee of shares—Liability of broker.]—D. held shares in a joint stock company, which he agreed through his broker, to sell to pltf. N., a dealer on the Stock Exchange. N. in due time gave the name of G. as the transferee, & the shares were transferred to him. The co. was afterwards wound up; & as it appeared that G. was an infant, D. was placed on the list as contributory in respect of these shares, & had paid £1,300, for calls on them. D. commenced an action against N. to recover the £1,300, & N. then filed the bill in this suit against D. & E. the father of G., alleging that E. was the real purchaser of the shares & liable for any loss, & praying that the action might be restrained, & that the questions might be decided in the suit. The judge having granted the injunction, D. appealed:—*Held*: D. ought not to be deprived of the opportunity of establishing his claim & of recovering, if he could, against N., merely because another person might also be liable to pay the money, & might be the person who ultimately would have to pay.—*NICKALLS v. EATON* (1870), 23 L. T. 689; 19 W. R. 172, L. C.

82. ———.]—QUEENSLAND INVESTMENT & LAND CO., LTD. v. O'CONNELL & PALMER (1896), 12 T. L. R. 502; 40 Sol. Jo. 621.

— **———.]—See, further, COMPANIES, Vol. IX., p. 330, Nos. 2081–2083.**

— **———.]—See, further, COMPANIES, Vol. IX., pp. 399–400, Nos. 2546–2561.**

— **Position of transferor to infant.]—See COMPANIES, Vol. IX., pp. 400, 401, Nos. 2562–2570a.**

— **Liability of parent.]—See COMPANIES, Vol. IX., pp. 401, 402, Nos. 2571, 2572.**

— **Allotments of shares to infants.]—See COMPANIES, Vol. IX., pp. 276, 277, Nos. 1699–1703.**

Of building societies.]—See BUILDING SOCIETIES, Vol. VII., pp. 465, 471, Nos. 69, 108.

Of friendly societies.]—See FRIENDLY SOCIETIES, Vol. XXV., p. 303.

Of industrial, provident & similar societies.]—See INDUSTRIAL, ETC., SOCIETIES, pp. 120–123.

Of trade union.]—See TRADE & TRADE UNIONS. Other societies.]—See Titles *passim*.

SECT. 11.—PARTNERSHIP.

See PARTNERSHIP.

SECT. 12.—PUBLIC AND OTHER DUTIES.

To exercise franchise.]—See ELECTIONS, Vol. XX., pp. 8, 9, Nos. 18–19.

To serve on juries.]—See JURIES.

Sect. 12.—Public and other duties. Sects. 13 & 14.]

To give evidence.]—See EVIDENCE, Vol. XXII., p. 388, Nos. 3974–3980.

—In criminal matters.]—See CRIMINAL LAW, Vol. XIV., pp. 453 *et seq.*

83. To present to living.]—ZOUCH d. ABBOT & HALLET v. PARSONS, No. 28, *ante.*

See, also, ECCLESIASTICAL LAW, Vol. XIX., pp. 378, 379, Nos. 2000–2003.

84. To enter into recognisances—To prosecute.]—A person of the age of sixteen is competent to enter into a recognisance conditioned to prosecute on a criminal charge; & if it be forfeited & estreated, the ct. will not discharge it, unless a sufficient case for relief be made out.—*Ex p. WILLIAMS* (1824), M'Cle. 493; 13 Price, 673; 148 E. R. 206.

Recognisances generally, see CRIMINAL LAW, Vol. XIV., p. 201.

SECT. 13.—PUBLIC AND OTHER OFFICES AND POSITIONS.

85. Office of public & pecuniary trust — Clerk of court.]—An infant cannot be appointed to the office of clerk of a ct. of requests, where it is part of the duty of that officer to receive the money of the suitors.

No authority has been cited to show that the grant of an office of public & pecuniary trust to an infant is valid. It is true that the offices of sheriff & of gaoler have been granted in fee & that such grants are not void, on the ground that those offices may by descent vest in an infant. In those cases, however, the grantees have the power of appointing deputies. . . . Looking at this Act of Parliament, it appears that this is an office of pecuniary trust, & it seems to me, therefore, impossible to allow the grant of such an office to an infant, for in the event of him being guilty of negligence, the suitors of the ct. might be deprived of that remedy which they ought to have against a public officer entrusted with their money (ABBOTT, C.J.).—CLARIDGE v. EVELYN (1821), 5 B. & Ald. 81; 106 E. R. 1123.

*Annotations:—*Mentd. Drinkwater v. Deakin (1874), L. R. 9 C. P. 626; Hobbs v. Morey (1903), 73 L. J. K. B. 47.

86. Bailiff.]—*Semble*: an infant cannot be a bailiff or sheriff's officer.—CUCKSON v. WINTER (1828), 2 Man. & Ry. K. B. 313; 6 L. J. O. S. K. B. 309.

87. Office for which officer can appoint deputy—Sheriff.]—A grant by the bishop of the office of register of a diocese, in reversion after the death of the tenant for life, to an infant of eleven years of age, *exercendum per se vel deputatum sufficientem*, is good, notwithstanding the infancy; but if he make an insufficient deputy, it is a forfeiture of the office.

As an infant may have an office by descent, as to be sheriff or warden of the Fleet & the like, which are offices of charge & of trust, so he may have an office by grant. . . . Also if it had fallen unto him at the time of the grant, he was then of such age as by intendment he might have written the acts & orders, etc., & made election of a sufficient deputy (*per CUR.*).—YOUNG v. FOWLER

(1640), Cro. Car. 555; March, 38; 79 E. R. 1078.

*Annotations:—*Consd. Claridge v. Evelyn (1821), 5 B. & Ald. 81. Refd. Eddleston v. Collins (1852), 10 Hare, 99. Mentd. Threadneedle v. Linum (1674), Freem. K. B. 179; Ridley v. Pownell (1675), Freem. K. B. 394; R. v. Kempe (1695), 1 Ld. Raym. 49; Trelawney v. Winchester (Bp.) (1757), 1 Keny. 256.

88. —CLARIDGE v. EVELYN, No. 85, *ante.*

89. —Gaoler.]—WHITTINGHAM'S CASE, No. 43, *ante.*

90. ——.]—YOUNG v. FOWLER, No. 87, *ante.*

91. ——.]—CLARIDGE v. EVELYN, No. 85, *ante.*

Public officers generally, see PUBLIC AUTHORITIES.

Office of Sovereign.]—See CONSTITUTIONAL LAW, Vol. XI., p. 499, No. 25.

Peerage.]—See PEERAGES & DIGNITIES.

Membership of Parliament.]—See PARLIAMENT.

Membership of, or office in municipal or other corporations.]—See LOCAL GOVERNMENT.

Guardianship of poor.]—See POOR LAW.

92. Office of descent.]—WHITTINGHAM'S CASE, No. 43, *ante.*

93. ——.]—A grant of the reversion of the office of register to an infant of eleven years of age *exercendum per se vel sufficientem deputatum suum*, etc., is good.—YOUNG v. STOELL (1632), Cro. Car. 279; 79 E. R. 844; *sub nom.* YONGE v. STOWELL, W. Jo. 310.

*Annotations:—*Refd. Eddleston v. Collins (1852), 10 Hare, 99. Mentd. Ridley v. Pownell (1675), Freem. K. B. 394; R. v. Kempe (1695), 1 Ld. Raym. 49; R. v. Wake (1857), 4 Jur. N. S. 68.

94. ——.]—YOUNG v. FOWLER, No. 87, *ante.*

95. ——.]—CLARIDGE v. EVELYN, No. 85, *ante.*

96. Lordship of manor.]—Grants by copy shall not be avoided for infancy, coverture, nor in respect of the exility, baseness, or uncertainty of the interests or estates of the lords.—SWAYNE'S CASE (1608), as reported in 8 Co. Rep. 63 a; 77 E. R. 568.

*Annotations:—*Mentd. Sammer v. Force (1610), 2 Brownl. 208; Rowles v. Mason (1612), 2 Brownl. 85; Liford's Case (1614), 11 Co. Rep. 46 b; Secheverel v. Dale (1627), Poph. 193; Thorne v. Tyler (1641), March, 161; Barnardiston v. Soam (1674), 3 Keb. 419; Gosling v. Veley & Joslin (1850), 19 L. J. Q. B. 111.

97. Stewardship of manor.]—An infant cannot take a grant of the office of steward of a manor, except *exercendum per se aut deputatum*.—SCAMBLER v. WATERS (1598), Cro. Eliz. 636; 78 E. R. 876.

*Annotations:—*Dbtd. Young v. Fowler (1640), Cro. Car. 555. Consd. Eddleston v. Collins (1853), 3 De G. M. & G. 1. Mentd. Salisbury's Case (1613), 10 Co. Rep. 58 b; Gee v. Freedland (1626), Cro. Car. 47.

98. ——.]—The steward of the manor, although a minor, may execute the office if he have sufficient discretion.—EDDLESTON v. COLLINS (1853), 3 De G. M. & G. 1; 20 L. T. O. S. 298; 17 Jur. 331; 1 W. R. 169; 43 E. R. 1; *sub nom.* EDDLESTON v. COLLINS, 22 L. J. Ch. 480, L. C. & L. JJ.

*Annotations:—*Mentd. Flack v. Downing College (1853), 13 C. B. 945; Re Betton's Trust Estates (1871), L. R. 12 Eq. 553.

99. Mastership of apprentice.]—An apprentice bound to an infant gains settlement under indenture notwithstanding master's infancy.—R. v. ST. PETROX (INHABITANTS) (1791), 4 Term Rep. 196; 2 Bott, 401; 100 E. R. 970.

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of of Peace being ministerial be held an .—CROSBIE

SECT. 14.—POWERS.

See, generally, POWERS.

100. General rule.]—(1) As to the general question concerning powers, it must be admitted there are some kind of powers an infant may execute; as where he is a mere instrument or conduit pipe, where no prudence or discretion is required, or where his right is not affected (LORD HARDWICKE, C.).

(2) But that is different from these powers. These powers over real estate were introduced by Statute of Uses, 1534 (c. 11); for before that they were done by way of condition. At common law an infant might have performed a condition; that is a condition for his benefit; so he might make a feoffment for his benefit; as if he had an estate on condition to make a feoffment of part of it to J. S. or else to lose the whole estate. But, as to the other kind of powers to be executed by infants, I find no authority for it. . . . Taking it therefore in general, I am of opinion, an infant cannot execute a power [*i.e.* a power of appointment over real estate] (LORD HARDWICKE, C.).

(3) An infant may undoubtedly present to a church. He may present by guardian, if only a month old; & the strong ground of that is, there is no inconvenience; because the bishop is to judge of the clerk's ability (LORD HARDWICKE, C.).—*HEARLE v. GREENBANK* (1749), 1 Ves. Sen. 298; 3 Atk. 695; 27 E. R. 1043, L. C.

Annotations:—As to (2) Consd. Re Cardross's Settlmt. (1878), 7 Ch. D. 728; *Re D'Angibau, Andrews v. Andrews* (1880), 15 Ch. D. 228; *Re Wernher, Wernher v. Belt*, [1918] 1 Ch. 339. *Reid. Boughton v. Boughton* (1750), 2 Ves. Sen. 12. *Generally, Reid. Stikeman v. Dawson* (1847), 1 De G. & Sm. 90. *Mentd. Farquharson v. Colville* (1772), Rom. 129; *Frank v. Standish* (1772), 15 Ves. 39, n.; *Cull v. Showell* (1773), Amb. 727; *Whistler v. Whistler* (1794), 2 Ves. 367; *Crickett v. Dolby* (1795), 3 Ves. 10; *Mitchell v. Bower* (1796), 3 Ves. 283; *Shedden v. Goodrich* (1803), 8 Ves. 481; *Crauford v. Coutts* (1806), 2 Bl. 655; *Murray v. Elibank* (1806), 13 Ves. 1; *Thellusson v. Woodford* (1806), 13 Ves. 209; *Lloyd v. Williams* (1816), 1 Madd. 450; *Morgan v. Morgan* (1820), 5 Madd. 408; *Dundas v. Dundas* (1830), 2 Dow. & Cl. 349; *Festing v. Allen* (1844), 5 Hare, 573; *Donovan v. Needham* (1846), 9 Beav. 164; *Blacket v. Lamb* (1851), 14 Beav. 482; *Moore v. Webster* (1866), L. R. 3 Eq. 267; *Appleton v. Rowley* (1869), L. R. 8 Eq. 139; *Re George's Estate, George v. Turnell* (1876), 25 W. R. 182; *Cooper v. Macdonald* (1877), 7 Ch. D. 288; *May v. Potter* (1877), 25 W. R. 507; *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1885), 55 L. J. Ch. 46; *Re Bowlby, Bowlby v. Bowlby* (1904), 73 L. J. Ch. 810; *Re Anderson, Pegler v. Gillatt*, [1905] 2 Ch. 70; *Re Harris, Leacroft v. Harris*, [1909] 2 Ch. 206; *Re De Virte, Valani v. De Virte*, [1915] 1 Ch. 920; *Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492.

101. —.]—The exercise by an infant of a power simply collateral being valid both as to real & personal estate, the first question I have to consider is, as regards personal estate, what becomes of a power in gross. . . . I had better state what I mean, because the words are used in so many different senses by different writers. The first power, a power simply collateral, I understand to be a power given to a person who has no interest whatever in the property over which the power is given. The second power, a power in gross, is a power given to a person who has an interest in the property over which the power extends, but such an interest as cannot be affected by the exercise of the power. The most familiar instance is that of a tenant for life with a power of appointment after his death. The third kind of power is a power exercisable by a person who has an interest in the property, which interest is capable of being affected, diminished or disposed

of to some extent by the exercise of the power. That power is commonly called a power appendant or appurtenant. As regards the first power, that is, a power collateral, it is settled . . . that that power can be exercised by an infant. On principle, it is very difficult to see why it is so settled. I mean, it is very difficult to see why, if discretion is required for the disposal of property, it should not be so in the case of the exercise of a power; & one would think there is as much judgment or discretion wanted for the exercise of a power as for the disposal of property. However, as the law stands, that appears not to be so; & the reason, if reason is to be found anywhere, seems to be this, that it requires more discretion to dispose of your own property than to dispose of other people's. That is the only reason I can find. We find expressions such as WOOD, V.C., used in *King v. Bellord*, No. 105, *post*, of the infant being, in exercising the power, "a mere conduit-pipe"; but, on principle, it is very difficult to understand that the same amount of discretion or judgment should not be required in both cases, & that an infant can actually distribute property of other people though the same infant cannot dispose absolutely of a shilling of his own property (JESSEL, M.R.).—*Re D'ANGIBAU, ANDREWS v. ANDREWS* (1879), 15 Ch. D. 228; 49 L. J. Ch. 182; 41 L. T. 645; 28 W. R. 311; *affd.* (1880), 15 Ch. D. p. 236, C. A.

Annotations:—Consd. Re Wernher, Wernher v. Belt, [1918] 1 Ch. 339; *Re Sutton, Boscawen v. Wyndham*, [1921] 1 Ch. 257. *Reid. Shipway v. Ball* (1881), 16 Ch. D. 376; *Re Newcastle's Estates* (1883), 24 Ch. D. 129; *Pouey v. Hordern*, [1900] 1 Ch. 492; *Re Wernher, Wernher v. Belt*, [1918] 2 Ch. 82. *Mentd. Re Baker, Collins v. Rhodes, Re Seaman, Rhodes v. Wish* (1881), 44 L. T. 414; *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89; *Re Plumtre's Marriage Settlmt., Underhill v. Plumtre*, [1910] 1 Ch. 609; *Pullan v. Koe*, [1913] 1 Ch. 9; *Re Torrington*, [1913] 2 Ch. 623; *Re Pryce, Nevill v. Pryce*, [1917] 1 Ch. 234.

102. Capacity to confer power on self.]—*Re D'ANGIBAU, ANDREWS v. ANDREWS*, No. 35, *ante*.

103. Power without an interest—Capacity.]—(1) Power to revoke the uses of a settlement reserved to the settlor "or any of the heirs of his body," well executed by the heir of his body, being a *feme covert* & an infant; because it is for her benefit, & consistent with the intention of the settlement.

(2) Regularly by law, coverture or infancy debar the party from making any deed or writing to dispose of any estate or interest.

(3) If a conveyance be to the use of J. S. & the heirs of his body with power for him or the heirs of his body to make leases, the heir of his body, being a *feme covert*, without her husband, or infant, cannot make such a lease while the disability continues.

(4) In case of a bare power an infant, or a *feme covert*, may transfer an estate as an instrument or conduit pipe of one who is able, as an infant may give livery on a feoffment as an attorney; so may *feme covert* though it be to her own husband.

(5) Without doubt a power may be in a feoffment to the use of A. that A. may make leases whether within age or of full age, or covert, or sole.

(6) If an infant *feme sole* to whom a general power, not collateral, of leasing is given & she take husband & then make a lease, it is avoidable.

PART III. SECT. 14.

P. Over personalty.]—An infant

cannot exercise a power over personal property though authorised to do so by the instrument creating the power

which goes to defeat his or her interest therein.—*Re ARMIT'S TRUSTS* (1871), 5 L. R. Eq. 352.—*IR.*

Sect. 14.—Powers. Sect. 15: Sub-sects. 1, 2 & 3.]

(7) The reason why in any cases of powers infancy or coverture hinders the execution of them, is in respect to the prejudice to the person revoking.

(8) By the presumption of law they [infants] are not fit to dispose of estates, or to have power to dispose of them to their own prejudice. . . . In those Acts that concern the disposition of an estate or interest the reason of the law turns, in case of infancy or coverture, upon the point of prejudice, or not prejudice, unto their interest.

(9) An infant, though he cannot grant the next avoidance, yet he may present to the bishop; for that presentation ought to be without money.

(10) An infant cannot surrender a lease; yet if he take a new lease for a greater interest, it is good till avoided by him; if for the same term & no more, it is void, because it is without increase of term, or decrease of rent; & his acts are merely void where there is not apparent benefit, or *seem* of a benefit.—GRANGE v. TIVING (1665), O'Bridg. 107; 124 E. R. 494.

Annotations:—As to (1) Rejd. Re D'Angibau, Andrews v. Andrews (1880), 15 Ch. D. 228. As to (4) Rejd. King v. Bellord (1863), 32 L. J. Ch. 646. Generally, Mentd. Thomas v. Sorrel (1673), 3 Keb. 184; Evans v. Evans (1853), 1 Drew. 654.

104. —.]—HEARLE v. GREENBANK, No. 100, *ante*.

105. **Power of sale.]—**There can be no doubt upon the authorities from the earliest times that if a man, by his will, gives an infant a simple power of sale without an interest the infant may exercise it. . . . It is to be observed that all the cases relied on with reference to powers have gone upon the principle that the infant, in executing the power, is a mere conduit pipe, as it has been termed, of the will of the donor of the power; so that when the estate is created, the infant . . . is merely the instrument by whose hands testator or donor acts. The donor it is said may use any hand however weak to carry out his intentions. This principle fails altogether to reach the case of a devise in trust to an infant (WOOD, V.C.).—KING v. BELLORD (1863), 1 Hem. & M. 343; 2 New Rep. 442; 32 L. J. Ch. 646; 8 L. T. 633; 11 W. R. 900; 71 E. R. 149.

Annotations:—Rejd. Re Cardross's Settltmt. (1878), 7 Ch. D. 728; Re D'Angibau, Andrews v. Andrews (1880), 15 Ch. D. 228.

106. —.]—*Re D'ANGIBAU, ANDREWS v. ANDREWS*, No. 35, *ante*.

See, now, Law of Property Act, 1925 (c. 20), s. 26 (2).

107. **Power coupled with interest—Incapacity.]—**GRANGE v. TIVING, No. 103, *ante*.

108. —.]—Though in cases of mere powers or authorities infants may execute, because nothing moves from them, yet this is an interest, & can no more be departed with in equity by an infant, than by an infant's assignment of a legal estate at law. (LORD MACCLESFIELD, C.).—HALSEY v. BADHAM (1734), 2 Eq. Cas. Abr. 154; 22 E. R. 132, L. C.

109. — **Intention of donor—For exercise during minority.]—**An infant can exercise a power, even though it be coupled with an interest, where an intention appears that it should be exercisable during minority.

By a settlement made with the sanction of the ct., upon the marriage of a lady then, & described as, "an infant of seventeen

certain funds belonging to her were vested in trustees upon trust to retain existing investments, or reinvest "with the consent" of the lady & her husband during their joint lives; the lady taking the first life interest under the settlement:—*Held*: the lady had power to consent to a proposed re-investment, notwithstanding her minority.—*Re CARDROSS'S SETTLEMENT* (1878), 7 Ch. D. 728; 47 L. J. Ch. 327; 38 L. T. 778; 26 W. R. 389.

Annotations:—Folld. Re Sutton, Boscawen v. Wyndham, [1921] 1 Ch. 257. Rejd. Re D'Angibau, Andrews v. Andrews (1880), 15 Ch. D. 228; Re Newcastle's Estates (1883), 24 Ch. D. 129; Re Wernher, Wernher v. Beit, [1918] 2 Ch. 82.

110. —.]—Testator by his will settled a legacy of £50,000 upon usual trusts for A., his wife & issue, & declared that if no issue of A. should attain a vested interest then the legacy should fall into & form part of his, testator's, residuary estate, & testator empowered the trustees on A.'s marriage & with his consent to revoke the trusts & to resettle the legacy upon such trusts for the benefit of A., his wife & issue, & with such powers & provisions as the trustees should deem proper. By a codicil testator bequeathed a sum of £50,000 to his trustees to be held by them upon the trusts & with powers for the benefit of B., her husband & issue, similar to those for the benefit of A., his wife & issue, declared in his will concerning the £50,000 thereby settled, except that no part of the capital was to be paid or advanced to or for the benefit of B. Both A. & B. were infants at the date of the will. After the death of testator B. married, being still an infant, & by a deed executed in contemplation of her marriage the trustees with her consent & in exercise of the power conferred on them by the will & codicil revoked the trusts of her legacy & resettled same upon trusts for her benefit, & her husband & issue, which varied somewhat from those declared in the will; in particular the ultimate trust in default of her issue was for her absolutely. On the question whether the resettlement was valid having regard to the fact that B. was an infant:—*Held*: (1) upon the true construction of the will & codicil testator intended to confer a power on B. during her minority to consent to an exercise by the trustees of their power of revocation & resettlement, & he could lawfully confer such a power upon her; (2) the ultimate trust in the resettlement, in default of B.'s issue for B. absolutely, was prohibited by the codicil, & therefore not authorised by the power to resettle.—*Re SUTTON, BOSCAWEN v. WYNDHAM*, [1921] 1 Ch. 257; 90 L. J. Ch. 71; 124 L. T. 526; 65 Sol. Jo. 155.

111. **Over realty—Power to revoke uses.]—**GRANGE v. TIVING, No. 103, *ante*.

112. — **Power to lease.]—**GRANGE v. TIVING, No. 103, *ante*.

113. — **Power to Jointure.]—**HOLLINGSHEAD v. HOLLINGSHEAD (1708), cited in 2 P. Wms. 229; Gilb. 167; 1 Stra. 604; 24 E. R. 709, L. C.

Annotations:—Rejd. Coventry v. Coventry (1724), 1 Stra. 596; Jackson v. Jackson (1793), 4 Bro. C. C. 462.

114. **Power of appointment.]—**HEARLE v. GREENBANK, No. 100, *ante*.

See, now, Law of Property Act, 1925 (c. 20), s. 1 (10) & sched. VII.

115. **Over personalty—Power in gross.]—***Re D'ANGIBAU, ANDREWS v. ANDREWS*, No. 35, *ante*.

See, also, Nos. 100, 105, ante.

SECT. 15.—RELEASES, RECEIPTS, SURRENDERS AND ACCOUNTS STATED.

SUB-SECT. 1.—RELEASES AND RECEIPTS.

Infants' contracts generally, *see* Part V., *post*.

116. Release.]—(1) Payment by a trustee to an infant *cestui que trust*, nineteen years of age, on the false representation by herself & her parents, that she had attained the age of twenty-one:—*Held*: a discharge to the trustee for the sum so paid.

(2) A release executed by the infant to the trustee of all demands in respect of the trust:—*Held*: not a bar to a suit by the name *cestui que trust* against the trustee, although such suit was not brought until seven years after the *cestui que trust* had attained twenty-one.

The release of infants is worth nothing in law (WIGRAM, V.C.).—OVERTON v. BANISTER (1844), 3 Hare, 503; 8 Jur. 906; 67 E. R. 479.

Annotation:—*As to* (1) *Reid*. Stikeman v. Dawson (1847), 1 De G. & Sm. 90.

117. — By infant executor.]—RUSSEL v. PRAT (1579), 1 And. 177; 123 E. R. 417, Ex. Ch.

Annotations:—*Mentd.* Sale v. Coventry (Bp.) (1590), 1 And. 241; Rutland v. Rutland (1595), Cro. Eliz. 377.

118. —.]—ANON. (1584), 1 And. 117; 123 E. R. 384.

Annotation:—*Mentd.* Thrustout d. Levick v. Copplin (1772), 2 Wm. Bl. 801.

119. — Without consideration.]—A release by an infant without consideration is void.—KNOT v. BARLOW (1599), Cro. Eliz. 671; 78 E. R. 909.

120. — Soon after coming of age — Viewed with suspicion.]—A bill brought after an acquiescence of five years, & after a mother's death against her representative, to set releases aside, as unduly obtained by her, & for an account of his father's & grandmother's estates, & to be paid his full share thereof. The procuring releases from a person immediately upon his coming of age is always a circumstance to create a suspicion of unfairness, but as there was no particular imposition charged through means of debt, the ct. would not determine the question as to the unfairness of the releases, till the master had taken the account of the father's personal estate only.—STEADMAN v. PALLING (1746), 3 Atk. 423; 26 E. R. 1044, L. C.

121. — — — Professing to proceed upon examination of complicated accounts.]—Degree of weight to be attached to deeds of release executed by *cestuis que trust* within a few days of their respectively coming of age, when such releases profess to proceed upon the examination of complicated accounts.

The bill stated that an account had been made out, showing that a certain sum was due to pltf., & it alleged that debts set up that account & the payment of the balance, as a final settlement. The bill charged the contrary, & that much more was due to pltf., as would appear if certain accounts were rendered. A deed of release had, in fact, been executed by pltf. at the time of the payment of the balance in question, but the bill made no mention of it. As this deed of release acknowledged the receipt of certain sums, it could not be wholly set aside; but the ct. was of opinion, in

the circumstances of the case, that it did not deprive pltf. of his right to the accounts which he sought. *Semble*: the proper form of the decree in such case is to declare that pltf. is entitled to the accounts, notwithstanding the provisions of the deed of release; but a decree which directed the accounts without noticing the deed of release, was not considered to require alteration.—WEDDERBURN v. WEDDERBURN (1838), 4 My. & Cr. 41; 8 L. J. Ch. 177; 3 Jur. 596; 41 E. R. 16, L. C.

Annotations:—*Mentd.* Portlock v. Gardner (1842), 1 Hare, 594; Willett v. Blanford (1842), 1 Hare, 253; Egg v. Devey (1847), 10 Beav. 444; Allfrey v. Allfrey (1849), 1 H. & Tw. 179; Travis v. Milne (1851), 9 Hare, 141; Simpson v. Chapman (1853), 4 De G. M. & G. 154; Swinborne v. Nelson (1853), 16 Beav. 416; Hart v. Clarke (1854), 24 L. T. O. S. 185; Wedderburn v. Wedderburn (1856), 22 Beav. 84; Clements v. Hall (1857), 24 Beav. 333; Bright v. Legerton (1861), 2 De G. F. & J. 606; Vyse v. Foster (1872), 8 Ch. App. 315, n.; Edinburgh Corpn. v. Lord Advocate (1879), 4 App. Cas. 823.

Receipt—By infant married woman.]—*See* Law of Property Act, 1925 (c. 20), s. 21; Trustee Act, 1925 (c. 19), s. 31.

SUB-SECT. 2.—SURRENDERS.

122. General rule—Void.]—LLOYD v. GREGORY, No. 556, *post*.

123. — — —.]—Bond of an infant or *non compos* is void.

The grants of infants & of persons *non compos* are parallel both in law & reason; & there are express authorities that a surrender made by an infant is void (*per* CUR.).—THOMPSON v. LEACH (1698), Carth. 435; Comb. 468; 1 Com. 45; Holt, K. B. 357; 3 Lev. 284; 1 Ld. Raym. 313; 3 Mod. Rep. 301; 12 Mod. Rep. 173; 2 Salk. 427, 576, 618, 675; 3 Salk. 300; 2 Vent. 198; 90 E. R. 1097; *sub nom.* LEACH v. THOMPSON, 1 Show. 296; *sub nom.* LEECH'S CASE, Freem. K. B. 502; *on appeal*, *sub nom.* LEACH v. THOMSON, Show. Parl. Cas. 150, H. L.

Annotations:—*Consd.* Zouch d. Abbot & Hallet v. Parsons (1765), 3 Burr. 1794. *Mentd.* Atkin v. Berwick (1719), 10 Mod. Rep. 431; Ashley v. Branwood (1734), Kel. W. 201; Burgoyne v. Benson (1738), West temp. Hard. 340; Yates v. Boen (1738), 2 Stra. 1104; Taylor d. Atkyns v. Horde (1757), 1 Burr. 60; Townson v. Tickell (1819), 3 B. & Ald. 31; Balme v. Hutton (1831), 2 Tyr. 17; Garland v. Carlisle (1837), 4 Scott, 587; Doe d. Chidgey v. Harris (1847), 16 M. & W. 517; Siggers v. Evans (1855), 5 E. & B. 367; Xenos v. Wickham (1862), 13 C. B. N. S. 381; Peacock v. Eastland (1870), L. R. 10 Eq. 17; Standing v. Bowring (1885), 31 Ch. D. 282; Muller & Co.'s Margarine v. I. R. Comrs. (1899) 69 L. J. Q. B. 291; Mallott v. Wilson, [1903] 2 Ch. 494; Daily Telegraph Newspaper Co. v. McLaughlin, [1904] A. C. 776.

Surrender of leases—Surrender by infant.]—*See* No. 556, *post*.

— **Surrender to infant—Power of Court of Chancery to sanction.]**—*See* No. 609, *post*.

—.]—*See, further*, LANDLORD & TENANT.

SUB-SECT. 3.—ACCOUNTS STATED.

See, now, Infants Relief Act, 1874 (c. 62).

PART III. SECT. 15, SUB-SECT. 1.

116 i. Release.]—Moneys payable to infants under a policy of life insurance may, where no trustee or guardian is appointed, be paid to the exors., of the will of the insured, without security being given by them, & payment to them is a good discharge to the insurers.—DODDS v. ANCIENT ORDER

OF UNITED WORKMEN (1894), 25 O. R. 570.—CAN.

116 ii. —.]—Notwithstanding a direction in a will that a legacy is to be paid to a legatee when she reaches the age of eighteen, the exor. is not bound, in the absence of a provision that the infant's discharge shall be sufficient, to pay the legacy to her

upon her attaining that age; but there is no reason for applying the rule where the legacy is in the hands of the ct., no discharge being in that case required; & in a proper case an order will be made for payment out to the infant upon her attaining that age, with the privity of the official guardian.—*Re* ROBERTSON (1909), 17 O. L. R. 568; 13 O. W. R. 208.—CAN.

SECT. 16.—TESTAMENTARY CAPACITY.

See, generally, WILLS.

Infant soldiers & sailors on service.]—*See Wills (Soldiers & Sailors) Act, 1917 (c. 58); & ROYAL FORCES.*

Will of infant domiciled abroad—Execution of powers.]—*See CONFLICT OF LAWS, p. 385, No. 621.*

SECT. 17.—TRUSTEESHIP.

See, now, Law of Property Act, 1925 (c. 20), s. 20. Appointment of new trustee.]—See Trustee Act, 1925 (c. 19), ss. 36, 40, 41, 44, 51.

Effect of conveyance of legal estate to infant as trustee.]—*See Law of Property Act, 1925 (c. 20), s. 19 (4).*

Jointly with adult.]—*See Law of Property Act, 1925 (c. 20), s. 19 (5).*

Part IV.—Marriage.**SECT. 1.—IN GENERAL.**

Capacity to marry.]—*See HUSBAND & WIFE, Vol. XXVII., p. 40, Nos. 166–175.*

Consent to marriage—Necessity for—& by whom given.]—*See HUSBAND & WIFE, Vol. XXVII., pp. 55 et seq.*

Breach of promise of marriage.]—*See HUSBAND & WIFE, Vol. XXVII., pp. 25, 26, Nos. 16–22.*

Marriage settlements of infants.]—*See Part VIII., Sect. 11, post.*

SECT. 2.—RIGHTS AND DUTIES OF GUARDIANS.

Capacity of infant to marry.]—*See HUSBAND & WIFE, Vol. XXVII., p. 40, Nos. 166–175.*

Consents required to marriage of infant.]—*See, now, Guardianship of Infants' Act, 1925 (c. 45), s. 9, & sched.; & generally, HUSBAND & WIFE, Vol. XXVII., pp. 55 et seq.*

How consent to be given—Must be disinterested—Bonds in consideration of marriage.]—*See BONDS, Vol. VII., pp. 169, 170, Nos. 72–80.*

Seduction & marriage of infant—Without consent of parent or guardian.]—*See CRIMINAL LAW, Vol. XIV., pp. 117, 118, Nos. 871–876.*

Ward of court.]—*See Part XV., Sect. 7, post.*

Proceedings by parents to annul marriages of infants.]—*See HUSBAND & WIFE, Vol. XXVII., pp. 376, 383, Nos. 3647, 3764.*

124. Liability of guardian—Security—To prevent marriage without consent of court.]—An infant being in the custody of her father-in-law, the ct. ordered him to enter into a recognisance not to suffer her to marry, etc.—*HIDE'S CASE* (1675), 3 Salk. 178; 91 E. R. 762; *sub nom. R. v. VINER (LORD MAYOR OF LONDON)*, Freem. K. B. 389; 2 Lev. 128; 3 Keb. 504; *sub nom. VINER'S CASE*, Freem. K. B. 522; *sub nom. EMERTON'S CASE*, Freem. K. B. 401.

Annotations:—Refd. Ash's Case (1702), Proc. Ch. 203. *Mentd. R. v. Smith* (1736), Ridg. temp. H. 149; *R. v. Winton* (1792), 5 Term Rep. 89.

125. — Procuring marriage to own child.]—One of the guardians of an infant girl of about nine years old, took her from a boarding school, & married her to his own son, who had no estate; the ct. ordered the guardian to produce the girl in ct., & then committed her to the other guardian, ordering an information to be brought against the guardian who married the ward to her disparagement; but held this to be no contempt, the ward not being under the immediate care of the ct.—*GOODALL v. HARRIS* (1729), 2 P. Wms. 561; 2 Eq. Cas. Abr. 756; 24 E. R. 862; *sub nom. TREACLE v. HARRIS*, Mos. 236, L. C.

Annotation:—Mentd. R. v. Green (1781), 3 Doug. K. B. 36.

126. — —.]—*ANON.* (1729), Fitz-G. 106; 94 E. R. 674, L. C.

Removal of guardian.]—*See Nos. 1499, 2067, post.*

127. Prevention of improper marriages—Assistance of court.]—This ct. will assist the testamentary guardian to prevent an improper marriage of the infant heir.—*RAYMOND'S (LORD) CASE* (1734), Cas. temp. Talb. 58; 25 E. R. 661, L. C.

Annotation:—Refd. Beard v. Travers (1749), 1 Ves. Sen. 313.

128. — Injunction against communication—Between intended spouses.]—*SHIPBROOK (LORD) v. HINCHINBROOK (LORD)* (1778), 2 Dick. 547; 21 E. R. 383, L. C.

129. — — —.]—Injunction upon affidavit of an intended marriage with a male infant, aged eighteen, restraining communication with him until farther order.—*PEARCE v. CRUTCHFIELD* (1807), 14 Ves. 206; 33 E. R. 500, L. C.

130. — Detention of clothes justified.]—Guardians of a female under age are justified in stopping her elopement, & in detaining her clothes if she has eloped; & a carrier by whom she has sent them is justified in delivering them up to the guardians.—*BARKER v. TAYLOR* (1823), 1 C. & P. 101, N. P.

SECT. 3.—WARDS OF COURT.

See Part XV., Sect. 7, post.

Part V.—Contracts.**SECT. 1.—IN GENERAL.**

Contract for necessities.]—*See Sect. 6, post.*

Contracts of apprenticeship & service.]—*See MASTER & SERVANT.*

Contracts of infant trader.]—*See Sect. 8, post.*

Contracts to make & take leases.]—*See Part VIII., Sect. 8, post.*

Presumption of undue influence in contracts.]—*See CONTRACT, Vol. XII., pp. 101 et seq.*

SECT. 2.—BINDING CONTRACTS.

See Infants Relief Act, 1874 (c. 62).

131. General rule — Binding when for infant's benefit.]—An infant may sue on a contract of marriage with a person of full age.

The single question is whether this contract, as against pltf., was absolutely void. We are all of opinion that this contract is not void, but only voidable at the election of the infant, & as to the person of full age, it absolutely binds. The contract of an infant is considered in law as different from the contracts of all other persons. In some cases his contract shall bind him; such is the contract of an infant for necessaries, & the law allows him to make this contract as necessary for his preservation; & therefore in such case a single bill shall bind him, though a bond with a penalty shall not. Where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him as to give him an opportunity to consider it when he comes of age; & it is good or voidable at his election. But though the infant has this privilege, yet the party with whom he contracts has not; he is bound in all events. As marriage is now looked upon to be an advantageous contract, & no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant; we think that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts; & no dangerous consequence can follow from this determination, because our opinion protects the infant, even more than if we rule the contract to be absolutely void. As to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts (LORD RAYMOND, C.J.).—*HOLT v. CLARENCIEUX (WARD)* (1732), 2 Stra. 937; 2 Barn. K. B. 173; Fitz.-G. 275; 93 E. R. 954.

Annotations:—Distd. Burgess v. Merrill (1812), 4 Taunt. 468. *Consd. Warwick v. Bruce* (1813), 2 M. & S. 205. *Refd. Smith v. Smith* (1745), 3 Atk. 304; *Harvey v. Ashley* (1748), 3 Atk. 607; *R. v. Macolesfield* (1758), Burr. S. C. 458; *Zouch d. Abbot & Hallet v. Parsons* (1765), 3 Burr. 1794. *Mentd. Tarbuck v. Bispham* (1836), 6 L. J. Ex. 49; *R. v. Mills* (1844), 10 Cl. & Fin. 534.

132. — — —.]—It has been adjudged that an infant may bind himself for his own benefit (LORD MANSFIELD, C.J.).—*R. v. EVERED* (1777), Cald. Mag. Cas. 26.

Annotation:—Consd. Gray v. Cookson (1812), 16 East, 13.

133. — — — At time of agreement.]—*MAD-DON d. BAKER v. WHITE*, No. 619, *post*.

134. — — —.]—An infant slave in the West Indies, executed an indenture, by which he covenanted to serve B. for a certain term of years as his servant, & B. covenanted to do certain things on his part: B. then came to England with the slave. In an action against A. who had seduced him from the service of B., A. was not permitted to allege that the contract was void, as being made by an infant & a slave, & therefore that the declaration, which stated him to have

been retained as a servant for a term of years, was not proved; for the ct. held that the effect of such a contract might be the manumission of the slave, & consequently that it was for his own benefit, & being for his own benefit, that it was, at most, only voidable by the infant himself.

We have seen that some contracts of infants, even by deed, shall bind them. Some are merely void, namely such as the ct. can pronounce to be to their prejudice. Others, & the most numerous class, of a more uncertain nature as to benefit or prejudice, are voidable only, & it is in the election of the infant to affirm them or not. . . . Upon the distinction between those two species of contracts, we certainly are not warranted to decide, that a contract which may have the effect of emancipation, & which certainly puts the infant in no worse condition than he was in before, is so prejudicial to him as to be merely void. If it be a contract voidable only, the infant may affirm it (*EYRE, C.J.*).—*KEANE v. BOYCOTT* (1795), 2 Hy. Bl. 511; 126 E. R. 676.

Annotations:—Distd. Cox v. Muncey (1859), 6 C. B. N. S. 375. *Refd. Baylis v. Dineley* (1815), 3 M. & S. 477; *Cooper v. Simmons* (1862), 7 H. & N. 707; *Walter v. Everard*, [1891] 2 Q. B. 369. *Mentd. Forbes v. Cochrane* (1823), 3 Dow. & Ry. K. B. 679; *The Slave, Grace, R. v. Allan* (1827), 2 Hag. Adm. 94; *Sykes v. Dixon* (1839), 9 Ad. & El. 693; *Hartley v. Cummings* (1847), 5 C. B. 247; *Evans v. Walton* (1867), L. R. 2 C. P. 615.

135. — — —.]—An infant can do no act to bind himself, except such as is clearly for his own benefit.—*R. v. GREAT WIGSTON (INHABITANTS)* (1824), 3 B. & C. 484; 5 Dow. & Ry. K. B. 339; 2 Dow. & Ry. M. C. 445; 3 L. J. O. S. K. B. 85; 107 E. R. 813.

Annotations:—Consd. Waterman v. Fryer, [1922] 1 K. B. 499. *Mentd. Ellen v. Topp* (1851), 6 Exch. 424.

136. — — —.]—An infant agreed to serve a dairyman for a weekly sum, & not to serve privately on his own account any of the customers during the employment or within two years after it ceased:—*Held*: the contract being beneficial to the infant, was not void under Infants Relief Act, 1874 (c. 62), s. 1, & therefore could be enforced by injunction.—*FELLOWS v. WOOD* (1888), 59 L. T. 513; 52 J. P. 822; 4 T. L. R. 645, D. C.

Annotations:—Distd. De Francesco v. Barnum (1889), 43 Ch. D. 165. *Follid. Evans v. Ware*, [1892] 3 Ch. 502; *Morrison, Fleet v. Fletcher* (otherwise *Fletcher*) (1900), 17 T. L. R. 95.

137. — — — Not confined to apprenticeship & service.]—*CLEMENTS v. LONDON & NORTH WESTERN RY. CO.*, No. 168, *post*.

138. — — —.]—An infant entered into a contract with his employers, milk sellers, not to carry on a milkman's business within a distance of two miles nor to solicit his employers' customers "under a penalty of £200 to be recovered as & by way of liquidated damages & not by way of penalty." In an action for an injunction to restrain the infant from carrying on a milkman's business within the specified distance:—*Held*: the contract was binding on the infant, the clause as to the payment of the £200 only binding him to pay the damage actually caused by his breach of contract & not being a penalty claim in the ordinary

PART V. SECT. 2.

131 i. General rule—Binding when for infant's benefit.]—An infant cannot, during his minority avoid, on the ground of infancy, a lease which is for his benefit.—*HARTSHORN v. EARLY* (1868), 19 C. P. 139.—*CAN.*

q. Division of property.]—A division of property took place in 1837 between A., the mother & guardian of pltf., & B., the husband of two child-

less widows, who become debts. in a suit to recover possession of the property on the ground that the division did not bind pltf.:—*Held*: there being no proof of fraud, nor that undue advantage was taken of pltf.'s minority, & in the absence of proof of gross inequality in the distribution of the property, the division was valid & binding upon pltf.—*NALLAPA REDDI v. BALAMMAL* (1864), 2 Mad. 182.—*IND.*

r. Bond of guardian—For existing liability.]—The general proposition that a guardian of a minor cannot bind his ward personally by a simple contract debt, by a covenant or by any promise to pay money or damages, is subject to the modification that the promise will not bind the minor, unless it has been made merely to keep alive a debt, for which the ward's property was liable.—*BHAWAL SAHU v. BALI-NATH PERTAB NARAIN SINGH* (1907).

Sect. 2.—Binding contracts. Sect. 3.]

sense.—**MORRISON, FLEET & Co., LTD. v. FLETCHER** (1900), 17 T. L. R. 95.

139. ———.]—**COWERN v. NIELD**, No. 338, *post*.

140. ———.]—Pltf., a teacher of singing, agreed with defts., a lady of seventeen years of age & her father, to give the lady three years' tuition in singing at 100 guineas a year. During tuition & for seven years after its completion pltf. was to be his pupil's business manager, to receive one-third of her gross income until the fees were fully paid, to carry out all negotiations for engagements to sing, & to receive a commission on the salary. Before the lady came of age the total tuition fees had been paid to pltf. in the form of commission. When she came of age she took no step to repudiate the agreement, but in the following year she married & refused to pay any further commission. Pltf. brought an action upon the agreement against the lady & her father & husband:—*Held*: the agreement was one which, though made with an infant, was binding upon her as being for her benefit, & pltf. was entitled to an account.—**MACKINLAY v. BATHURST** (1919), 36 T. L. R. 31, C. A.

——— **Contracts of apprenticeship & service.]**

—See **MASTER & SERVANT**.

141. **Capitalisation of arrears of interest — By infant debtor — Fresh security given.]**—**CROMWELL'S (LADY) CASE** (*circa* 1724), cited in 9 Mod. Rep. p. 103; 88 E. R. 343.

Education of infant.]—See Part XII., Sect. 2, *post*.

Contracts for necessaries.]—See Sect. 6, *post*.

Contracts of apprenticeship.]—See **MASTER & SERVANT**.

Contracts of service.]—See **MASTER & SERVANT**.

Contracts of infant trader.]—See Sect. 8, *post*.

SECT. 3.—VOID CONTRACTS.

See **Infants Relief Act, 1874** (c. 62), s. 1.

142. **General rule—Void if prejudicial to infant.]**—**KEANE v. BOYCOTT**, No. 134, *ante*.

143. ———.]—**BAYLIS v. DINELEY**, No. 78, *ante*.

144. ———.]—An infant was apprenticed by a deed containing a provision that the master should not be liable to pay wages to the apprentice so long as his business should be interrupted or impeded by or in consequence of any turn-out, & the apprentice might during any such turn-out employ himself in any other manner or with any other person for his own benefit:—*Held*: this provision not being for the benefit of the infant, the apprenticeship deed could not be enforced against the infant under **Employers & Workmen Act, 1875** (c. 90), ss. 5, 6.—**MEAKIN v. MORRIS** (1884), 12 Q. B. D. 352; 53 L. J. M. C. 72; 48 J. P. 344; 32 W. R. 661, D. C.

Annotations:—*Apprvd.* **Corn v. Matthews**, [1893] 1 Q. B. 310. *Consd.* **Green v. Thompson**, [1899] 2 Q. B. 1. *Refd.* **Farmers & Cleveland Dairies Co. v. Riley** (1893), 9 T. L. R.

260; **Morrison, Fleet v. Fletcher** (otherwise **Fletcher**) (1900), 17 T. L. R. 95.

145. ———.]—An infant was apprenticed by a deed containing a provision that the masters should not be liable to pay wages to the apprentices so long as their business should be interrupted or impeded by or in consequence of any turn-out, & that the apprentice might during any such turn-out & for such reasonable time thereafter as might be necessary for him to enable him to determine such employment as thereafter mentioned employ himself in any other manner or with any other person for his own benefit & that in case the apprentice should elect so to employ himself the masters should not during the time he should so employ himself be bound to teach or instruct him:—*Held*: this provision was so much to the detriment of the infant that the apprenticeship deed could not be enforced against him under **Employers & Workmen Act, 1875** (c. 90), ss. 5, 6.—**CORN v. MATTHEWS**, [1893] 1 Q. B. 310; 62 L. J. M. C. 61; 68 L. T. 480; 57 J. P. 407; 41 W. R. 262; 9 T. L. R. 183; 37 Sol. Jo. 190; 4 R. 240, C. A.

Annotations:—*Consd.* **Clements v. L. & N. W. Ry.**, [1894] 2 Q. B. 482. *Distd.* **Green v. Thompson**, [1899] 2 Q. B. 1. *Consd.* **Bromley v. Smith**, [1909] 2 K. B. 235.

146. ———.]—A contract entered into by an infant which is not for his benefit is void, & an action is not maintainable against a third party for damages for inducing the infant to break his engagements under such contract.—**DE FRANCESCO v. BARNUM** (1890), 45 Ch. D. 480; 60 L. J. Ch. 63; 63 L. T. 438; 39 W. R. 5; 6 T. L. R. 463.

Annotations:—*Appld.* **Corn v. Matthews**, [1893] 1 Q. B. 310. *Consd.* **Clements v. L. & N. W. Ry.**, [1894] 2 Q. B. 482. *Apprvd.* **Mackinlay v. Bathurst** (1919), 36 T. L. R. 31. *Refd.* **Roberts v. Gray**, [1913] 1 K. B. 520. *Mentd.* **Whitwood Chemical Co. v. Hardman** (1891), 39 W. R. 433.

147. ———.]—Pltf., an infant, who was employed at a colliery, the only practicable mode of access to which was by defts.' railway, entered into an agreement in writing with them whereby it was agreed that, in consideration of defts.' permitting pltf. to travel by their railway at certain reduced rates, neither pltf. nor his exors. or administrators or relatives should have any claim against defts. for any accident, injury, or loss which might happen to him while travelling on their railway, notwithstanding any such accident, injury, or loss should be occasioned by the negligence of defts. or of any of their officers or servants; & it was further agreed that the pltf., his exors. & administrators, would indemnify defts. against all loss, costs, damages, & expenses which they might incur by reason of any such accident, injury, or loss, or by reason of any claim or legal proceedings instituted by pltf. or them against defts. or any of their officers or servants. Pltf., on signing the agreement, was provided by defts. with a free pass:—*Held*: the agreement, as a whole, was an unfair one as between pltf. & defts., in the sense that it was so much to the detriment of pltf. as to make it a contract which was not for his benefit, & consequently that it afforded no answer to an

I. L. R. 35 Calo. 320; 12 C. W. N. 256.

I. L. R. 31 Mad. 458.—IND.

t. ———.]—A bond executed by the guardian of a minor as such but which contains only a personal covenant by the guardian to pay & does not charge the minor's estate, will nevertheless be binding on the minor, if it is executed for a pre-existing debt, on bill.—**DURASAMI v. MUTHIAL REDDI** (1908),

PART V. SECT. 3.

142 i. **General rule—Void if prejudicial to infant.]**—A contract was signed by pltf., when a lad of eighteen, for the purchase of land from deft. & for the payment during the minority, of the purchase-money, with a forfeiture clause, under which, in the event of the default, he might lose the land &

everything he had paid. Under the contract the pltf. did not get possession nor a selling title nor a right to specific performance:—*Held*: the contract was to his prejudice, & so not merely voidable but void; & judgment was given in his favour for recovery of the payments that he had made during his minority.—**PHILLIPS v. GREATER OTTAWA DEVELOPMENT Co.** (1916), 38 O. L. R. 315; 33 D. L. R. 269.—CAN.

action brought to recover damages for personal injuries occasioned by the negligence of defts.—*FLOWER v. LONDON & NORTH WESTERN RY. CO.*, [1894] 2 Q. B. 65; 63 L. J. Q. B. 547; 70 L. T. 829; 58 J. P. 685; 42 W. R. 519; 10 T. L. R. 427; 9 R. 494, C. A.

Annotation:—*Reid. Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482.

148. ———.]—*VIDITZ v. O'HAGAN*, No. 703, *post*.

149. ———.]—(1) Deft., being then an infant, entered the service of pltfs., the proprietors of a daily paper in Sheffield, as a junior reporter, under a written contract which made the service determinable by a month's notice on either side, & provided that after leaving pltfs.' service deft. would not, either on his own account or in partnership with any other person, be connected, as proprietor, employee, or otherwise, with any newspaper business carried on in Sheffield or within a radius of twenty miles from the town hall thereof. There was evidence that such a restriction was almost unique in contracts of this kind:—*Held*: the restriction was void as being against public policy.

(2) Even if the restriction could have been enforced against an adult, still, having regard to its unusual character, the contract was not for the benefit of an infant, & invalid on that ground also.—*SIR W. O. LENG & CO., LTD. v. ANDREWS*, [1909] 1 Ch. 763; 78 L. J. Ch. 80; 100 L. T. 7; 25 T. L. R. 93, C. A.

Annotations:—*As to* (1) *Consd. Herbert Morris v. Saxelby*, [1916] 1 A. C. 688. *Reid. Mason v. Provident Clothing & Supply Co.*, [1913] A. C. 724; *Eastes v. Russ*, [1914] 1 Ch. 468; *Millers v. Steodman* (1915), 84 L. J. K. B. 2057; *Ropeways v. Hoyle* (1919), 120 L. T. 538; *Attwood v. Lamont*, [1920] 3 K. B. 571; *Hepworth Manufacturing Co. v. Ryott*, [1920] 1 Ch. 1; *Bowler v. Lovegrove*, [1921] 1 Ch. 642. *Generally, Mentd. Russell v. Carpenters & Joiners Amalgamated Soc.*, [1910] 1 K. B. 506.

150. *Sale of hair by girl.*—*SCROGGAM v. STEWARDSON* (1874), 3 Keb. 369; 84 E. R. 771.

Annotation:—*Consd. Stikeman v. Dawson* (1847), 1 Ta

Penalty—*Penalty of an infant to indemnify against loss or damage in respect of shares in co. purchased on the faith of representations made by the infant, is void, & not merely voidable, & cannot be adopted & ratified by the obliger after he has attained his majority.*—*BEAM v. BEATTY* (1902), 22 C. L. T. 381; 4 O. L. R. 554; 1 O. W. R. 616.—CAN.

a. *Ratification.*—By reason of the infancy of one of the subscribers, a co., which was formed for the purchase of a road had no legal existence at the time of the registration of their declaration of incorporation:—*Held*: no subsequent ratification by him after attaining majority could validate his contract.—*HAMILTON & FLAMBOROUGH ROAD CO. v. TOWNSEND, HAMILTON & FLAMBOROUGH ROAD CO. v. FLATT* (1886), 13 A. R. 534.—CAN.

b. ———.]—*Infants Relief Act*, 1874 (c. 62), s. 2, is not by North-West Territories Act, s. 11, in force in Alberta. Deft. was held liable on a contract entered into when an infant & ratified in writing after attaining his majority.—*BRAND v. GRIFFIN* (1908), 9 W. L. R. 427.—CAN.

c. ———.]—Where the natural guardian with rights extinguished but purporting to act as a *de facto* guardian encumbered the minor's property with his consent:—*Held*: the encumbrances were null & void. An encumbrance thus created without authority cannot be ratified by the minor on attaining majority. There can be no ratification of a transaction which is void owing to the promisor possessing no con-

tractual capacity at the time. Nor can a void deed form a good consideration for a fresh contract made by the minor on attaining majority.—*ARUMUGUM CHETTI v. DURASINGA TREVAR* (1914), 1 L. R. 37 Mad. 38.—IND.

d. ———.]—An action is maintainable by an indorsee for value, against the acceptor of a bill of exchange, accepted by the latter after attaining twenty-one years of age, for a debt contracted during infancy, & after the passing of *Infants Relief Act*, 1874 (c. 62), though not in respect of necessities. *Seemle*, however, in such case the acceptance would, as between the immediate parties to the bill, be a "promise or ratification" within the Act, upon which an action at suit of the drawer would not lie.—*BELFAST BANKING CO. v. DOHERTY* (1879), 4 L. R. Ir. 124.—IR.

e. *Mortgage.*—Deft., a minor, purchased an estate, & gave the vendor a mtge. for the purchase-money:—*Held*: the mtge., being the deed of an infant, was absolutely void.—*GRACE v. WHITEHEAD* (1859), 7 Gr. 591.—CAN.

f. ———.]—Deft. was one of several *cestuis que trust* who joined with their trustee in a mtge. for the purpose of discharging a lien upon the trust estate. It was recited in the mtge. deed that they had agreed to join therein in order to vest all their interests in the mtgee., but subject to the terms of the mtge. Deft. was then an infant under nineteen years of age, but that fact did not appear on the face of the instrument, in which

151. *Bond.*—*THOMPSON v. LEACH*, No. 123, *ante*.

152. *Penalty—Bond.*—*BAYLIS v. DINELEY*, 5. 78, *ante*.

153. ———.]—*VIDITZ v. O'HAGAN*, No. 703, *post*.

154. *For breach.*—*FARMERS & CLEVELAND DAIRIES CO. v. RILEY*, No. 34, *ante*.

155. *Not capable of ratification.*—*Re ONSLOW, Ex p. KIBBLE*, No. 62, *ante*.

156. ———.]—*Re SEAGER, SEELEY v. BRIGGS*, No. 390, *post*.

157. ———.]—*SMITH v. KING*, No. 63, *ante*.

158. ———.]—Deft., who was an infant at the time, drew a cheque on a date prior to July 29, 1913, making it payable to one B., & postdating it Aug. 14. The cheque was in payment of betting debts. On July 29 deft. came of age. On Aug. 11 pltf. cashed the cheque for B., & on Aug. 14 presented it, but it was returned marked "account closed":—*Held*: in an action on the cheque, pltf. could not recover.—*HUTLEY v. PEACOCK* (1913), 30 T. L. R. 42.

159. ———.]—*GARDNER v. WAINFUR*, No. 197, *post*.

Ratification of voidable contracts.—*See Sect. 4, sub-sect. 3, post*.

160. *Contract partly valid, partly invalid—Purchase of goods during & after infancy—Payment on account after attaining majority—Appropriation of payment.*—Where payment on account has been made in respect of purchases made during & after infancy, the vendor cannot appropriate the payment to the purchases made during infancy.—*KEEPING v. BROOM* (1895), 11 T. L. R. 595.

Restrictive covenants in contracts of apprenticeship.—*See MASTER & SERVANT*.

Lease by infant—No rent reserved.—*See No. 578, post*.

Sale & exchange of animals—Warranty by infant.—*See ANIMALS*, Vol. II., pp. 268, 269, Nos. 469, 470.

she was made to covenant for payment of the mtge. money:—*Held*: it was contrary to proper practice to have such a covenant on the part of an infant, & the covenant was void, as the infant had received no benefit from it & had been induced to enter into it *per incuriam*.—*BROWN v. GRADY* (1899), 31 O. R. 73.—CAN.

g. ———.]—A mtge. made by a minor is void.—*MOHORI BIBER v. DHARMODAS GHOSE* (1902), 1 L. R. 30 Cal. 539; 7 C. W. N. 441; L. R. 30 Ind. App. 114.—IND.

h. ———.]—A mtge. entered into by an infant is not merely voidable, but void *ab initio*.—*KAMTA PRASAD v. SHEO GOPAL* (1904), 1 L. R. 26 All. 342.—IND.

k. *Conveyance for voluntary past services—Partial payment made.*—A conveyance to a child for voluntary past services for which, however, partial payment had been made is void.—*UNION BANK OF CANADA v. MURDOCK*, [1917] 2 W. W. R. 112; 34 D. L. R. 150.—CAN.

l. *Acknowledgment of debt by guardian.*—An acknowledgment of a debt by the guardian of a minor does not bind the minor.—*CHHATO RAM v. BILTO ALI* (1898), 1 L. R. 26 Cal. 51.—IND.

m. *Contract to repay money lent—Not for necessities.*—If a minor accepts money except for necessities, he cannot be compelled to repay it, & any contract to do so made by him as a minor is void against him.—*NARJIN SINGH v. CHIRANJI LAL* (1924), 1 L. R. 46 All. 568.—IND.

SECT. 4.—VOIDABLE CONTRACTS.

SUB-SECT. 1.—WHAT CONTRACTS ARE VOIDABLE.

161. Meaning of voidable contract—Valid until avoided.]—The Infants' Relief Act, 1874 (c. 62), does not apply to a marriage settlement executed by an infant; but such a settlement is, as against the infant, voidable only; that is to say, valid until repudiated within the time & in the manner allowed by law.

Such contracts are, with some exceptions, valid until repudiated. It was suggested in argument that "voidable" may equally well signify "invalid until confirmed"; but to my mind that apart from the ordinary use of language, does not express the technical sense of the word (KEKEWICH, J.).—DUNCAN v. DIXON (1890), 44 Ch. D. 211; 59 L. J. Ch. 437; 62 L. T. 319; 38 W. R. 700; 6 T. L. R. 222.

Annotation :—*Reid*. Carter v. Silber (1892), 66 L. T. 473.

162. ———.]—The contracts of infants being, as a general rule, voidable only, an infant subscriber of a company's memorandum of assocn. is bound by his signature thereof unless & until the contract thereby created is avoided, & is therefore, at the time of his subscribing his name thereto, a "person" within Companies Act, 1862 (c. 89), s. 6, & capable of complying with the requisitions of that sect.

The rights of third persons, accrued before such signature by an infant is avoided, remains good, notwithstanding its subsequent avoiding by the infant.—*Re* LAXON & Co. (2), [1892] 3 Ch. 555; 67 L. T. 85; 40 W. R. 621; 8 T. L. R. 666; 36 Sol. Jo. 609.

Annotations :—*Reid*. *Re* Royal Naval School, Seymour v. Royal Naval School, [1910] 1 Ch. 806. *Mentd.* Ladies' Dress Assocn. v. Pulbrook (1900), 69 L. J. Q. B. 705.

163. ———.]—VIDITZ v. O'HAGAN, No. 703, *post*.

164. Benefit accruing to infant.]—DAVIES v. MANINGTON (1658), 2 Sid. 109; 82 E. R. 1283.

165. ———.]—HOLT v. CLARENCIEUX (WARD), No. 131, *ante*.

166. ———.]—BAYLIS v. DINELEY, No. 78, *ante*.

PART V. SECT. 4, SUB-SECT. 1.

161 i. Meaning of voidable contract—Valid until avoided.]—A voidable deed is valid until some act is done to avoid it, & it lies upon those who claim in opposition to the deed to show that such act has been done.—ALLEN v. ALLEN (1842), 4 L. Eq. R. 472; 2 Dr. & War. 307; 1 Con. & Law. 427.—IR.

164 i. Benefit accruing to infant.]—The effect of legislation now embodied in R. S. O., 1887, c. 127, s. 3, has been to give to the conveyance of an infant *feme covert* the same characteristics as are by law attributed to the conveyances of male infants, *i.e.*, if such deeds are of benefit to the infant or operate to pass an estate or interest, they are voidable not void.—WHALLS v. LEARN (1888), 15 O. R. 481.—CAN.

164 ii. ———.]—Guardians having mortgaged property belonging to a minor to enable them to discharge debts binding on his estate, the mtgee. sued to recover the amount of principal & interest due. The necessity had been urgent, the terms of the deed fair, & the money had been duly applied; but the guardians had not obtained the sanction of the ct. On its being contended that the mtge. was invalid & incapable of being enforced :—*Held* : a mtge. so executed was not void, but only voidable; & debt. was entitled to avoid the mtge., but only on the condition of restoring any benefit received by him thereunder to the person from whom it had been received.

The fact that the person who had received the benefit was debt. did not alter his position.—SINAYA PILLAI v. MUNISAMI AYYAN (1899), 1 L. R. 22 Mad. 289.—IND.

n. Deed.]—The deed of an infant is voidable only.—DONOHUE v. HALLETT (1828), N. B. Dig. 410.—CAN.

o. ———.]—The deed of an infant is not void *ab initio*, but voidable on his attaining majority.—FOLEY v. CANADA PERMANENT LOAN & SAVINGS CO. (1882), 4 O. R. 38.—CAN.

p. ———.]—MCDONALD v. RESTIGOUCHE SALMON CLUB (1896), 33 N. B. R. 472.—CAN.

q. ———.]—A deed, which takes effect by delivery, & is executed by an infant, is voidable only, & not void.—ALLEN v. ALLEN (1842), 4 L. Eq. R. 472; 2 Dr. & War. 307; 1 Con. & Law. 427.—IR.

r. Promissory note.]—The promissory note of an infant is voidable only, & he may confirm it after he comes of age.—FISHER v. JEWETT (1835), 2 N. B. R. (Ber.) 69.—CAN.

t. Conveyance of land.]—A conveyance of land made by an infant is not absolutely void, but voidable by him, either before or after he comes of age.—DOE d. JACKSON & GARRION v. WOODRUFFE (1850), 7 U. C. R. 332.—CAN.

a. ———.]—FEATHERSTON v. McDONELL (1865), 15 O. P. 162.—CAN.

b. ———.]—MILLER v. OSTRANDER (1866), 12 Gr. 349.—CAN.

167. ———.]—An infant's contract in respect of a subject of a permanent character is not void, but merely voidable; & if the infant wishes to repudiate such a contract he must do so before or within a reasonable time after he attains full age.

In May, 1882, an infant purchased a plot of freehold land from the trustees of a building society of which he was a member & a committee-man. In July of that year he came of full age. For four & a half years he paid monthly instalments of the purchase money, & acted as a committee-man :—*Held* : he had ratified the contract, & was liable under its provisions.—WHITTINGHAM v. MURDY (1889), 60 L. T. 956.

168. ———.]—(1) It has been clearly held that contracts of apprenticeship & with regard to labour are not contracts to an action on which the plea of infancy is a complete defence, & the question has always been, both at law & in equity, whether the contract, when carefully examined, in all its terms is for the benefit of the infant (KAY, L.J.)

(2) That raises this question of law, whether this is a contract which he can now repudiate, he being still an infant. I am of opinion, without going again through the cases that have been cited, that the answer to this proposition depends on whether on the true construction of the contract as a whole, it was for his advantage. If it was not so, he can repudiate it; but if it was for his advantage, it was not a voidable contract, but one binding on him, which he had no right to repudiate (LORD ESHER, M.R.).

(3) It is for the ct under these circumstances to say what is the construction of the contract, & . . . whether it is clearly & manifestly for the benefit of the infant (LORD ESHER, M.R.).—CLEMENTS v. LONDON & NORTH WESTERN RY. CO., [1894] 2 Q. B. 482; 63 L. J. Q. B. 837; 70 L. T. 896; 58 J. P. 818; 42 W. R. 663; 10 T. L. R. 539; 38 Sol. Jo. 562; 9 R. 641, C. A.

Annotations :—*As to* (1) *Expld.* & *Apld.* Morter v. G. E. Ry. (1908), 2 B. W. C. C. 480. *As to* (2) *Apld.* Roberts v. Gray, [1913] 1 K. B. 520.

169. ——— Absence of benefit—Question for

c. ———.]—GILCHRIST v. RAMSAY (1868), 27 U. C. R. 500.—CAN.

d. ———.]—DOE d. FOSTER v. LEE (1871), N. B. Dig. 410.—CAN.

e. ———.]—DOE d. SEELY v. CHARLTON (1881), 21 N. B. R. 119.—CAN.

f. ———.]—FOLEY v. CANADA PERMANENT LOAN & SAVINGS CO. (1882), 4 O. R. 38.—CAN.

g. ———.]—ROBINSON v. SUTHERLAND (1893), 19 Man. L. R. 199.—CAN.

h. Mortgage.]—A mtge. made by an infant is not absolutely void, but voidable by him, either before or after he comes of age.—DOE d. JACKSON & GARRION v. WOODRUFFE (1850), 7 U. C. R. 332.—CAN.

k. ———.]—FEATHERSTON v. McDONELL (1865), 15 O. P. 162.—CAN.

l. ———.]—MILLER v. OSTRANDER (1866), 12 Gr. 349.—CAN.

m. ———.]—GILCHRIST v. RAMSAY (1868), 27 U. C. R. 500.—CAN.

aa. ———.]—Declaration on debt. & covenant to pay off a mtge. to L., on land conveyed by him to pltf., non-payment, & a sale of the land under the mtge. to M., who evicted pltf. Plea on equitable grounds, that before the mtge. fell due, debt., at pltf.'s request, advanced to him the money required to pay it off, which pltf. promised & gave his bond to debt. to do; that afterwards pltf., owing debt. \$400, gave him a mtge. therefor upon the same land: that when the

judge.]—*CLEMENTS v. LONDON & NORTH WESTERN Ry. Co.*, No. 168, *ante*.

170. ———— **How ascertained—Construction as a whole.**—*MERRIOTT v. MARTIN* (1899), 43 Sol. Jo. 717.

171. ———— ————.]—A contract by an infant for necessities & for his benefit is binding on him, & cannot be repudiated by him on the ground that it is partly executory. An infant entered into a contract to go on a tour as a professional billiard player, & this contract was held to be for necessities & for his benefit. He acted on it to some extent & received some benefits under it. Part of the contract was executory:—*Held*: the contract was binding on him as a whole & he could not repudiate any part of it.

It is quite idle to say "Look at the contract & see if there is one clause which is adverse to the infant." The ct. cannot consider whether that is for the infant's benefit &, if it is not, say that the whole contract is therefore void; it must look at the contract as a whole, & see whether, looking at it as a whole, it is a contract for the infant's benefit, not merely a contract for necessities, but if it is a contract which on the whole is for the infant's benefit (*COZENS-HARDY, M.R.*).—*ROBERTS v. GRAY*, [1913] 1 K. B. 520; 82 L. J. K. B. 362; 108 L. T. 232; 29 T. L. R. 149; 57 Sol. Jo. 143, C. A.

Annotation:—*Reid. Mackinlay v. Bathurst* (1919), 36 T. L. R. 31.

Repudiation.—*See* Sub-sect. 2, *post*

Ratification.—*See* Sub-sect. 3, *post*.

Leases by & to infants.—*See* Part VIII., Sect. 8, *post*.

Avoidance of apprenticeship deeds.—*See* MASTER & SERVANT.

SUB-SECT. 2.—REPUDIATION.

172. **Who may avoid—Infant only.**—A promise to an infant that if he paid money debt. would

mtge. to L. fell due, pltf. being unable to pay it off according to his bond, it was agreed by all parties that L. should sell one-half of the land for more than her mtge., & pay pltf. the surplus, & release to pltf. the other half; that L. accordingly sold half the land to M., & released the other half to pltf. by deed, in which debt. joined, which deed pltf. accepted, & L. also paid to pltf. the balance of the purchase money received for the other half, above L.'s mtge. Replication, that pltf. when all these transactions took place, was an infant, by reason whereof his alleged bond & mtge. were voidable, & he has avoided the same:—*Held*: the replication was good for that there was nothing alleged in the plea to which pltf. was prevented from setting up his infancy as an answer, & he might avoid the bond & mtge. whenever they were relied upon against him.—*GALLAGHER v. GALLAGHER* (1870), 30 U. C. R. 415.—CAN.

o. ———.]—*FOLEY v. CANADA PERMANENT LOAN & SAVINGS CO.* (1882), 4 O. R. 38.—CAN.

p. ———.]—A mtge. executed by an infant before the passing of the Infants' Contracts Act is not void but voidable.—*SAUNDERS v. RUSSELL* (1902), 23 C. L. T. 56; 9 B. C. R. 321.—CAN.

q. **Bill of sale—To secure loan.**—Repudiation of a bill of sale by an infant avoids it.—*MEYERS v. BLACKBURN* (1905), 38 N. S. R. 50.—CAN.

r. **Purchase of shares.**—Where an infant purchases shares in a co. he may repudiate the contract upon coming of age.—*Re PRUDENTIAL LIFE INSURANCE CO. & PATERSON*, [1918]

1 W. W. R. 105.—CAN.

t. **Release of interest in ancestral property.**—The contract of a minor is not void, but voidable only, & is capable of ratification after he attains majority. A release by a minor father of all his right & interest in the ancestral property to his son is valid if ratified by the donor after he attains majority.—*SADASHIV VAMAN DHAMANKAR v. TRIMBAK DIVAKAR KARANDIKAR* (1898), I. L. R. 23 Bom. 146.—IND.

PART V. SECT. 4, SUB-SECT. 2.

172 i. **Who may avoid—Infant only.**—A contract of promise of marriage to an infant can only be avoided by the act of the infant, & not by the act of her guardian.—*PARKS v. MAYBER* (1851), 2 C. P. 257.—CAN.

172 ii. ———.]—Pltf., acting on behalf of his son H., who had been assaulted & beaten by debt., accepted from debt. a promissory note in settlement of the claim for damages sustained by H.:—*Held*: the contract being one which was voidable only by H., & binding unless avoided by him, debt. remained bound.

In this class of cases the right to treat the contract as voidable exists exclusively as a means of protection to the infant & is, until disaffirmed by the infant, binding upon the other party, who is to be regarded as having bound himself with due consideration.—*HUBLEY v. MORASH* (1894), 27 N. S. R. (15 R. & G.) 281.—CAN.

172 iii. ———.]—A contract entered into with a minor is merely voidable at the option of the minor; & there is nothing to prevent him suing thereon, supposing the contract

make an assurance is not void, but is voidable by the infant.—*GABLE v. FORESTER* (1861), 1 Keb. 1; 83 E. R. 773; *sub nom.* *FORRESTER'S CASE*, 1 Sid. 41.

Annotation:—*Mentd. Holt v. Clarencieux* (Ward) (1732), 2 Stra. 937.

173. ———.]—An infant may maintain an action upon a contract made for his benefit, but he cannot be sued upon it himself.—*SMYTH v. BOWEN* (1669), 2 Keb. 581; 84 E. R. 366; *sub nom.* *SMITH v. BOWIN*, 1 Mod. Rep. 25; 1 Vent. 51.

Annotation:—*Mentd. Holt v. Clarencieux* (Ward) (1732), 2 Stra. 937.

174. ———.]—*FARNHAM v. ATKINS* (1670), 1 Sid. 446; 82 E. R. 1208.

Annotation:—*Reid. Nash v. Inman*, [1908] 2 K. B. 1.

175. ———.]—Infancy is a personal privilege & none shall take advantage of it but he himself (*HOLT, C.J.*).—*COAN v. BOWLES* (1691), Carth. 122; Holt, K. B. 358; 1 Show. 165; 90 E. R. 1097; *sub nom.* *CONE v. BOWLS*, Comb. 100; 12 Mod. Rep. 1; 1 Salk. 205.

Annotations:—*Reid. Keniston v. Friskobaldi* (1727), Fitz-G. 1. *Mentd. R. v. Glastonby* (1736), Lee temp. Hard. 355; *Golding v. Dias* (1808), 10 East, 2; *R. v. York City JJ.* (1834), 1 Ad. & El. 828; *Met. Ry. v. Wilson* (1871), L. R. 6 C. P. 376.

176. ———.]—A. during his minority, by himself & his guardian agreed to grant a lease; & the lessee entered, & continued in possession, & paid rent after A. came of age. The lessee then claimed that he was only tenant at will the lease not being binding on A.:—*Held*: a lease should be executed in accordance with the agreement & the lessee should execute a counterpart, & pay costs.—*CLAYTON v. ASHDOWN* (1714), 9 Vin. Abr. 393; 2 Eq. Cas. Abr. 516; 22 E. R. 435.

177. ——— **Promise of marriage.**—*HOLT v. CLARENCIEUX* (WARD), No. 131, *ante*.

178. ——— **Infant trader.**—The trading contract of an infant is not void but he may enforce it at his election.

to be otherwise valid.—*SASHI BHUSAN DUTT v. JADU NATH DUTT* (1885), I. L. R. 11 Calc. 552.—IND.

172 iv. ———.]—A contract entered into with a minor is only voidable at the option of the minor.—*MAHAMED ARIF v. SARASWATI DEBYA* (1891), I. L. R. 18 Calc. 259.—IND.

172 v. ———.]—It is the peculiar privilege of infants for their protection, that though they are not bound, yet those who enter into contracts with them shall be bound, if it be prejudicial to the infant to rescind the contract.—*SHANNON v. BRADSTREET* (1803), 1 Sch. & Lef. 52.—IR.

172 vi. ——— **Marriage articles** executed by an adult & infant, there being no settlement under Infants' Settlement Act, 1855 (c. 43), nor any afterwards executed in pursuance of the articles, though voidable by the infant on his or her attaining age, are binding upon the adult.—*Re SMITH'S TRUSTS* (1890), 25 L. R. Ir. 439.—IR.

172 vii. ———.]—A deed of conveyance was executed by several joint tenants, including two infants. There was nothing to show that the infants executed on the same day & as nearly as possible at the same time, nor that the infants also executed after all the other grantees. Afterwards, one of the infants having died, the other, on coming of age, re-entered, & disaffirmed his conveyance:—*Held*: he was not able to disaffirm deceased infant's conveyance.—*TUCKER v. COLEMAN* (1885), 4 N. Z. L. R. 128 (S. C.)—N.Z.

177 i. ——— **Promise of marriage.**—*— v. JAMIESON* (1889), 17 O. R. 626.—CAN.

Sect. 4.—Voidable contracts: Sub-sect. 2.]

It has been urged for pltf. that it is incumbent on deft. to show that an infant can enter into a trading contract. The general law is that the contract of an infant may be avoided or not, at his option. As to the case put, the infant could maintain no such action; for he cannot perform the duties of a steward, & the law would not compel the lord to make an unavailing appointment (GIBBS, C.J.).—BRUCE v. WARWICK (1815), 6 Taunt. 118; 128 E. R. 978, Ex. Ch.; *affg.* S. C. *sub nom.* WARWICK v. BRUCE (1813), 2 M. & S. 205.

Annotations:—*Mentd. R. v. All Saints, Cambridge* (1822), 1 B. & C. 23; *Evans v. Roberts* (1826), 5 B. & C. 829.

179. — Marriage settlement.]—A marriage settlement, the husband being adult & the wife a minor, is binding on the former, though not on the latter.

In 1839 A. B. married a ward of ct. without leave; articles were executed both before & after the marriage. In 1840 a reference was made to approve of a settlement, but nothing was done thereon. In 1850 the parties executed a settlement of the wife's real estate without the sanction of the ct. In a suit instituted by the wife to annul the articles & confirm the settlement:—*Held*: in 1852, the power of the ct. was not affected by the lapse of time, the parties coming to the ct. had given it authority to do what was right, & a reference must be made to the master to report as to the propriety of the settlement of 1850, & whether it ought to be varied, & to approve of a settlement of the wife's personal estate.—CAVE v. CAVE (1852), 15 Beav. 227; 51 E. R. 524.

Annotation:—*Consd. Field v. Moore, Field v. Brown* (1855), 7 De G. M. & G. 691.

180. Party privy to infant.]—A. sold goods to an infant, & delivered them to B. for the purpose of being worked up by him for the vendee. The vendee afterwards, & after a portion of the goods had been used in performance of the work, went with A. to B.'s shop, & desired that the remainder might be returned to A., B. thereupon said, "I will return them or pay for them" at a price then agreed upon:—*Held*: it was competent to A. thus to rescind the contract without writing; &, supposing the agreement so to do was one which the infant himself might have repudiated, it was not competent to B. to object that the rescission was void, as not being for the infant's benefit.

An infant, or one in privity to him, may object to a contract on the ground that it was not for his benefit (JERVIS, C.J.).—DOUGLAS v. WATSON (1856), 17 C. B. 685; 139 E. R. 1245.

181. — How determined.]—By a marriage settlement the father of the intended husband, then a minor, covenanted with the trustees to pay them an annuity during the life of the intended wife or of any child or grandchild of the marriage, & the trustees were to pay the annuity to the husband during his life or until his bkpcy., & after determination of his interest for the benefit of the wife & the issue of the mar-

riage. The settlement contained an agreement by the husband to vest in the trustees upon certain trusts all property to which he should become entitled under the will of his father. The husband came of age about a month after he had executed the settlement. The father died nearly four years afterwards, leaving property by will to his son. More than a year after his father's death the husband repudiated the settlement:—*Held*: the settlement was as regards the husband voidable, not void; if he chose to repudiate it he must do so within a reasonable time after he came of age; he must be treated as knowing the contents of the deed whether he knew them or not; & his repudiation not being made within a reasonable time, he was bound by the settlement.

It seems to me that in measuring a reasonable time, whether in point of fact he had or had not acquainted himself with the nature of the obligations which he had undertaken is wholly immaterial. The time must be measured in precisely the same way whether he had so made himself acquainted or not. I do not say that he was under any obligation to make himself acquainted. . . All I say is this, that he cannot maintain that the reasonable time when measured must be a longer time because he has chosen not to make himself acquainted with the nature of the deed which he has executed (LORD HERSCHELL, C.).—EDWARDS v. CARTER, [1893] A. C. 360; 63 L. J. Ch. 100; 69 L. T. 153; 58 J. P. 4; 1 R. 218, H. L.; *affg.* S. C. *sub nom.* CARTER v. SILBER, CARTER v. HASLUCK, [1892] 2 Ch. 278, C. A.

Annotations:—*Consd. Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482; *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421; *Viditz v. O'Hagan*, [1900] 2 Ch. 87. *Appl. Carnell v. Harrison*, [1916] 1 Ch. 328. *Reid. Hamilton v. Hamilton*, [1892] 1 Ch. 396; *Re Foulkes, Foulkes v. Hughes* (1893), 69 L. T. 183; *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461; *Davenport v. Marshall* (1901), 85 L. T. 340.

182. —.]—Where a married woman, after attaining twenty-one, by deed though unacknowledged, affirms a settlement executed by her before her marriage, whilst an infant, such settlement is binding on her.

A man is bound by his covenant voidable on the ground of infancy unless he disaffirms it within a reasonable time after he comes of age. What is a reasonable time depends on the circumstances of the case (CHITTY, J.).

If he allows the reasonable time to elapse without doing anything either affirming or disaffirming the covenant, it stands as absolutely binding on him (CHITTY, J.).—*Re HODSON, WILLIAMS v. KNIGHT*, [1894] 2 Ch. 421; 63 L. J. Ch. 609; 71 L. T. 77; 42 W. R. 531; 10 T. L. R. 471; 38 Sol. Jo. 457; 8 R. 346.

Annotations:—*Consd. Harle v. Jarman*, [1895] 2 Ch. 419. *Reid. Viditz v. O'Hagan*, [1899] 2 Ch. 569.

183. Time for — "Reasonable time."]—W., when an infant of 20 years old, applied to be taken as an apprentice by A., & represented that he was of full age, & was bound without any premium for seven years, & received weekly wages. He continued working till two years after

180 i. — Party privy to infant.]—The conveyance of an infant is voidable only, & may be confirmed after he comes of age; but if he dies soon after coming of age, having done no act to confirm the deed, his heirs may avoid it.—DOE d. FOSTER v. LEE (1871), N. B. Dig. 410.—CAN.

183 i. Time for — "Reasonable time."]—The deed of an infant is not void *ab initio*, but voidable on his attaining

majority. If he wishes to avoid it, he must expressly repudiate his contract within a reasonable time otherwise his silence will be held to amount to an affirmation of it.—FOLEY v. PERMANENT LOAN & SAVINGS (1882), 4 O. R. 38.—CAN.

183 ii. —.]—MCDONALD v. RESTIGOUCHE SALMON (1896), 33 N. B. R. 472.—CAN.

183 iii. —.]—A mtge. executed

by an infant before the passing of the Infants' Contracts Acts is not void, but voidable, & if the infant wishes to avoid it he must expressly repudiate it within a reasonable time after coming of age.—SAUNDERS v. RUSSELL (1902), 9 B. C. R. 321.—CAN.

183 iv. —.]—An infant who enters into a contract for the purchase of chattels, not necessaries, may repudiate the purchase within a

he attained majority, & then absented himself without cause:—*Held*: he was properly convicted under the statute [4 Geo. 4, c. 34] for unlawfully absenting himself, for that assuming he could have disaffirmed the contract after majority, he had not done so within a reasonable time.—*WRAY v. WEST* (1866) 15 L. T. 180; 31 J. P. 37.

184. ———.]—*WHITTINGHAM v. MURDY*, No. 167, *ante*.

185. ———.]—*VIDITZ v. O'HAGAN*, No. 703, *post*.

Avoidance of allotment of shares to infants.]—*See COMPANIES*, Vol. IX., p. 276, No. 1701 *et seq*.

Avoidance of transfer of shares to infant.]—*See COMPANIES*, Vol. IX., pp. 399 *et seq*.

Avoidance of contract of membership—In statutory company.]—*See COMPANIES*, Vol. X., p. 1117, Nos. 7849–7854.

Avoidance of apprenticeship agreement.]—*See MASTER & SERVANT*.

Avoidance of marriage settlement.]—*See Part VIII.*, Sect. 11, *post*.

186. **Effect of repudiation—Refund of premium on lease.]—***ESRON v. NICHOLAS*, No. 618, *post*.

187. ——— **On purchase of estate—Revestment in vendor.]—***Semble*: an infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession & has not disclaimed at all events, unless he still continues a minor.

An infant is not absolutely bound but is in the same situation as an infant acquiring real estate, or any other permanent interest: he is not deprived of the right which the law gives every

infant of waiving & disagreeing to a purchase which he has made; & if he waives it, the estate acquired by the purchase is at an end . . . As the estate vests, as it certainly does, the burthen upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, & reverts it in the party from whom the infant purchased; if made within age, it suspends it only, because such disagreement may be again recalled, when the infant attains his majority. . . . The infant, even in the case of a lease, which is disadvantageous to him, cannot protect himself if he has taken possession, & has not disclaimed—at all events, unless he still be a minor (*PARKE, B.*).—*NORTH WESTERN RY. CO. v. M'MICHAEL, BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO. v. PILCHER* (1850), 5 Exch. 114; 6 Ry. & Can. Cas. 618; 15 Jur. 132; 155 E. R. 49; *sub nom.* *LONDON & NORTH WESTERN RY. CO. v. M'MICHAEL, BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO. v. PILCHER*, 20 L. J. Ex. 97; 16 L. T. O. S. 440.

Annotations:—*Conrad. Whittingham v. Murdy* (1889), 60 L. T. 956. *Reid. West Cornwall Ry. v. Mowatt* (1850), 19 L. J. Q. B. 478; *Cork & Bandon Ry. v. Goode* (1853), 1 O. L. R. 345; *R. v. Midland Counties & Shannon Junction Ry.* (1863), 9 L. T. 155.

188. ——— **Restitution of benefits obtained.]—***BURTON v. LEVEY*, No. 398, *post*.

Compare Nos. 367, 377, *post*.

189. **Effect of omission to repudiate—Infant bound.]—***Re HODSON, WILLIAMS v. KNIGHT*, No. 182, *ante*.

190. ———.]—*VIDITZ v. O'HAGAN*, No. 703, *post*.

reasonable time after coming of age & recover back any money he has paid on such purchase, provided he can put the vendor back in the position he was in before the contract was made & offers to do so.—*NICKLIN v. LONGHURST*, [1917] 1 W. W. R. 439; 27 Man. L. R. 255.—CAN.

183 v. ———.]—Where an infant purchases shares in a co. he may repudiate the contract upon coming of age, but is bound to do so within a reasonable time.—*Re PRUDENTIAL LIFE INSURANCE CO. & PATERSON*, [1918] 1 W. W. R. 105.—CAN.

183 vi. ———.]—An infant cannot disaffirm his deed after the lapse of twelve years.—*GERSE v. TAYLOR* (1879), 3 N. Z. L. R. C. A. 265.—N.Z.

188 i. **Effect of repudiation—Restitution of benefits obtained.]—**The policy of the law now is generally to allow the infant to suspend his ultimate decision upon questions of benefit or injury, till he is of legal capacity to bind himself, as an adult. When he arrives at majority he is clothed with full legal capacity with all its incidents & as an adult has no special protection on the ground of ignorance of the law, & any disaffirmance by him of a deed executed during minority should only be given effect to on the terms of his restoring to the other party, as far as possible, any benefit obtained by him during minority.—*FOLEY v. CANADA PERMANENT LOAN & SAVINGS CO.* (1882), 4 O. R. 38.—CAN.

188 ii. ———.]—When a little more than two months after coming of age, a married woman sought to set aside conveyances for value made by her while an infant *feme covert* to debts, who were ignorant of her disability, & under which debts had taken possession:—*Held*: she was entitled to such relief, but before the same could be granted, she must make complete restoration to debts of the specific or an equivalent value of that which she had received from them during her infancy.—*WHALLIS v. LEARN* (1888),

15 O. R. 481.—CAN.

188 iii. ———.]—*NICKLIN v. LONGHURST*, [1917] 1 W. W. R. 439; 27 Man. L. R. 255.—CAN.

a. ———.]—The repudiation by an infant during infancy of a contract previously entered into will have the same effect as such repudiation would have if made after attaining majority, provided nothing is done since attaining majority to ratify the contract.—*PHILLIPS v. SUTHERLAND* (1910), 15 W. L. R. 594; 22 Man. L. R. 491.—CAN.

189 i. **Effect of omission to repudiate—Infant bound.]—**An infant contracting in respect of a subject of a permanent nature is bound by the contract, unless he repudiates it within a reasonable time after he attains the age of twenty-one.—*McFERRAN v. McFERRAN* (1896), 15 N. Z. L. R. 292.—N.Z.

b. **What constitutes repudiation—Bringing action of ejectment.]—**The bringing an ejectment by an infant to regain possession of land conveyed to him, is so complete an avoidance of the deed that he cannot afterwards ratify it.—*DOE d. JACKSON & GARRION v. WOODRUFFE* (1850), 7 U. C. R. 332.—CAN.

c. ——— **Defending action of ejectment.]—**A mtge. by an infant may be avoided during infancy & defending by guardian an ejectment brought by the mtgee. is a sufficient avoidance.—*GILCHRIST v. RAMSAY* (1868), 27 U. C. R. 500.—CAN.

d. ——— **Property conveyed during infancy conveyed to another after majority.]—**A conveyance made by an infant is not binding on her when she comes of age, & is voidable at her option, & she effectually avoids such conveyance by a conveyance of the lands to another, executed a few months after she came of age.—*ROBINSON v. SUTHERLAND* (1893), 9 Man. L. R. 199.—CAN.

e. ———.]—E., an infant,

made a conveyance of land to J., who entered into possession. After E. came of age he made a second conveyance to M., but did no other act of avoidance of his former deed, & M. entered upon the land:—*Held*: E. had not avoided his conveyance to J.—*JOHNSON v. MCKAY* (1883), 2 N. Z. L. R. 156 (S. C.).—N.Z.

f. ——— **Solicitors threatening proceedings & issuing writ—Qualified by infant's statement.]—**R., in 1896, being then an infant, executed a mtge. in favour of S. R. came of age on Jan. 27, 1900, & at that time, on account of default having been made in the payment of the loan, S. was proceeding to sell under power of sale in the mtge. R.'s solrs., on Feb. 13, 1900, wrote S., saying that no valid mtge. had ever been executed by R., & threatening proceedings to protect their client's interests, & on Mar. 2 they issued a writ on behalf of R. against S. claiming a declaration that the mtge. was null & void, & an injunction restraining sale. On cross-examination on an affidavit made by R. in support of a motion for an *interim* injunction, he said, in substance, that the reason he did not pay was because he couldn't, & that he had never repudiated his contract, & in Oct. 1900, he discontinued his action. On Nov. 2, 1900, S. commenced his foreclosure action, & in defence R. pleaded infancy:—*Held*: the solr.'s letter & the writ did not constitute repudiation, as they were qualified by R.'s statement that he did not intend to repudiate.—*SAUNDERS v. RUSSELL* (1904), 9 B. C. R. 321.—CAN.

g. **Avoidance of insurance.]—**Action on a promissory note given in payment of the first premium on a policy of life insurance. Deft. pleaded that he was a minor when the contract was made; that it was disadvantageous to him, as it absorbed nearly all his annual revenue; & that as soon as his tutor had heard of it he had served

Sect. 4.—Voidable contracts: Sub-sect. 3.]**SUB-SECT. 3.—RATIFICATION.**

See Infants Relief Act, 1874 (c. 62).

Promises of marriage by infants, see HUSBAND & WIFE, Vol. XXVII., pp. 25, 26, Nos. 16–22.

191. What constitutes ratification—Payment of purchase-money — Payment by instalments.] — WHITTINGHAM v. MURDY, No. 167, *ante*.

192. Whether ratification or fresh promise—Question for jury.]—Deft. during his infancy made an offer of marriage to pltf. which she accepted subject to the approval of his parents. He afterwards gave her an engagement ring, which she wore; & two days before he attained his majority he went into the country to visit his father, & on his return, the day after he came of age, he saw pltf., & told her that he had explained all to his father, & that he assented to the engagement, adding, "Now I may & will marry you as soon as I can":—*Held*: it was properly left to the jury to say whether this was a fresh absolute promise to marry, or merely a ratification of the original promise made during infancy, so as to be avoided by the operation of the Infants Relief Act, 1874 (c. 62), s. 2.—NORTHCOTE v. DOUGHTY (1879), 4 C. P. D. 385.

Annotations:—*Consd.* Ditcham v. Worrall (1880), 5 C. P. D. 410. *Distd.* Holmes v. Brierley (1888), 59 L. T. 70.

193. — Ratification of original promise.]—A promise of marriage is within the Infants Relief Act, 1874 (c. 62), s. 2. Therefore no action can be brought for the breach of a promise of marriage made during infancy, notwithstanding a ratification of such promise has been made after full age. Ratification in such case would have reference to the original promise, & therefore would not be evidence of a new or fresh promise.—COXHEAD v. MULLIS (1878), 3 C. P. D. 439;

a protest on the co. on the ground that the contract was injurious to his pupil:—*Held*: deft. had established his plea, & it was not his interest to have so large an insurance, especially as his health was not good, & the premium took up nearly all of his fixed income.—IMPERIAL LIFE INSURANCE CO. v. CHARLEBOIS, 22 C. L. T. 417.—CAN.

PART V. SECT. 4, SUB-SECT. 3.

h. What constitutes ratification — Conduct.]—L. bound himself to H. under articles of clerkship, but being a minor his father was also made a party to the articles. The father covenanted, in addition to the usual covenants, that L. on admission as a solr. would not practice in the town of T. or within a radius of 50 miles thereof, & that he would pay the sum of £2,000 as liquidated damages to H. on breach of this covenant. The father in addition covenanted that L. would, & L. also covenanted for himself that he would, on coming of age enter into a like covenant. During the currency of the articles H. by virtue of a power conferred therein & at the request of L. assigned them to his partner. L. on coming of age was not formally requested to, & did not, enter into the covenant referred to, but continued service under the articles for a period of two years after attaining his majority; & was admitted as a solr. He afterwards commenced practice in the town of T.:—*Held*: L. had ratified & adopted the articles.—HAMILTON v. LETHBRIDGE (1912), 14 C. L. R. 236.—AUS.

k. — Assignments by a minor to his tutor (though voidable), impeached after a lapse of years, sustained, the evidence establishing that subsequent dealings had taken

place between the minor & tutor, after the former was of age, which amounted to a release of all claims on the part of the minor.—MOTZ v. MOREAU (1859–61), 13 Moo. P. C. C. 376; 15 E. R. 142.—CAN.

l. — Pltf. being at the time an infant, on Feb. 20, 1878, executed a mtge. in favour of defts. The proceeds were chiefly applied in paying off prior incumbrances on the land. Pltf. came of age on Apr. 19, 1880. After this date, & with full knowledge of his position, he, on Jan. 10, 1881, executed another mtge., with the object of in part paying off the mtge. in question; & moreover, by certain conversations with an agent of defts. he admitted his liability under the latter mtge. nor did he take any steps to disaffirm it until Sept. 7, 1882. On Sept. 30, 1882, this action was commenced:—*Held*: the mtge. in question was not void, but only voidable, & pltf.'s conduct after he came of age amounted to a ratification of it.—FOLEY v. CANADA PERMANENT LOAN & SAVINGS CO. (1882), 4 O. R. 38.—CAN.

m. — Acquiescence.]—D.'s father died in 1847. His will, purporting to devise all his real estate to his wife in fee, was not duly executed, & D. became entitled as heir-at-law. Three months before D. came of age he agreed with P. for the sale to him of the real estate for value. A conveyance to P. was prepared by D., & executed by his mother, the devisee under the father's will, D. being a witness to it. P. afterwards sold & conveyed his interest, & D. brought ejectment against the purchaser. D. had at various times acquiesced in the sale after he became of age:—*Held*: D.'s conduct & his subsequent acquiescence after his attaining

47 L. J. Q. B. 761; 39 L. T. 349; 42 J. P. 808; 27 W. R. 136.

Annotations:—*Distd.* Northcote v. Doughty (1879), 4 C. P. D. 385. *Consd.* & *Distd.* Ditcham v. Worrall (1880), 5 C. P. D. 410. *Distd.* Whitehead v. Hall (1887), 31 Sol. Jo. 445. *Consd.* Duncan v. Dixon (1890), 44 Ch. D. 211. *Refd.* Holmes v. Brierley (1888), 59 L. T. 70.

194. — Evidence of fresh promise.]—When both pltf. & deft. were under age, deft. made an express promise to marry the pltf., which she accepted, but no time for the marriage was then fixed. For some years afterwards, & after deft. had come of age, the parties remained on the footing of engaged lovers, & at last, the deft. being then of age, the day of their marriage was fixed, pltf. naming the day at the request of deft. to do so. Ultimately deft. refused to marry. In an action for breach of promise of marriage:—*Held*: assuming the case of *Coxhead v. Mullis*, No. 193, *ante*, to be rightly decided, & a contract to marry is within the Infants' Relief Act, 1874 (c. 62), & therefore not capable of being ratified by an infant after he comes of age, there was here evidence from which a jury ought to find a fresh promise to marry made after deft. had come of age, as distinguished from a mere ratification of the promise to marry which had been made during deft.'s infancy.—DITCHAM v. WORRALL (1880), 5 C. P. D. 410; 49 L. J. Q. B. 688; 43 L. T. 286; 44 J. P. 799; 29 W. R. 59.

Annotations:—*Appld.* Whitehead v. Hall (1887), 31 Sol. Jo. 445. *Distd.* Holmes v. Brierley (1888), 59 L. T. 70. *Consd.* Brown v. Harper (1893), 68 L. T. 488. *Refd.* *Re* Foulkes, Foulkes v. Hughes (1893), 69 L. T. 183.

195. — Contract of personal service—Continuance of service after majority.]—In Sept. 1886, deft. agreed to serve pltf., a firm of law accountants, at a weekly salary of 30s., or such other sum as might be agreed upon, & at the expiration of the agreement not to seek employment from or do work for persons who might at

majority, estopped him from denying the validity of the sale.—LEARY v. ROSE (1863), 10 Gr. 346.—CAN.

n. — Mere acquiescence for about two & a half months, after attaining majority was considered insufficient to operate as a ratification of a conveyance.—WHALLS v. LEARN (1888), 15 O. R. 481.—CAN.

o. — A. sued in 1885 to recover certain estates from B., alleging claim under his adoption which took place in 1865. In 1875 A., being still a minor, relinquished by deed his claim to the estates for £12,000, but now alleged that he thought he was relinquishing it only in favour of deft.'s predecessor in title who died in 1883, having been in possession of the estates since 1867. Pltf. attained his majority in 1878:—*Held*: assuming pltf. was a minor of fifteen years of age at the date of the deed of relinquishment, it was not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878; his conduct of acquiescence in the deed of relinquishment amounted to ratification of it.—VENKATACHALAM v. MAHALAKSHMAMMA (1886), 1 L. R. 10 Mad. 272.—IND.

p. — Continuing in possession of land—Sale & exchange.]—An exchange of lands by an infant is not void, but voidable only, & as such may be rendered valid by acts of confirmation. Where therefore, a party said to have been under age & intoxicated when he made an exchange of lands, continued, after coming of age, in possession of the property received in exchange, & afterwards sold or exchanged it for other property, it was considered such a confirmation as barred those claiming under him from

any time up to the expiration of the agreement have employed pltf's. At the time of the execution of the agreement deft. was a minor. After attaining twenty-one he continued in pltf.'s service for over four years, & his wages were raised from time to time. He left in Apr. 1892, & sought & obtained employment from persons who prior to that date were customers of pltf's.—*Held*: it ought to be inferred from the conduct of the parties that a new contract between them containing a stipulation by deft. in the terms of the agreement of Sept. 1886, not to seek employment or do work for former customers of pltf's., had been entered into after deft. attained twenty-one, & an injunction ought to be granted to restrain the breach of such stipulation.—*BROWN v. HARPER* (1893), 68 L. T. 488; 9 T. L. R. 429; 37 Sol. Jo. 495; 3 R. 585.

196. — Infant mortgagor—Fresh covenant on majority.]—An infant entitled to a share in real estate, joined in a mtge. thereof, & in three subsequent further charges, the aggregate principal money secured by the four deeds being £500. After the infant came of age, a reconveyance of the mortgaged property was executed to the mtgors., & a fresh mtge. was executed of the same property by the same mtgors. to the same mtgee. for £550. This mtge. did not refer to the previous mtges. The mtgor. who had executed the first-mentioned mtges. when an infant, died the year following the execution of the last mtge. His brother claiming as his heir-at-law or as otherwise entitled to his share of the realty, brought an action to have all the mtges. declared void under Infants Relief Act, 1874 (c. 62), alleging that the last mtge. & the covenants therein contained were merely by way of ratification of the previous mtges. & the covenants in them:—*Held*: the contracts contained in the

mtges. executed while the mtgor. was an infant, for repayment of the money lent, & also the assurance by him of the hereditaments in the same mtges., would be void under the Infants' Relief Act, 1874 (c. 62), but the covenant for repayment in the mtge. executed after he came of age could not, in the circumstances, be regarded as a mere ratification of his contract made during infancy, but was a fresh covenant made after he had come of age, & upon a good consideration, & such mtge. accordingly could not be declared void or non-enforceable as against his representatives or successors in title.—*Re FOULKES, FOULKES v. HUGHES* (1893), 69 L. T. 183; 3 R. 682.

197. — Fresh charge on majority.]—A married woman, during infancy, with her husband's consent executed a mtge. to her solr. of her reversionary interest for a sum expressed to be for her maintenance & for necessaries. After she attained twenty-one, by a supplemental deed expressing her desire of confirming the principal deed, she charged the premises to the mtgee. for a further advance, admitting that all matters incident to the former indenture had been explained to her ratifying & confirming it as if executed by her when of full age. Deft. W., another client of the solr., having made advances, a transfer supplemental to the original mtge. was executed by the married woman & the solr. of his mtge. debt, & the reversionary interest was assigned to W. subject to the subsisting equity of redemption. W. having sued the married woman for his debt, signed judgment by consent. She subsequently assigned the equity of redemption in the premises to S. & with him brought an action against W. & the solr., alleging that the advances made before she attained twenty-one were in fact made to her husband, & that she had acted without independent advice & without

impeaching the transaction.—*MILLER v. OSTRANDER* (1886), 12 Gr. 349.—CAN.

g. — Re-acknowledgment of deed.]—M. came of age on Aug. 27, 1857. On July 1 previous, he executed a deed of the premises in question to U., under whom deft. claimed, which was registered on Aug. 26. This deed was re-acknowledged between Aug. 28 & Aug. 30, & the re-acknowledgment registered on Sept. 5, in the same year. On Aug. 28, a judgment was entered up against M. in favour of pltf. on a confession of judgment in *assumpsit* signed the same day, & pltf. claimed through a sale by the sheriff upon a writ placed in the sheriff's hands on Oct. 5, 1857:—*Held*: there had been a sufficient re-acknowledgment of the deed by the infant, & the confession of judgment was not *per se* an act done to avoid the deed.—*McCOPPIN v. MCGUIRE* (1873), 34 U. C. R. 157.—CAN.

r. — Mere omission to disaffirm.]—A conveyance of land by an infant is voidable only, & may be avoided by him after coming of age. Mere omission to disaffirm such a deed is not sufficient evidence to warrant a jury in finding a confirmation.—*DOE d. SEELY v. CHARLTON* (1881), 21 N. B. R. 119.—CAN.

t. — Silence.]—*FOLEY v. CANADA PERMANENT LOAN & SAVINGS CO.* (1882), 4 O. R. 38.—CAN.

a. —]—The deed of an infant is not void *ab initio*, but voidable on his attaining his majority. If he wishes to avoid it, he must expressly repudiate his contract within a reasonable time after coming of age; otherwise his silence will be held to amount to an affirmation of it.—*MCDONALD v. RESTIGOUCHE SALMON CLUB* (1896), 33 N. B. R. 472.—CAN.

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b. — Admission of existing liability.]—To constitute a ratification, after full age, of a debt contracted during infancy, there must be at least an admission of an existing liability.—*LOUDEN MANUFACTURING CO. v. MILMINE* (1907), 9 O. W. R. 829; 14 O. L. R. 532.—CAN.

c. — Delay.]—A delay of seventeen months in commencing an action to rescind a contract should not be treated as a ratification.—*PHILLIPS v. SUTHERLAND* (1910), 15 W. L. R. 594; 22 Man. L. R. 491.—CAN.

d. —]—Long delay in repudiating a contract by a minor on his attaining majority, when such delay is wholly unaccounted for, is sufficient ground for inferring a ratification of the contract.—*BOIDONATH DEY v. RAMKISHORE DEY* (1870), 10 B. L. R. 326, n.; 13 W. R. 166.—IND.

e. —]—*DOORGA CHURN SHAHA v. RAMNARAIN DOSS* (1870), 10 B. L. R. 327, n.; 13 W. R. 172.—IND.

f. — Acceptance of dividend.]—Where an infant purchases shares in a co. his acceptance of a dividend after he comes of age is a definite affirmation of the contract.—*Re PRUDENTIAL LIFE INSURANCE CO. & PATERSON*, [1918] 1 W. W. R. 105.—CAN.

g. — Kistbundi given on attaining majority.]—Applt. made a claim upon resps. in respect of certain bonds given during their minority by their exor. & guardian. On attaining majority, resps., being desirous of avoiding payment, were advised that they could only do so by instituting a suit to which the exor. must be a party, & in which a settlement of his accounts would be required. Rather than do this they came to terms with

applt. in order to obtain time for the payment of the debt by instalments, & a *kistbundi* was accordingly executed:—*Held*: resps. could not now, after the death of their guardian, dispute their liability for a debt which they had thus deliberately undertaken to pay.—*GOLAUB KOONWURRE BEBEE v. ESHAN CHUNDER CHOWDHOREE* (1861), 2 W. R. 47; 8 Moo. Ind. App. 447.—IND.

h. — Repayment of loan — Not for necessaries.]—If a minor accepts money except for necessaries, he cannot be compelled to repay it, & any contract to do so made by him as a minor is void against him, but if, when of full age, he takes it upon himself to repay, there is no reason either in law or equity why his agreement should be deemed unlawful.—*NARAIN SINGH v. CHIRANJI LAL* (1924), 1 L. R. 46 All. 568.—IND.

k. — Exercise of power of revocation—Execution of marriage settlement.]—A father, tenant for life, & his son, *quasi* tenant in tail in remainder, of a renewable freehold, joined, while the son was under age, in executing a deed, by which the lands were limited to the father for life, remainder to the son absolutely, if he survived the father, but if he died in the father's lifetime, without issue, to the father absolutely. The father subsequently executed a deed, by which he purported to convey his interest to the son, but remained in possession, & afterwards obtained a renewal from the landlord. The father & son afterwards joined in conveying part of the lands comprised in the original settlement, by which the entail was created; & in order to enable them to do so, exercised a power of revocation, which was reserved to them jointly by the deed

Sect. 4.—Voidable contracts: Sub-sects. 3 & 4.
Sect. 5.]

proper accounts having been furnished, alleging also misrepresentation, & claiming redemption on payment of such part of the advances as were proved to have been made to her & for necessities:—*Held*: the moneys in question had been advanced to the infant for & expended for necessities, although the original mtge. did not bind the reversionary interest, but was void & not capable of confirmation by the purported confirmation in the supplemental deed executed after her majority, yet the married woman & her husband had by that deed executed after her majority by a new bargain created a charge on the premises in respect of the debt due for necessities, & having acknowledged that the full sum was owing on the securities, obtained the money to pay off the solr. from W., the transferee, redemption could only be ordered against W. without reducing his security by the sum representing the advances made during infancy.—*GARDNER v. WAINFUR* (1919), 89 L. J. Ch. 98; 120 L. T. 688.

198. "No action shall be maintained"—Application to "set off"—Statute of Frauds Amendment Act, 1828 (c. 14), s. 5.]—(1) The right of a deft. in an action to set off a debt due from pltf. to him, under 2 Geo. 2, c. 22, s. 13, exists only where the debt sought to be set-off is enforceable by action.

Where deft. sought to set off a debt, arising upon the promise of an infant, such promise not having been ratified in accordance with above

sect.:—*Held*: the replication of infancy to the plea of set-off was a sufficient answer, & pltf. was entitled to recover.

(2) The words in above sect., "No action shall be maintained," extend to cases of set-off; so that a deft. may not set off a promise of an infant supported merely by a parol ratification after full age in an action brought against him by the infant, any more than he might sue the infant upon such promise, both being equally precluded by above sect.—*RAWLEY v. RAWLEY* (1876), 1 Q. B. D. 460; 45 L. J. Q. B. 675; 35 L. T. 191; 24 W. R. 995, C. A.

Annotation:—Generally, *Mentd. McCreagh v. Cox & Ford* (1923), 92 L. J. K. B. 855.

Protection against bankruptcy proceedings.]—See *BANKRUPTCY*, Vol. IV., p. 28, Nos. 222, 223.

Ratification of infants' marriage settlements.]—See Part VIII., Sect. 11, *post*.

Contracts for service—Remaining in service after majority.]—See *MASTER & SERVANT*.

SUB-SECT. 4.—SPECIFIC PERFORMANCE.

Enforcement against infant—Election of infant to avoid.]—See Nos. 172–179, *ante*.

199. — Agreement to grant lease.]—Defts., an adult & an infant, agreed to grant a lease of property of which they were joint tenants. The adult was not guilty of misrepresentation or misconduct:—*Held*: specific performance could not be decreed against both defts., one being an infant, nor

executed during the son's minority. The son afterwards executed a settlement upon his marriage, to which the father was no party, by which he conveyed the lands to trustees, upon trusts, for his intended wife, & the issue of the marriage, with remainder, in default of issue, to himself absolutely. The son survived the father, & died, leaving issue female only. The next *quasi* tenant in tail filed his bill, claiming the benefit of the entail as still subsisting:—*Held*: the deed executed by the infant was voidable only, & not void, & either the exercise of the power of revocation, or the marriage settlement by the infant, was of itself a sufficient confirmation of that deed.—*ALLEN v. ALLEN* (1842), 4 I. Eq. R. 472; 2 Dr. & War. 307; 1 Con. & Law. 427.—IR.

l. — Consent judgment.]—Y., in an action tried before a jury, obtained judgment against M., for £65, the price of a horse sold to M. while an infant. M. had pleaded infancy in his defence, but had withdrawn the plea at the trial, & fought the case on the ground that the transaction was one of hiring, not of sale. Y. subsequently issued a debtor's summons against M. for payment of the amount of the judgment & costs. The judge in bkpcy., being of opinion on the evidence before him that the horse was not a necessary, dismissed the debtor's summons:—*Held*: the Ct. of Bankruptcy had power to go behind the judgment, & inquire into the consideration; & there being evidence before the judge entitling him to find that the horse was not a necessary, he was right in dismissing the debtor's summons.—*Re MEAD*, [1916] 2 I. R. 285.—IR.

m. — Acquiescence in expenditure on land.]—Deft. during his minority became the grantee in fee of lands purchased by his father from the Crown in the name & for the benefit of the deft. Deft. & his father conveyed the lands on Mar. 28, 1855, during deft.'s minority, to one of pltf's. for the sum of \$40, & a portion of

the land was resold by the purchaser to his co-pltf's. Deft. attained his majority in Oct. 1861, up to which time about £30 had been expended on the land. Subsequently to Oct. 1861, & prior to Mar. 17, 1866, when deft. gave pltf's. notice to quit & deliver up possession of the land in dispute, £456 had been expended in further improving the property. These improvements had been made with the knowledge, consent, & encouragement of deft. An action of ejectment having been brought by deft. against pltf's., & judgment obtained therein, & the present suit having been instituted to restrain further proceedings thereon:—*Held*: the acts of deft. after his majority did not amount to a confirmation of the conveyance executed by him during his minority, but pltf's. were entitled to an injunction restraining proceedings upon the judgment obtained by deft. in his action of ejectment until he had paid pltf's. the value of the improvements made upon the land by them with deft.'s knowledge, consent, & encouragement after he attained his majority.—*FRANCE v. SUISTED*, Mac. 586.—N.Z.

n. "No action shall be maintained"—Statute of Frauds Amendment Act, 1828 (c. 14), s. 5.]—The above sect. is in force in Saskatchewan.—*MOLYNEUX v. TRAILL* (1915), 32 W. L. R. 292; 9 W. W. R. 137.—CAN.

o. Evidence—Sufficiency of.]—Acts of less moment & significance than are required to avoid the conveyance of a minor may be sufficient evidence of its ratification.—*FOLEY v. CANADA PERMANENT LOAN & SAVINGS CO.* (1882), 4 O. R. 38.—CAN.

p. — —.]—Ratification has been assumed sometimes on what appears to be very slight evidence, for the apparent purpose of preventing fraud; but there is no case where ratification has been assumed in the absence of any evidence, & in the face of an express repudiation & abandonment.—*GREAT WESTERN IMPLEMENT CO. v. GRAMS* (1908), 8 W. L. R. 160.—CAN.

PART V. SECT. 4, SUB-SECT. 4.

q. Enforcement against infant—Costs.]—A decree for specific performance against the infant heirs of vendors should be without costs.—*COMMANDER v. GILRIE* (1858), 6 Gr. 473.—CAN.

r. — —.]—Pltf., who at the time of the contract, & at the commencement of this action, was an infant, entered into a contract with deft., who was not aware of the infancy for the purchase of certain land; pltf. knew that deft. was not the owner of the land, but that his rights were those of a purchaser under an agreement upon which payments were to be made: with this knowledge pltf. made payments on account of the price to deft., & while still an infant tendered money to deft. sufficient to make up 50 per cent. of the purchase-money & a mtge. on the land executed by himself, & asked for a deed of the land in accordance with the provisions in the contract. Pltf. made an affidavit that he was over twenty-one years of age, although he knew he was not & that he could not make a valid or legal mtge. Deft. did not accept the tender; & pltf. afterwards, while still under age, repudiated the contract, on the ground of infancy & so notified deft.:—*Held*: what deft. contracted for was a document which would give him security on the land, which the mtge. tendered did; pltf. was unable to perform a condition precedent & that was fatal to his claim for rescission based upon the provision of the contract referred to.—*ROBINSON v. MOFFATT* (1915), 9 O. W. N. 99, 209; 35 O. L. R. 9.—CAN.

t. — —.]—In a suit to enforce specific performance of a contract against a minor, entered into by a guardian appointed with the sanction of the ct., it was not shown that the contract was for the benefit of the minor:—*Held*: a decree for specific performance of a contract should not be made against deft. while an infant.—*JUGUL KISHORI CHOWDHURANI v.*

against the adult as to her share & therefore an injunction to restrain dealings with the property until trial would not be granted against both or either.—*LUMLEY v. RAVENSCROFT*, [1895] 1 Q. B. 683; 64 L. J. Q. B. 441; 72 L. T. 382; 59 J. P. 277; 43 W. R. 584; 39 Sol. Jo. 345; 14 R. 347, C. A.

200. Enforcement by infant—Want of mutuality.]—An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual.

The act of filing the bill cannot bind him, & my opinion therefore is, that the bill must be dismissed with costs, to be paid by the next friend (*LEACH, M.R.*).—*FLIGHT v. BOLLAND* (1828), 4 Russ. 298; 38 E. R. 817.

Annotations:—*Reid. King v. Bellord* (1863), 11 W. R. 900. *Mentd. Pickering v. Ely (Bp.)* (1843), 2 Y. & C. Ch. Cas. 249; *Norris v. Jackson* (1860), 1 John. & H. 319.

201. —.]—*HARGRAVE v. HARGRAVE*, No. 1972, *post*.

See, generally, SPECIFIC PERFORMANCE.

SECT. 5.—RECOVERY BY INFANT OF SUMS PAID UNDER VOID OR VOIDABLE CONTRACTS.

202. Right to recover—Deposit.]—*BUCKINGHAMSHIRE (EARL) v. DRURY*, No. 367, *post*.

203. —.]—Though an infant who has entered into a contract cannot be compelled to complete it, yet he cannot maintain an action to recover back a deposit.

Though an infant is not compellable to complete a contract, yet that when he has paid money under it, he cannot recover it back unless

he can show that fraud had been practised on him. If an infant was to buy a thing not being necessities, he could not be compelled to pay for it; but having done so, he could not recover back the money (*LORD KENYON*).—*WILSON v. KEARSE* (1800), Peake, Add. Cas. 196.

Annotation:—*Apprvd. Re Burrows, Ex p. Taylor* (1856), 8 De G. M. & G. 264.

204. — Premium on lease.]—If an infant pay money without a valuable consideration he cannot recover it back in an action for money had & received.

Therefore where A. during his infancy paid a sum to B. as a premium for a lease, which he avoided after he became of age, & received no benefit from the occupation from that period:—*Held*: he was not entitled to recover.

Qu.: If an infant enter into an agreement with an adult, to take a lease of a house, & the former alone pay the premium to the lessor, he can, on failure of consideration recover it back, in an action brought in his own name, without joining such adult.—*HOLMES v. BLOGG* (1818), 8 Taunt. 508; 2 Moore, C. P. 552; 129 E. R. 481.

Annotations:—*Expld. & Distd. Corpe v. Overton* (1833), 10 Bing. 252. *Distd. Everett v. Wilkins* (1874), 29 L. T. 846. *Consd. Hamilton v. Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589. *Appl. Steinberg v. Scala (Leeds)*, [1923] 2 Ch. 452. *Reid. Newry & Ennis-killen Ry. v. Coombe* (1849), 3 Exch. 565; *Re Burrows, Ex p. Taylor* (1856), 8 De G. M. & G. 254.

205. — Premium on partnership.]—An infant paid by means of borrowed money a premium on entering into a partnership & before he became of age disaffirmed the contract:—*Held*: he could not have recovered back the premium had his partners remained solvent & therefore could not prove for it under their bkpcy.—*Re*

ANUNDA LAL CHOWDHURI (1895), I. L. R. 22 Calc. 545.—IND.

a. —.]—A decree for specific performance can be given against a minor when the ct. finds that it is for the benefit of the minor that the contract should be performed.—*KHAIRUN-NESSA BIBI v. LOKE NATH PAL* (1899), I. L. R. 27 Calc. 276.—IND.

b. —.]—The certificated guardian of a minor, finding that it was necessary that some of the minor's property should be sold, applied for permission to the district judge, who sanctioned the sale for a price of Rs725. Subsequently the guardian discovered that this was an inadequate price, & having received an offer of Rs825 for the property, went again to the district judge for sanction to the second contract obtained sanction & sold the property for Rs825:—*Held*: the former contract being to the detriment of the minor could not be specifically enforced.—*CHITTAR MAL v. JAGAN NATH PRASAD* (1906), I. L. R. 29 All. 213.—IND.

c. Enforcement by infant.]—The widow & infant heirs of C. were entitled, subject to a mtge. to E. By agreement between the widow, E., & W., the premises were conveyed to W., upon an oral understanding that he should retain a part of the premises, equal in value to the sum due on E.'s mtge., which he was to assume, & that he should convey the remainder of the land to the widow, for the benefit of herself & children. The conveyance to W. having been made, the widow & infant heirs filed their bill, seeking a specific performance of the agreement to convey the portion agreed on to them:—*Held*: the specific relief sought could not be decreed, but under the general prayer, & the case stated, plffs. were entitled to some relief; & a demurrer was therefore overruled.—*CLARK v. EBY* (1865), 11 Gr. 98.—CAN.

d. —.]—Deft. in 1871 wrote to his son, who had left home to work for himself, that if he would return he would give him 50 acres of his farm & a share of the cattle & sheep when pltf. got married, but if he stayed away he would sacrifice his own & his father's interests. Upon receipt of the letter pltf. returned & remained on the farm working it with his father, except at certain times when he went to work for wages for himself. It was proved that the father had pointed out the 50 acres which he intended to give his son, & the son entered & erected a house thereon with his father's approval, & occupied it with his family, he having married in 1879:—*Held*: pltf. was entitled to specific performance of this agreement.—*GARSON v. GARSON* (1882), 3 O. R. 439.—CAN.

e. —.]—An infant may elect to ratify & take advantage of a contract entered into by an agent for him, & the ct. will, in the exercise of its equitable jurisdiction, assist the infant in enforcing his rights.—*JOHANNSON v. GUDMUNDSON* (1909), 19 Man. L. R. 83.—CAN.

f. —.]—Deft., a widow, promised pltf., her son, that, if he would remain at home with her & work on the farm until all the debts were paid off, she would buy & give him a farm when he got married & wanted to set up for himself. Pltf. did remain at the home, working without wages, until all the conditions were fulfilled, & faithfully performed his part of the bargain. The land claimed by pltf. was bought by deft. in her own name but for him pursuant to the said agreement, & he was let into possession as owner pursuant to the terms of the agreement:—*Held*: pltf. was entitled to have the agreement specifically performed by the conveyance of the land to him.—*DOUGLAS v. DOUGLAS* (1914), 24 Man. L. R. 430; 28 W. L. R. 481.—CAN.

g. —.]—A minor cannot main-

tain a suit for specific performance of a contract entered into on his behalf by his guardian.—*FATIMA BIBI v. DEBNAUTH SHAH* (1893), I. L. R. 20 Calc. 508.—IND.

PART V. SECT. 5.

202 i. Right to recover—Deposit.]—Pltf., an infant, agreed to purchase from deft. a house & lot & paid a deposit at the time the agreement was signed. The evidence negatived any misrepresentation on the part of deft., & showed that pltf. took possession of & controlled the property:—*Held*: although an infant is not compellable to complete a contract, yet when he has paid money under it he cannot recover it back unless he can show that fraud has been practised upon him.—*SHORT v. FIELD* (1914), 7 O. W. N. 400, 758; 32 O. L. R. 395.—CAN.

h. — *Instalment on purchase price—Sale of land.]*—*PHILLIPS v. GREATER OTTAWA DEVELOPMENT CO.* (1916), 38 O. L. R. 315; 33 D. L. R. 333.—CAN.

i. — *Sale of motor cycle.]*—A minor, aged 17, purchased a motor cycle agreeing to pay the price in instalments & upon the further condition that if any instalment was not duly paid the seller could retake the cycle & keep the moneys paid. The minor was not assisted by his father in making the contract. There was evidence that the father knew that his son possessed & used the cycle, but not that he knew of the terms upon which the boy had it, or knew that it had been purchased. The minor failed to keep up his instalments after he had paid \$25, & the seller retook possession of the cycle. In an action by the minor's father to recover the \$25 paid to the seller:—*Held*: the contract was not one for the minor's benefit; the father's knowledge did not amount to a ratification of the contract; & the father was

Sect. 5.—Recovery by infant of sums paid under void or voidable contracts. Sect. 6: Sub-sects.

BURROWS, *Ex p. TAYLOR* (1856), 8 De G. M. & G. 254; 25 L. J. Bcy. 35; 26 L. T. O. S. 266; 2 Jur. N. S. 220; 4 W. R. 305; 44 E. R. 388, L. JJ.

Annotations:—Consd. Hamilton v. Vaughan-Sherrin Electrical Engineering Co., [1894] 3 Ch. 589; *Steinberg v. Scala* (Leeds), [1923] 2 Ch. 452.

206. — Instalment on purchase price—Sale of business.]—Pltf., during infancy, agreed with deft. in writing to buy one half share of a public-house business of deft., agreeing to pay an instalment of the purchase-money at once, & the balance at a future uncertain time, deft. to provide board & lodging for pltf. & his wife, & pltf. not to receive any fruits of the partnership until the balance should be paid. Pltf. paid an instalment of the purchase-money, & went with his wife to board & lodge with deft., & shared the management of the business, but afterwards, & before his majority, rescinded the agreement:—*Held*: pltf. might, in an action for money had & received, recover back the instalment paid under the agreement, less the amount expended by deft. in providing board & lodging for pltf. & his wife.—*EVERETT v. WILKINS* (1874), 29 L. T. 846.

207. — — — — — Enjoyment of goods purchased.]—Pltf., an infant, agreed with deft. to become tenant of a house, & to pay a certain sum for the furniture therein. Pltf. paid deft. part of this sum & occupied the house, & used the furniture during several months:—*Held*: pltf. was not entitled under Infants Relief Act, 1874 (c. 62), s. 1, to recover back the amount paid by him to deft.

Under the contract in question, which was one for his advantage, pltf., an infant, undertook to pay deft. a sum of money. He paid deft. part of this sum, & gave him a promissory note for the balance. The judge satisfied himself that pltf. was an infant at the time when he entered into the contract, & having satisfied himself of this, did, in my opinion, justice according to law. He set aside the contract, & he ordered the promissory note to be cancelled. It is now contended that, in addition to this relief, pltf. was entitled to an order for the re-payment of the sum paid by him to deft. as money paid under a contract declared to be void. No doubt the words of Infants' Relief Act, 1874 (c. 62), s. 1, are strong & general, but a reasonable construction ought to be put upon them. The construction which has been contended for on behalf of pltf. would involve a violation of natural justice. When an infant has paid for something & has

entitled to succeed.—*BADDELAY v. CLARKE* (1923), 44 N. L. R. 306.—S. AF.

l. — Rent of premises — Money paid for goods & fixtures.]—If an infant pay money without valuable consideration, he can get it back; & if he pay money for valuable consideration, he may also recover it, but subject to the condition that he can restore the other party to his former position:—*Held*: pltf., an infant, was not entitled to recover from deft. moneys paid for rent of premises & purchase of goods & fixtures.—*STURGEON v. STARR* (1911), 17 W. L. R. 402.—CAN.

m. — Excess deposit paid into bank—Bank Act, s. 95.]—The above sect. imposes no restriction upon repayment by the bank of a deposit in excess of \$500 made by an infant. The restriction is upon the amount of deposit; & if, as a matter of policy, the legislature requires an infant's account to be kept under \$500, & the

bank, in ignorance of the fact that the depositor is an infant, receives a sum in excess of \$500, it becomes the bank's duty, on learning of his minority, to repay the excess to the infant. The sect. affords no sanction for the argument that, because \$1,800 was unlawfully received by the bank from the infant, & paid out on the infant's order, the infant was entitled to demand payment of \$1,300, the disability having ceased; & at any rate, the sect. is not applicable, because there is no "law of the Province" which prevents an infant from depositing money in & withdrawing it from the bank, even assuming that the expression "law of the Province" is not to be confined to an express statutory provision:—*Held*: pltf., suing the bank for part of the money which it had paid out upon his order, should have come to the ct. promptly after his disability ceased; a delay of a year & a half after majority was fatal to his claim; & it was no excuse that

consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid. Here the infant pltf. who claimed to recover back the money which he had paid to deft. had had the use of a quantity of furniture for some months. He could not give back this benefit or replace deft. in the position in which he was before the contract. The object of the statute would seem to have been to restore the law for the protection of infants upon which judicial decisions were considered to have imposed qualifications. The legislature never intended in making provisions for this purpose to sanction a cruel injustice. Deft. therefore could not be called upon to repay the money paid to him by pltf., & the decision appealed against is right (*COLERIDGE, C.J.*).—*VALENTINI v. CANALI* (1889), 24 Q. B. D. 166; 59 L. J. Q. B. 74; 61 L. T. 731; 54 J. P. 295; 38 W. R. 331; 6 T. L. R. 75, D. C. *Annotation:—Reid. Stocks v. Wilson* (1913), 108 L. T. 834.

208. — Failure of consideration.]—Held: pltf. might recover back in an action for money had & received a sum which while an infant he had paid in advance towards the purchase of a share in deft.'s trade; to be retained by deft. as a forfeiture if pltf. failed to fulfil an agreement to enter into partnership with deft.—*CORPE v. OVERTON* (1833), 10 Bing. 252; 3 Moo. & S. 738; 3 L. J. C. P. 24; 131 E. R. 901.

Annotations:—Apld. Everett v. Wilkins (1874), 29 L. T. 846; *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589. *Distd. Steinberg v. Scala* (Leeds), [1923] 2 Ch. 452.

— — — — — **Money paid in respect of shares.]—**See COMPANIES, Vol. IX., pp. 276, 286, Nos. 1699, 1700, 1773.

SECT. 6.—CONTRACTS FOR NECESSARIES.

SUB-SECT. 1.—IN GENERAL.

See Infants Relief Act, 1874 (c. 62), & Sale of Goods Act, 1893 (c. 71), s. 2.

209. Liability of infant.]—Whenever necessities are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessities out of his own property.—*Re RHODES, RHODES v. RHODES* (1890), 44 Ch. D. 94; 59 L. J. Ch. 298; 62 L. T. 342; 38 W. R. 385, C. A.

Annotations:—Apprvd. Nash v. Inman, [1908] 2 K. B. 1. *Reid. Healing v. Healing* (1902), 51 W. R. 221; *Re Clabbon* (1904), 73 L. J. Ch. 853; *Re J.*, [1909] 1 Ch. 574. *Mentd. Birkenhead Union Grdns. v. Brookes* (1906), 95 L. T. 359; *Catt v. Wood*, [1908] 2 K. B. 458.

he had been misled by his mother as to the date of his birth; the bank acted honestly, without any knowledge of pltf.'s infancy, & there was nothing in his appearance to indicate infancy or to provoke inquiry.—*FREEMAN v. BANK OF MONTREAL* (1912), 26 O. L. R. 451.—CAN.

PART V. SECT. 6, SUB-SECT. 1.

209 i. Liability of infant.]—An infant about to marry may make himself liable for goods reasonably required for the marriage or for the joint establishment after marriage.—*QUIGGAN BROTHERS v. BAKER*, [1906] V. L. R. 259.—AUS.

209 ii. —.]—JEWELL v. BROAD (1909), 14 O. W. R. 269; 19 O. L. R. 1; *affd.* 14 O. W. R. 1272.—CAN.

209 iii. —.]—The mere fact that an infant has a father, mother or guardian does not prevent his being bound to pay for what was actually necessary for him when furnished, if

210. — Infant pauper—Liability to poor law guardians.]—The rule that, where necessities are supplied to a person who from any disability cannot himself contract, the law implies an obligation to pay for them out of his property extends to the case of an infant pauper supported by guardians in discharge of their statutory duty. This liability is not cut down by the Poor Law Amendment Act, 1849 (c. 103), s. 16, which gives special means of recovering one year's maintenance; & the guardians can therefore recover six years' arrears of moneys expended for the maintenance of an infant pauper.—*Re CLABDON (AN INFANT)*, [1904] 2 Ch. 465; 73 L. J. Ch. 853; 91 L. T. 316; 68 J. P. 588; 53 W. R. 43; 20 T. L. R. 712; 48 Sol. Jo. 673; 2 L. G. R. 1292.

*Annotations:—**Mentd.* Birkenhead Union Grdns. v. Brookes (1906), 95 L. T. 359; St. Mary, Islington Union v. Bigginden, [1910] 1 K. B. 105; *Re* Benson, Knareborough Grdns. v. Benson (1918), 87 L. J. Ch. 622.

211. — In rem.]—*NASH v. INMAN*, No. 240, *post*.

212. — —.]—In my opinion the position of a lunatic & that of an infant with regard to necessities are precisely the same . . . The obligation is not properly a contractual obligation; it is an obligation implied by law from the fact that necessities have been supplied to a person who is unable to contract, but it is none the less an obligation & it has exactly the same status as debt (*FLETCHER MOULTON*, L.J.).—*Re J. (A PERSON OF UNSOUND MIND)*, [1909] 1 Ch. 574; 78 L. J. Ch. 348; 100 L. T. 281; 21 Cox, C. C. 766, C. A.

213. — Contract for necessary & unnecessary goods.]—(1) A contract, being one entire contract, for the purchase of goods is not binding on an infant, merely because the goods include certain articles which may be properly called necessities, if they also include a substantial number of things that are not necessities.

(2) What the Ct. of Equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. It has done no more than this & this is a very different thing from making him liable to pay damages & compensation for the loss of the other party's bargain. If the infant has obtained property by fraud he can be compelled to restore it (*LUSH*, J.).—*STOCKS v. WILSON*, [1913] 2 K. B. 235; 82 L. J. K. B. 598; 108 L. T. 834; 29 T. L. R. 352; 23 Mans. 129.

*Annotation:—**As to* (2) *Distd.* Leslie v. Sheill, [1914] 3 K. B. 607.

214. Effect of onerous term — Hiring car at infant's risk.]—*FAWCETT v. SMETHURST*, No. 392, *post*.

Limitation of action for necessities.]—*See* LIMITATION OF ACTIONS.

Liability of father for necessities supplied to infant.]—*See* Part X., Sect. 1, sub-sect. 1, C. (b), *post*.

SUB-SECT. 2.—WHAT ARE NECESSARIES.

A. Onus of Proof.

215. On plaintiff—To prove goods necessities.]—When to a declaration for goods sold & delivered,

neither his parents nor guardian did anything towards his care or support. The test is whether the articles supplied were needed for the use of the infant.—*JAGON RAM MARWARI v. MAHADEO PROSAD SAHU* (1909), 1 L. R. 36 Cal. 768; 13 C. W. N. 643.—*IND.*

n. Goods purchased appropriated

on account of board.]—An infant trader bought goods from pltf., part of which were given by him to his boarding-house keeper on account of his board:—*Held*: the fact of the goods being so applied did not render them necessities so as to enable pltf. to recover.—*JENKINS v. WAY* (1881), 14 N. S. R. (2 R. & G.) 394; 2 C. L. T. 108.—*CAN.*

deft. [an undergraduate] pleads infancy, & pltf. replies necessities, & it appears in evidence that the goods are *prima facie* not necessities, it is for pltf. to show special circumstances, causing them to become necessities, in order to entitle him to recover their value.

The facts are that pltf. brings his action, to which deft. pleads infancy, whereupon pltf. replies that the goods are necessities. Now the burden of proof is upon pltf. to show that the things are necessities. The demand is for cakes, desert, ice, figs, etc., & are clearly not necessities for a person who has the necessary meat & drink provided for him. Then the question is, are these articles necessities for him? If they were not, the case falls within that of *Brooker v. Scott*, No. 246, *post*, & *Wharton v. Mackenzie*, *Cripps v. Hills*, No. 219, *post*; & as nothing is shown here to prove that there were any particular circumstances to take the case out of the general rule, the rule must be made absolute (*COLERIDGE*, J.).—*SHIELDS v. ROTTON* (1848), 11 L. T. O. S. 132.

216. — —.]—An infant, the son of a baronet, & having an income of £500 a year, with the prospect of £20,000 on attaining his majority, bought on credit a pair of solitaires, or shirt sleeve studs, composed of crystals adorned with diamonds & rubies, & a silver goblet for presentation to a friend, at whose house he had been staying. No evidence was given of anything peculiar in deft.'s station rendering it exceptionally necessary for him to have such articles. The jury, in answer to the question put to them, found that the articles were necessities, & suitable to deft.'s station & degree:—*Held*: as the *onus* was on pltf., & he gave no evidence to show that the articles were necessities, the question ought not to have been left to the jury.

The question in all such cases is one of mixed law & fact, the preliminary question being, as in all other cases, whether there is any evidence on which the jury could properly find for the party on whom the *onus* of proof lies. The judge, who must be supposed to know as well as a jury can know without evidence, what is the usual & normal state of things, & whether any particular article is of such a description that it may be a necessary under such usual state of things, must determine, first, whether the case is such as to cast on pltf. the *onus* of proving that the articles in question are necessities, & then whether there is any sufficient evidence for the jury to satisfy that *onus*; & if there is not, he ought to direct a nonsuit.—*RYDER v. WOMBWELL* (1868), L. R. 4 Exch. 32; 38 L. J. Ex. 8; 19 L. T. 491; 17 W. R. 167, Ex. Ch.

*Annotations:—**Consd.* Jenner v. Walker (1868), 19 L. T. 398. *Distd.* Hill v. Arbon (1876), 34 L. T. 125. *N.F.* Barnes v. Toye (1884), 13 Q. B. D. 410; *Johnstone v. Marks* (1887), 19 Q. B. D. 509. *Consd.* Hewlings v. Graham (1901), 70 L. J. Ch. 568. *Refd.* Gorer v. Readon (1869), 20 L. T. 40; *Nash v. Inman*, [1908] 2 K. B. 1. *Mentd.* Blackman v. L. B. & S. C. Ry. (1869), 17 W. R. 769; *Giblin v. McMullen* (1869), L. R. 2 P. C. 317; *Cockle v. L. & S. E. Ry.* (1870), L. R. 5 C. P. 457; *Steward v. Young* (1870), L. R. 5 C. P. 122; *African Merchants Co. v. British & Foreign Marine Insce.* (1873), L. R. 8 Exch. 154; *Gee v. Met. Ry.* (1873), L. R. 8 Q. B. 161; *Abbott v. Bates* (1874), 43 L. J. C. P. 150; *Bridges v. N. L. Ry.* (1874), L. R. 7 H. L. 213; *Met. Ry. v. Jackson* (1877), 3 App. Cas. 193; *Dublin, Wicklow, &*

o. Evidence.]—Declarations made & letters written by an infant, are receivable in evidence on the part of pltf., in an action brought by him against the infant after attaining his full age, for necessities furnished to him during infancy.—*O'NEILL v. READ* (1845), 7 L. L. R. 434.—*IR.*

Sect. 6.—Contracts for necessities: Sub-sect. 2, A., B., C. & D. (a).]

Wexford Ry. v. Slattery (1878), 3 App. Cas. 1155; *Hall v. Jupe* (1880), 49 L. J. Q. B. 721; *Finegan v. L. & N. W. Ry.* (1889), 53 J. P. 663; *Hiddle v. National Fire & Marine Insce. of New Zealand*, [1896] A. C. 372; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Everett v. Griffiths*, [1921] 1 A. C. 631.

217. ——— Sutable to station in life — & absence of other supply.]—*NASH v. INMAN*, No. 240, *post*.

B. Functions of Judge and Jury.

218. What may be necessities—Question for judge.]—In an action for goods sold to an infant, the issue being necessities, if any part of the articles proved to have been furnished to deft. may fall within the description of necessities, the evidence ought to be left to the jury.—*MADDOX v. MILLER* (1813), 1 M. & S. 738; 105 E. R. 275.

*Annotations:—**Refd.* *Ryder v. Wombwell* (1868), L. R. 3 Exch. 90; *Nash v. Inman* (1908), 77 L. J. K. B. 626.

219. ———.]—In an action for goods sold & delivered, infancy was pleaded: replication, that the goods were necessities sutable to the estate & condition of deft. It appeared that deft. was residing as an undergraduate at Oxford; & that the goods consisted of articles supplied for dinners at his own rooms, where he received parties of friends, & for fruit, confectionery, etc.:—*Held:—*(1) in default of explanation, the ct. would treat them as not necessities; (2) in case of explanation respecting any of the articles, as in the case of illness, where fruit, etc., was medically described, the question whether the articles were necessities or not would be a mixed one of law & fact; (3) the rank of fortune of deft. might make some articles "necessaries," which, in the case of another person, must be deemed articles of mere comfort & convenience; but articles which, in the particular case, are matters of comfort & convenience merely, can never be included under the term "necessaries;" (4) articles which might in some situations be necessities might not be so to a deft. *in statu pupillari* at Oxford, where necessities are, to a certain extent, supplied by the college.

(5) Dinners, suppers, ices, fruits & confectionery are not *prima facie* necessities, & the judge should so direct the jury, if no explanation showing their necessity be given.—*WHARTON v. MACKENZIE, CRIPPS v. HILLS* (1844), 5 Q. B. 606; *Dav. & Mer.* 544; 13 L. J. Q. B. 130; 2 L. T. O. S. 369; 8 Jur. 466; 114 E. R. 1378.

*Annotations:—**As to* (1) *Consd.* *Ryder v. Wombwell* (1868), L. R. 4 Exch. 32. *Refd.* *Shields v. Rotton* (1848), 11 L. T. O. S. 132. *As to* (5) *Folld.* *Bryant v. Richardson* (1866), 14 L. T. 24.

220. ———.]—*RYDER v. WOMBWELL*, No. 216, *ante*.

221. What are necessities in fact.]—To the plea of infancy, pltf. may reply that the debt was for necessities; of which the ct. are to judge.—*MAKARELL v. BACHELOR* (1601), Cro. Eliz. 583; 78 E. R. 826; *sub nom.* *MACKERELL v. BACHELOR*, Gouldsb. 168.

*Annotations:—**Consd.* *Maddox v. Miller* (1813), 1 M. & S. 738. *Refd.* *Ive v. Chester* (1620), Cro. Jac. 560; *Manby v. Manby* (1700), 1 S. P. 260. *Mentd.* *Bell v. Wardell* (1793), 100 E. R. 100.

222. — Question for jury.]—*MADDOX v. MILLER*, No. 218, *ante*.

223. ———.]—*LOWE v. GRIFFITH*, No. 564, *post*.

224. — Other sources of supply—Question for jury.]—There is no inflexible rule of law making it incumbent on a tradesman to institute inquiries as to the situation & resources of an infant before he gives him credit for necessities.

Whether the goods were necessities or not, was entirely a question for the jury; & this was fairly left to them. One matter for their consideration would be the nature of the supply deft. derived from other & authorised sources. . . . The absence of inquiry is matter of observation to the jury; but nothing more (*ERSKINE, J.*).—*BRAYSHAW v. EATON* (1839), 5 Bing. N. C. 231; 1 Arn. 466; 7 Scott, 183; 8 L. J. O. P. 153; 3 Jur. 222; 132 E. R. 1094.

*Annotations:—**Distd.* *Dalton v. Glib* (1839), 5 Bing. N. C. 198. *Consd.* *Barnes v. Toye* (1884), 13 Q. B. D. 410. *Refd.* *Ryder v. Wombwell* (1868), L. R. 4 Exch. 32; *Nash v. Inman* (1908), 77 L. J. K. B. 626.

225. ———.]—(1) Pltf. sued deft., a minor, for the price of a watch chain £8 10s., a set of coral studs £5, & a signet ring £4. Deft. was the son of a lieutenant-governor of India, an ensign in the army, & had an allowance of £80 a year, in addition to his pay. The question whether there articles were necessities was left to the jury, who found they were.—*GORER v. READON* (1869), 20 L. T. 40, N. P.

226. ———.]—*BARNES & Co. v. TOYE*, No. 250, *post*.

227. — According to station in life—Question for jury.]—Upon a replication of necessities to a plea of infancy in an action for the hire of horses, saddles, & harness, the question whether necessities or not necessities, is a question of fact for the jury. But where, upon such an issue, it appeared that deft. was an Oxford student, & pltf. gave no evidence that the horses, etc. were necessities, except that deft. himself kept a horse, & occasionally hunted with his father, a man of property who kept hounds, & the judge told the jury that he was of opinion that pltf. was not entitled to recover, the ct. set aside a verdict for pltf. & granted a new trial with costs, considering the verdict, which was for less than £20, to be perverse.—*HARRISON v. FANE* (1840), 1 Man. & G. 550; 1 Scott, N. R. 287; 4 Jur. 508; 133 E. R. 450.

*Annotations:—**Consd.* *Wharton v. M'Kenzie, Cripps v. Hills* (1844), 8 Jur. 466. *Folld.* *Bryant v. Richardson* (1866), 14 L. T. 24. *Consd.* *Ryder v. Wombwell* (1868), L. R. 3 Exch. 90.

228. ———.]—*PETERS v. FLEMING*, No. 236, *post*.

229. ———.]—*WHARTON v. MACKENZIE, CRIPPS v. HILLS*, No. 219, *ante*.

230. ———.]—*RYDER v. WOMBWELL*, No. 216, *ante*.

231. ———.]—(1) The case of *Ryder v. Wombwell*, No. 216, *ante*, carried to a ct. of error, apparently decided that the judge should himself direct the jury what are & what are not necessities:—*Held:—* if this case was to be taken to be the law the ct. must be bound by it, but the correct view of the question was that it is for the jury to say what articles are reasonably necessary with reference to the position of the infant; (2) *Semble:—* presents to a bride, who eventually becomes deft.'s wife, may be necessities.—*JENNER v. WALKER* (1868), 19 L. T. 398.

*Annotation:—**As to* (2) *Distd.* *Hewlings v. Graham* (1901), 70 L. J. Ch. 568.

232. ———.]—*JONES & Co. v. BARRON* (1887), 3 T. L. R. 379.

C. Station in Life.

See Sale of Goods Act, 1893 (c. 71), s. 2.

233. General rule.]—An infant, a captain in the army, is liable to pay for a livery ordered for his servant as necessities, but not for cookades ordered for the soldiers of his company.

The general rule is clear—that infants are liable for necessities according to their degree & station in life (LORD KENYON, C.J.)—*HANDS v. SLANEY* (1800), 8 Term Rep. 578; 101 E. R. 1556.

Annotation.—*Consd.* *Lowe v. Griffith* (1835), 4 L. J. C. P. 94.

234. Real & not apparent station in life.]—(1) Those things are to be deemed necessities, in order to charge an infant, which correspond with his real circumstances, not with his appearance in life.

(2) It is incumbent upon a tradesman before he trusts an infant with what may appear necessities to inquire whether he is provided by his friends.—*FORD v. FOTHERGILL* (1794), 1 Esp. 211; *Peake*, 301, N. P.

Annotations.—*As to* (2) *N.F.* *Brayshaw v. Eaton* (1839), 5 Bing. N. C. 231. *Refd.* *Barnes v. Toye* (1884), 53 L. J. Q. B. 567.

235. —.]—In an action for necessities supplied to the wife before the date of her marriage, & while she was an infant under the age of twenty-one years:—*Held*: the true test by which to judge whether the things supplied were necessities was the real position of the husband in society, & not the apparent & assumed condition which he may take upon himself.—*STACY v. FIRTH* (1867), 16 L. T. 498.

236. Not confined to requisites of subsistence.]—(1) To a declaration for goods sold, etc., deft. pleaded his infancy, to which pltf. replied that the goods were necessities suitable to the degree, estate, & condition of deft.:—*Held*: the term necessities included such things as were useful & suitable to the state & condition in life of the party, & not merely such as are requisite for bare subsistence.

(2) It is a question for the jury, whether the articles are such as a reasonable person, of the age & station of the infant, would require for real use.

(3) Articles which are purely ornamental, & not useful, are not in any case necessities.—*PETERS v. FLEMING* (1840), 6 M. & W. 42; 9 L. J. Ex. 81.

Annotations.—*As to* (1) *Apprvd.* *Wharton v. Mackenzie, Cripps v. Hills* (1844), 5 Q. B. 606. *Consd.* *Ryder v. Wombwell* (1868), L. R. 4 Exch. 32; *Barnes v. Toye* (1884), 53 L. J. Q. B. 567; *Hewlings v. Graham* (1901), 70 L. J. Ch. 568. *Refd.* *Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482. *As to* (2) *Consd.* *Bryant v. Richardson* (1866), 14 L. T. 24. *Refd.* *Nash v. Inman* (1908), 77 L. J. K. B. 626.

237. Relevant circumstances—Quality & quantity of goods supplied.]—(1) If a person of full age orders clothes, however extravagantly & absurdly, & they are delivered to him, he is bound to pay for them; but with a minor it is otherwise. A minor is only liable for necessities suitable to his state & degree, & the jury must consider not only whether the clothes were suitable in point of quality, but also in point of quantity. If a minor has been supplied with ten coats from another tradesman, & immediately after that pltf. supplies him with another, pltf. will not be entitled to be paid for that other coat, as it was unnecessary.

(2) If a minor is supplied with necessities suitable to his estate & degree, no matter from what quarter, a tradesman cannot recover for any further supply made to the minor just after.

In an action for the price of clothes, brought by a tailor against a minor, deft. may go into evidence to show that he had all the clothes which were suitable to his estate & degree from other tailors; & if he in fact had such clothes from them, it makes no difference that he has not paid for them, or even that he has successfully defended an action brought by one of them to recover the price of the clothes supplied by him.—*BURGHART v. ANGERSTEIN* (1834), 6 C. & P. 690; *sub nom.* *BURKHARDT v. ANGERSTEIN*, 1 Mood. & R. 458, N. P.

Annotations.—*As to* (1) *Refd.* *Ryder v. Wombwell* (1868), L. R. 3 Exch. 90. *As to* (2) *Refd.* *Nash v. Inman* (1908), 77 L. J. K. B. 626.

238. —.]—*JONES & Co. v. BARRON* (1887), 3 T. L. R. 379.

239. — Infant's rank & fortune.]—*WHARTON v. MACKENZIE, CRIPPS v. HILLS*, No. 219, *ante*.

Compare No. 270, *post*.

240. Contract under Sale of Goods Act, 1893 (c. 71), s. 2.]—Where an action is brought for the price of goods sold & delivered & deft. pleads & proves infancy, the *onus* is on pltf. to prove that the goods were necessities within the meaning of that term as defined in above sect.: that is to say, that the goods were suitable not only to the condition of life of the infant, but also to his actual requirements at the time of sale & delivery.

An infant, like a lunatic, is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic by supplying to him necessities, the law will imply an obligation to repay him for the services so rendered, & will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words the obligation arises *re* & not *consensu*. I do not mean that this nicety of legal phraseology has been adhered to. The common & convenient phrase is that an infant is liable for goods sold & delivered provided that they are necessities, & there is no objection to that phraseology so long as its true meaning is understood. But the treatment of such actions by the Cts. of Common Law has been in accordance with that principle I have referred to (*FLETCHER MOULTON, L.J.*).—*NASH v. INMAN*, [1908] 2 K. B. 1; 77 L. J. K. B. 626; 98 L. T. 658; 24 T. L. R. 401; 52 Sol. Jo. 335, C. A.

*D. Where Infant Already Supplied.**(a) With Things of Same Kind.*

241. No liability for further supply—Source of original supply irrelevant.]—*BURGHART v. ANGERSTEIN*, No. 237, *ante*.

242. —.]—(1) On a replication to a plea of infancy that the articles supplied were necessities, the question is not only whether the articles were of a kind that would be necessary to a person in the station of deft., but also whether deft. had a sufficient supply of those articles at the time of the sale by pltf., for, if he had, the

V. SECT. 6, SUB-SECT. 2.—C.

233 i. General rule.]—Necessaries include articles fit to maintain the particular person in the state, degree & station in life in which he is, & must

be determined with reference to the fortune & circumstances of the particular infant.—*JAGON RAM MARWARI v. MAHADEO PROSAD SAHU* (1909), I. L. R. 36 Cal. 768; 13 C. W. N. 643.—*IND.*

PART V. SECT. 6, SUB-SECT. 2.—D. (a).

*g. No liability for further supply.]—*Though a particular article furnished may correspond in quality & price with

Sect. 6.—Contracts for necessities: Sub-sect. 2, D.
(a), (b) & (c), & E. (a), (b), (c) & (d).]

goods supplied by pltf. were not necessities, & pltf. cannot recover for them; (2) & if a party supply goods to one under age without ascertaining whether such person be already fully supplied with such articles, he does so at the risk of their being proved to be not necessary at the time of the supply, by reason of the person being already fully supplied with such articles, & of thereby failing in an action for the recovery of their price.—**STEEDMAN v. ROSE** (1842), Car. & M. 422.

Annotations:—As to (1) **Refd.** Baines v. Toye (1884), 51 L. T. 292; Nash v. Inman (1908), 77 L. J. K. B. 626.

243. — Infant supplied by parents.]—An infant, who lives with & is properly maintained by her parent, cannot bind herself to a stranger for necessities.—**BAINBRIDGE v. PICKERING** (1779), 2 Wm. Bl. 1325; 96 E. R. 776.

Annotations:—**Refd.** Brayshaw v. Eaton (1839), 5 Bing. N. C. 231; Ryder v. Wombwell (1868), L. R. 4 Exch. 32; Barnes v. Toye (1884), 13 Q. B. D. 410.

244. — Clothes.]—If proper clothes are supplied to an infant, by his father, any others furnished in addition cannot be considered as necessities; & it is the duty of a tradesman when applied to by an infant for clothes to make inquiries of his friends, before he gives him credit.—**COOK v. DEATON** (1827), 3 C. & P. 114.

245. — FOSTER v. REDGRAVE (1867), L. R. 4 Exch. 35, n.

Annotations:—**Fold.** Barnes v. Toye (1884), 13 Q. B. D. 410. **Refd.** Ryder v. Wombwell (1868), L. R. 4 Exch. 32.

246. — Infant undergraduate.]—Dinners, confectionary, or fruit, supplied to an infant, an undergraduate in the university, having lodgings in the town, are not, *prima facie*, necessities; & in an action brought against him for such articles, no special circumstances being shown, the ct. directed a nonsuit to be entered.—**BROOKER v. SCOTT** (1843), 11 M. & W. 67; 152 E. R. 718.

Annotations:—**Consd.** Wharton v. Mackenzie, Cripps v. Hills (1844), 5 Q. B. 606. **Fold.** Shields v. Rotton (1848), 11 L. T. O. S. 69, 132. **Refd.** Bryant v. Richardson (1866), 14 L. T. 24; Ryder v. Wombwell (1868), L. R. 4 Exch. 32.

247. — Supplied by college with subsistence.]—**WHARTON v. MACKENZIE, CRIPPS v. HILLS**, No. 219, *ante*.

248. — SHIELDS v. ROTTON, No. 215, *ante*.

249. Evidence of existing supply—Admissible.]—**GORER v. READON**, No. 225, *ante*.

250. — Held: evidence that an [infant] deft. was already sufficiently supplied with articles of the same kind when the clothes in question were ordered, ought to have been admitted & left to the jury, notwithstanding that the fact of such supply had not been communicated to pltf., it being for the jury to judge of the effect of that supply on the question of necessities.—**BARNES & Co. v. TOYE** (1884), 13 Q. B. D. 410; 53 L. J. Q. B. 567; 48 J. P. 664; *sub nom.* **BAINES & Co. v. TOYE**, 51 L. T. 292; 33 W. R. 15, D. C.

Annotations:—**Consd.** Johnstone v. Marks (1887), 19 Q. B. D.

the infant's means, yet if it should turn out that the infant was already plentifully supplied with the thing purchased it does not fall within the description of "necessaries" in that particular case.—**JAGON RAM MARWARI v. MAHADEO PRASAD SAHU** (1909), I. L. R. 36 Calc. 768; 13 C. W. N. 643.—**IND.**

249 i. Evidence of existing supply—Admissible.]—The infant can always show that he was already plentifully supplied with similar goods.—**JAGON RAM MARWARI v. MAHADEO PRASAD**

SAHU (1909), I. L. R. 36 Calc. 768; 13 C. W. N. 643.—**IND.**

PART V. SECT. 6, SUB-SECT. 2.—
D. (c).

256 i. How far material.]—An infant can always show that he was already plentifully supplied with similar goods, & it is immaterial whether the seller knew it or not.—**JAGON RAM MARWARI v. MAHADEO PRASAD SAHU** (1909), I. L. R. 36 Calc. 768; 13 C. W. N. 643.—**IND.**

509. Refd. Jones v. Barron (1887), 3 T. L. R. 379; Morel v. Westmorland (1902), 87 L. T. 635; Nash v. Inman, [1908] 2 K. B. 1.

251. — In an action against an infant for the price of goods supplied to him on credit, evidence that at the time when the goods were supplied he was already sufficiently supplied with goods of the kind in question is relevant to the issue whether the goods when supplied were in fact necessities.—**JOHNSTONE v. MARKS** (1887), 19 Q. B. D. 509; 57 L. J. Q. B. 6; 35 W. R. 806; 3 T. L. R. 810, D. C.

Annotations:—**Consd.** Nash v. Inman, [1908] 2 K. B. 1. **Refd.** Lewis v. Alleyne (1888), 4 T. L. R. 251; Morel v. Westmorland (1902), 87 L. T. 635.

Knowledge of existing supply—By person dealing with infant.]—See Sub-sect. 2, D. (c), *post*.

(b) With Sufficient Money.

252. Effect on liability—Allowance by guardian.]—**BROOKE v. GALLY**, No. 71, *ante*.

253. — Held: an infant is liable for necessities furnished him, notwithstanding he has an adequate pecuniary allowance made to him by his guardians, & notwithstanding an account against an infant is generally extravagant, & for articles which are not necessities, yet the creditor is entitled to recover such part as consists of necessities. Semble: a jury is a proper tribunal for trying the question, if contested.—**MORTARA v. HALL** (1835), 4 L. J. Ch. 53, L. C.

254. — In addition to army pay.]—A minor, who has a sufficient income [an allowance in addition to army pay], may, nevertheless, enter into any reasonable contract for necessities, upon credit.—**BURGHART v. HALL** (1839), 4 M. & W. 727; 8 L. J. Ex. 235; 150 E. R. 1614.

Annotations:—**Refd.** Peters v. Fleming (1840), 6 M. & W. 42; Barnes v. Toye (1884), 13 Q. B. D. 410. **Mentd.** Bloor v. Davies & Bloor (1840), 7 M. & W. 235.

255. — Allowance by parent—Authority to deal with specified persons.]—**JONES & Co. v. BARRON** (1887), 3 T. L. R. 379.

(c) Knowledge of Tradesman of Existing Supply.

256. How far material.]—If a tradesman trusts an infant, he does it at his peril, & he cannot recover if it turns out that the party has been properly supplied by his friends.—**STORY v. PERY** (1831), 4 C. & P. 526.

Annotations:—**Distd.** Mortara v. Hall (1835), 4 L. J. Ch. 53. **Refd.** Brayshaw v. Eaton (1839), 5 Bing. N. C. 231.

257. — STEEDMAN v. ROSE, No. 242, *ante*.

258. — JONES & Co. v. BARRON (1887), 3 T. L. R. 379.

259. Duty to inquire.]—**FORD v. FOTHERGILL**, No. 234, *ante*.

260. — COOK v. DEATON, No. 244, *ante*.

261. — Where an infant has an allowance made to him by his guardians for his support, a tradesman is not entitled to be paid for articles supplied to the infant on credit, unless he can make out that, having regard to the infant's circumstances & station, which he is bound to inquire into, the articles were necessities.—

259 i. Duty to inquire.]—It is incumbent upon one who sells goods to an infant to inquire into his circumstances so as to determine not only whether the thing sold is such an article as an infant of the station in life of the purchasers would require, but whether in the particular case the purchaser had need for it, for if the infant did not require it, the seller cannot recover it.—**JAGON RAM MARWARI v. MAHADEO PRASAD SAHU** (1909), I. L. R. 36 Calc. 768; 13 C. W. N. 643.—**IND.**

MORTARA v. HALL (1834), 6 Sim. 465; 3 L. J. Ch. 150; 58 E. R. 668.

262. —.]—BRAYSHAW v. EATON, No. 224, ante.

263. — Precluded by parents conduct—Present while purchase made.]—In an action for the amount of certain articles of dress, to which the plea was infancy, & the replication necessities: *Held*: supposing it to be necessary for the tradesman to make inquiries into situation, circumstances, etc., before he supplies an infant residing under the same roof with her parent, with certain articles, the conduct of the parent may be of such a nature as to preclude the necessity of making such inquiries. Therefore, where the mother & daughter, an infant, went together in a carriage to the shop of pltf., & the daughter selected the articles, which were put into the carriage, & taken to the hotel by the mother, such conduct on the part of the latter was deemed equivalent to an approval of that which the daughter had done; & the ct. refused to disturb the verdict found for pltf.—DALTON v. GIB (1839), 5 Bing. N. C. 198; 1 Arn. 463; 7 Scott, 117; 8 L. J. C. P. 151; 3 Jur. 43; 132 E. R. 1080.

Annotation:—*Refd.* Ryder v. Wombwell (1868), L. R. 3 Exch. 90.

Effect of misrepresentation of age.]—See Part VI., post.

E. Particular Instances.

(a) Board and Lodging.

264. Board—For infant himself.]—REARSBY & CUFFER'S CASE (1613), Godb. 219; 78 E. R. 133.

265. — Not for stranger.]—COTTON v. WESTCOTT (1616), 1 Roll. Rep. 381; 3 Bulst. 187; 81 E. R. 549.

266. — Effect of promise by third party.]—If an infant comes to a stranger & boards with him, there is a contract in law implied, that he should pay for his board as much as it is worth; but if another undertakes to pay for his boarding, this express agreement takes away the implied contract.—DUNCOMB v. TICKRIDGE (1648), Aleyn, 94; 82 E. R. 933.

267. —.]—BUCKINGHAMSHIRE (EARL) v. DRURY, No. 367, post.

268. —.]—KEANE v. BOYCOTT (1795), 2 Hy. Bl. 511; 126 E. R. 676.

Annotations:—*Refd.* Baylis v. Dineley (1815), 3 M. & S. 477; Cooper v. Simmons (1862), 7 H. & N. 707. *Mentd.* Walter v. Everard, [1891] 2 Q. B. 369. *Mentd.* Forbes v. Cochrane (1823), 3 Dow. & Ry. K. B. 679; The Slave, Grace, R. v. Allan (1827), 2 Hag. Adm. 94; Sykes v. Dixon (1839), 9 Ad. & El. 693; Hartley v. Cummings (1847), 5 C. B. 247; Cox v. Muncey (1859), 6 C. B. N. S. 375; Evans v. Walton (1867), L. R. 2 C. P. 615.

269. Lodging—Infant prostitute—Effect of knowledge of prostitution.]—CRISP v. CHURCHILL (1794), cited in 1 Bos. & P. at p. 340; 126 E. R. 939.

Loan for necessaries.]—See Sub-sect. 3, post.

Liability of parents.]—See Part IX., post.

(b) Clothing.

270. General rule.]—MACKERELL v. BACHELOR (1601), Gouldsb. 168; 75 E. R. 1070; *sub nom.* MAKARELL v. BACHELOR, Cro. Eliz. 583.

Annotations:—*Consd.* Maddox v. Miller (1813), 1 M. & S. 738. *Refd.* IVE v. CHESTER (1620), Cro. Jac. 560; RAINSFORD v. FENWICK (1670), Cart. 215. *Mentd.* Manby v. Scot (1663), 1 Keb. 441; Bell v. Wardell (1740), Willes, 202.

271. —.]—REARSBY & CUFFER'S CASE (1613), Godb. 219; 78 E. R. 133.

272. —.]—An infant chargeable for necessary apparel.—JENE v. CHESTER (1619), Poph. 151; 79 E. R. 1251; *sub nom.* IVE v. CHESTER, Cro. Jac. 560.

Annotations:—*Mentd.* Hall v. Walland (1621), Cro. Jac. 618; Manby v. Scot (1663), 1 Keb. 441.

273. —.]—VERE v. DELAVALL (1626), W. Jo. 146; 82 E. R. 78.

274. Clothes for servants.]—Action upon the case; a *quantum meruit* for divers wares & merchandises, as clothes laces, for himself & his servant; & also *indebitatus assumpsit*, & mentions the wares in particular. Deft. pleads *infra ætatem*. Pltf. replies & confesses the minority, & says, at that time he was son & heir apparent of Sir R. F. & was by consent of his father in treaty of a marriage with an Earl's daughter, & these things were for wedding clothes.

Our being judges of the necessities is to the nature of the thing, not to the particulars, that indeed must be tried by a jury (*per CUR.*).—RAINSFORD v. FENWICK (1670), Cart. 215; 124 E. R. 924.

Annotations:—*Consd.* Maddox v. Miller (1813), 1 M. & S. 738. *Refd.* Helps v. Clayton (1864), 17 C. B. N. S. 553.

275. —.]—HANDS v. SLANEY, No. 233, ante.

276. Clothes for soldiers of company—Ordered by army officer.]—HANDS v. SLANEY, No. 233, ante.

277. Uniform for volunteer officer.]—Regimentals furnished to an infant who was a member of a volunteer corps, are necessities.—COATES v. WILSON (1804), 5 Esp. 152, N. P.

(c) Instruction and Education.

278. General rule—Necessary.]—BUCKINGHAMSHIRE (EARL) v. DRURY, No. 367, post.

279. —.]—KEANE v. BOYCOTT (1795), 2 Hy. Bl. 511; 126 E. R. 676.

Annotations:—*Consd.* Walter v. Everard, [1891] 2 Q. B. 369. *Refd.* Baylis v. Dineley (1815), 3 M. & S. 477; Cooper v. Simmons (1862), 7 H. & N. 707. *Mentd.* Forbes v. Cochrane (1823), 3 Dow. & Ry. K. B. 679; The Slave, Grace, R. v. Allan (1827), 2 Hag. Adm. 94; Sykes v. Dixon (1839), 9 Ad. & El. 693; Hartley v. Cummings (1847), 5 C. B. 247; Cox v. Muncey (1859), 6 C. B. N. S. 375; Evans v. Walton (1867), L. R. 2 C. P. 615.

280. Instruction in profession on trade—At trade reasonable price.]—The Deft. while an infant entered into a bond by which he bound himself to pay pltf. a certain premium in respect of education in a trade. On an action being brought against him after he was of age on the bond:—*Held*: (1) education in a trade might be a necessary for an infant, & pltf. was entitled to succeed, provided that the bond was a single bond; (2) the education had been supplied & was necessary to deft., & the price charged for it was reasonable.—WALTER v. EVERARD, [1891] 2 Q. B. 369; 60 L. J. Q. B. 738; 65 L. T. 443; 55 J. P. 693; 39 W. R. 676; 7 T. L. R. 469, C. A.

Annotations:—*As to* (1) *Consd.* Roberts v. Gray, [1913] 1 K. B. 520. *Refd.* Gadd v. Thompson, [1911] 1 K. B. 304.

281. — Professional billiard player.]—ROBERTS v. GRAY, No. 171, ante.

282. — Vocalist.]—MACKINLAY v. BATHURST, No. 140, ante.

— Contracts of apprenticeship & service.]—See MASTER & SERVANT.

(d) Medical Aid.

283. Costs of cure.]—An action upon the case for a promise against an infant to pay money for

Sect. 6.—Contracts for necessities: Sub-sect. 2, (d), (e), (f), (g), (h), (i) & (j); sub-sect. 3.]

curing him of the falling sickness, this shall bind him.—DALE v. COPPING (1610), 1 Bulst. 39; 80 E. R. 743.

284. Medicine.]—HUGGINS v. WISEMAN (1690), Carth. 110; 90 E. R. 669.

285. —.]—KEANE v. BOYCOTT (1795), 2 Hy. Bl. 511; 126 E. R. 676.

Annotations:—Consd. Walter v. Everard, [1891] 2 Q. B. 369. **Refd.** Baylis v. Dineley (1815), 3 M. & S. 477; Cooper v. Simmons (1862), 7 H. & N. 707. **Mentd.** Forbes v. Cochrane (1823), 3 Dow. & Ry. K. B. 679; The Slave, Grace, R. v. Allan (1827), 2 Hag. Adm. 94; Sykes v. Dixon (1839), 9 Ad. & El. 693; Hartley v. Cummings (1847), 5 C. B. 247; Cox v. Muncey (1859), 6 C. B. N. S. 375; Evans v. Walton (1867), L. R. 2 C. P. 615.

(e) Legal Aid.

286. Preparation of marriage settlement—Solicitor's costs.]—In the case of a settlement of personal property, the practice is for the lady's solr. to draw the settlement, & for the husband to pay for it.

Where the lady was an infant residing with & forming part of the family of her father, & the instructions for the settlement were given by the father, in circumstances from which the ct., exercising the functions of a jury, inferred that such instructions were given by her father as her agent.—**Held:** she, sued jointly with her husband, was liable for the expenses as for a debt contracted by her for necessities before the marriage.—HELPS v. CLAYTON (1864), 17 C. B. N. S. 553; 5 New Rep. 191; 34 L. J. C. P. 1; 11 L. T. 476; 29 J. P. 263; 10 Jur. N. S. 1184; 13 W. R. 161; 144 E. R. 222.

Annotations:—Refd. Steeden v. Walden, [1910] 2 Ch. 393. **Mentd.** Re Gray, [1901] 1 Ch. 239; Wales v. Carr (1902), 71 L. J. Ch. 483.

287. Protection of infants' property—Costs of.]—PRINCE v. HAWORTH (1904), 20 T. L. R. 313; **subsequent proceedings**, [1905] 2 K. B. 768.

(f) Things Supplied to Infant's Wife.

288. Board of wife.]—COTTON v. WESTCOTT (1616), 1 Roll. Rep. 381; 3 Bulst. 187; 81 E. R. 549.

289. After marriage.]—Necessaries for an infant's wife are necessities for him; but if provided in order for the marriage, he is not chargeable, though she uses them (PRATT, C.J.).—TURNER v. TRISBY (1719), 1 Stra. 168; 93 E. R. 452.

290. Before marriage—Present for future wife.]—JENNER v. WALKER, No. 231, ante.

(g) Funeral Expenses.

291. Personal benefit—Degree of affinity required.]—An infant widow is liable upon a contract by her for her deceased husband's funeral expenses,

teeth & filled seven. Another unemancipated minor son also visited resp. without the knowledge of his father, & had eighteen fillings performed. Applt. was not proved to have been aware of the work that was being done:—**Held:** the services were not necessities.—MCALLUM v. HALLEN (1916), E. D. L. 74.—S. AF.

PART V. SECT. 6, SUB-SECT. 2.—
E. (e).

t. General rule.]—Payments or connected with legal expenses of infants are concerned may, in circumstances, come under of necessities.—VENKATA GOPALARAJU v. (1899), 1 L. R.

PART V. SECT. 6, SUB-SECT. 2.—
E. (f).

290 i. Before marriage—Present for future wife.]—Wedding presents for the bride may be "necessaries."—JAGON RAM MARWARI v. MAHADEO PROSAD SAHU (1909), 1 L. R. 36 Calc. 768; 13 C. W. N. 643.—IND.

PART V. SECT. 6, SUB-SECT. 2.—
E. (h).

a. Riding horse—Hunter.]—Pltf. sued deft., an infant, for the price of a hunter worth £150. Deft., an English youth, was on a visit to a country hunting gentleman in Ireland, & at the time of the bargain, he stated that he was a member of the S. Hunt,

as such a contract may be considered as made for her personal benefit. **Semble:** that a child or more distant relation, being an infant, would not be liable upon a contract for the burial of a parent or relative.

Things necessary are those without which the infant cannot reasonably exist. . . . Articles of mere luxury are always excluded, though luxurious necessities are sometimes allowed. This principle alone would not decide this case. An infant is allowed by law to make a contract of marriage. A contract for necessities to an infant's wife or children is used by Lord Bacon as an illustration of the law on this subject. There are many authorities which lay down that Christian burial is a part of a man's own rights. An infant husband could contract for the Christian burial of his wife or children as *personæ conjunctæ*. Then the question arises whether there is any distinction between an infant husband & an infant widow. If the husband can so contract, it is because the burial of his *persona conjuncta* is a personal benefit to him. If so, we do not see why a different rule should prevail in the case of the wife. It may be observed, that as the ground of our decision arises out of the previous contract of marriage, it does not follow that other relations would be liable (ALDERSON, B.).—CHAPPLE v. COOPER (1844), 13 M. & W. 252; 13 L. J. Ex. 286; 3 L. T. O. S. 340; 153 E. R. 105.

Annotations:—Refd. Ryder v. Wombwell (1868), L. R. 3 Exch. 90. **Mentd.** L'adshaw v. Beard (1862), 12 C. B. N. S. 344.

(h) Means of Conveyance.

292. Carriage—For army officer.]—BERNARD v. — (circa 1825), cited in 7 C. & P. at p. 52.

Annotation:—Refd. Charters v. Bayntun (1835), 7 C. & P. 52.

293. —.]—A., a minor, had held a commission in the army, but sold it by reason of not having sufficient fortune to continue to hold it. His father was a beneficed clergyman, who paid various sums for him during his minority, & gave him a further sum of £1,500 when he attained the age of twenty-one years:—**Held:** a stanhope was not necessary for him while a minor as being suitable to his state & degree.—CHARTERS v. BAYNTUN (1835), 7 C. & P. 52, N. P.

294. Riding horse—For business purposes.]—*Indebitatus assumpsit* for a horse sold; plea, infancy; replication, that it was sold to carry debt. about on necessary business; demurrer:—**Held:** the demurrer admits the necessity, & judgment must be for pltf.—BARBER v. VINCENT (1680), Freem. K. B. 531; 89 E. R. 397.

295. — Exercise by medical advice.]—An apprentice of a chemist, who was entitled to some property when of age, bought a horse when nearly of age. He had been advised by a medical man

& that he was accustomed to hunt his step-father's horses, & talked of being allowed £600 a year by his step-father. The question whether the hunter was a "necessary" was left to the jury, who found that it was, & returned a verdict for £100:—**Held:** there was no evidence which could properly be left to the jury that the hunter was a "necessary."—SKRINE v. GORDON (1875), 1 L. R. 9 C. L. 479.—IR.

b. Bicycle.]—Where an infant owned a bicycle, which he used for periodically travelling a distance of 12 or 14 miles from his work to his home & bought another bicycle giving the first one in part payment:—**Held:** the bicycle was an article of utility & was a necessary.—SCARBOROUGH v.

to take exercise on horseback. The jury found that the horse was a necessary. The ct. refused a new trial.—*HART v. PRATER* (1837), 1 Jur. 623.

296. — *Hired by student.*—*HARRISON v. FANE*, No. 227, *ante*.

297. *Bicycle—Apprentice living with parents.*—A racing bicycle may be a necessary for an infant apprentice earning 21s. a week, & living with his parents.—*CLYDE CYCLE CO. v. HARGREAVES* (1898), 78 L. T. 296; 14 T. L. R. 338, D. C.

298. *Motor car—Hired at infant's risk—Effect of clause as to risk.*—*FAWCETT v. SMETHURST*, No. 392, *post*.

(i) *Things Used in Profession or Trade.*

Instruction in trade or profession.—*See MASTER & SERVANT.*

Trader—Liability for goods supplied.—*See Nos. 337, 340, 341, post.*

299. *Naval officer—Chronometer.*—A lieutenant in the Royal Navy, under the age of twenty-one, is not answerable for the price of a chronometer, in an action to which he has pleaded his infancy, & the replication is, necessities.—*BEROLLES v. RAMSAY* (1815), Holt, N. P. 77, N. P.

Military officer—Clothes for servant—& for soldiers of company.—*See No. 233, ante.*

— *Purchase of uniform.*—*See No. 277, ante.*

300. *Barber—Lease of house.*—*LOWE v. GRIFFITH*, No. 564, *post*.

301. *Farmer—Riding equipment.*—An infant, who was sole manager of a farm belonging to his father, & had some expectations, bought on credit from deft. one pair of spurs, a suit of best made kersey horse clothing, a breastplate, set of best plated harness, etc. At the trial a verdict was found for pltf., but leave was given to deft. to move for a nonsuit on the ground that there was no evidence to go to the jury that any of the articles were necessities:—*Held*: there was reasonable evidence, considering the position of deft., that the goods supplied were necessities.—*HILL v. ARBON* (1876), 34 L. T. 125; 40 J. P. 391, D. C.

302. *Music hall artist—Theatrical agent.*—*LOFTHOUSE v. BROWN*, [1898] W N. 52, D. C.

303. *Vocalist—Business manager.*—*MACKINLAY v. BATHURST*, No. 140, *ante*.

Compare No. 171, ante.

(j) *Luxuries, Liquors and Ornaments.*

304. *Luxury may be a "necessary."*—*CHAPLE v. COOPER*, No. 291, *ante*.

305. — *Under medical prescription—Exercise on horseback.*—*HART v. PRATER*, No. 295, *ante*.

306. — *Table delicacies.*—*WHARTON v. MACKENZIE, CRIPPS v. HILLS*, No. 219, *ante*.

STURZAKER (1905), 1 Tas. L. R. 117.—*AUS.*

c. Motor car—For business purposes.—*Held*: deft., an infant, was not liable for the price of a motor car bought for the purpose of aiding him in carrying on a trade or business: the fact that the car was "necessary" in his business did not make it a "necessary" for the price of which the infant could bind himself by contract.—*PYRETT v. LAMPMAN*, [1923] 1 D. L. R. 249; 53 O. L. R. 149.—*CAN.*

PART V. SECT. 6, SUB-SECT. 3.

316 i. *Liability.*—In a contract entered into on behalf of a minor by his guardian under which the guardian borrows money, but no charge is created on the minor's estate, no decree can be passed against the minor on his attaining his majority or his estate, except in cases in which the minor's estate would have been

liable for the obligation incurred by the guardian under the personal law to which he is subject.—*PATCHU RAMAJOGAYYA v. VAJJULA JAGANNADHAN* (1919), 1 L. R. 42 Mad. 185.—*IND.*

318 i. — *If expended on necessities.*—On Apr. 20, 1886, a sum of money was advanced by A. to a minor, who executed a bond in respect thereof & duly registered the same. The money was required by the minor to provide for his defence in certain criminal proceedings then pending against him on a charge of *dacoity*, & was used by him for that purpose. On June 18, 1892, A. instituted a suit against the minor for the amount due on the bond. It was urged on behalf of the minor, who had not attained majority at the time the suit was filed, that he was not liable to A. for the amount advanced; that it was not advanced for "necessaries": that he

307. *Intoxicating liquors.*—*BLACKSTONE'S CASE* (1619), cited Noy, 85; 74 E. R. 1052.

308. — *—*—*BROOKE v. GALLY*, No. 71, *ante*.

309. — *—*—In the case of an infant, who was entitled to an income of between £7 & £8 a week during his minority, such things as cartridges, champagne, & jewellery presented to a lady, to whom the infant was engaged without the consent of his guardian, but who did not become his bride, will not be allowed as "necessaries."—*HEWLINGS v. GRAHAM* (1901), 70 L. J. Ch. 568; 84 L. T. 497.

310. *Tobacco.*—Cigars & tobacco cannot, under ordinary circumstances, & in the absence of evidence of any special circumstances rendering them necessary medicinally or otherwise, be considered "necessaries" for an infant. In such a case the proper course is for the judge to withdraw the case from the consideration of the jury: but where there are such special circumstances it is a mixed question of law & fact, & must be left to the jury with proper directions.—*BRYANT v. RICHARDSON* (1866), L. R. 3 Exch. 93, n.; 14 L. T. 24; 12 Jur. N. S. 300; 14 W. R. 401.

Annotation:—*Consd. Ryder v. Wombwell* (1868), L. R. 3 Exch. 90.

311. *Ornaments.*—*PETERS v. FLEMING*, No. 236, *ante*.

312. *Jewellery—Suitable to station in life.*—*RYDER v. WOMBWELL*, No. 216, *ante*.

313. — *Infant already supplied.*—*GORER v. READON*, No. 225, *ante*.

314. — *Present to intended bride—Marriage solemnised.*—*JENNER v. WALKER*, No. 231, *ante*.

315. — *—*—*Marriage not solemnised.*—*HEWLINGS v. GRAHAM*, No. 309, *ante*.

SUB-SECT. 3.—LOANS TO INFANTS FOR PURCHASE OF NECESSARIES.

See Infants Relief Act, 1874 (c. 62), s. 1.

316. *Liability.*—Infant may buy necessities. But cannot borrow money to buy necessities.—*EARLE v. PEALE* (1711), 1 Salk. 386; 10 Mod. Rep. 66; 91 E. R. 336.

317. — *—*—*PROBART v. KNOUTH* (1783), 2 Esp. 472, n., N. P.

318. — *If expended on necessities.*—Infant chargeable for money lent to buy necessities, if so laid out.—*ELLIS v. ELLIS* (1698), Comb. 482; 1 Ld. Raym. 344; 5 Mod. Rep. 368; 12 Mod. Rep. 197; 3 Salk. 197; 91 E. R. 1126.

319. — *—*—*Liability of estate.*—One borrows money during his infancy, & applies it to the buying of necessities, & afterwards coming to age,

was not liable under the bond:—*Held*: the liberty of the minor being at stake, the money advanced must be taken to have been borrowed for necessities; in such a case the bond being the basis of the suit, could not be ignored & treated as non-existent, & on its being proved to have been executed by the minor in respect of money advanced for necessities, pltf. was entitled to a decree.—*SHAM CHARAN MAL v. CHOWDHRY DEBYA SINGH PAHRAJ* (1894), 1 L. R. 21 Cal. 872.—*IND.*

319 i. — *—*—*Liability of estate.*—The general proposition that a guardian of a minor cannot bind his ward personally by a simple contract debt, by a covenant or by any promise to pay money or damages, is subject to the modification that the promise will not bind the minor, unless it has been made merely to keep alive a debt, for which the ward's property was

Sect. 6.—Contracts for necessities: Sub-sect. 2, E.
(i), (e), (f), (g), (h), (i) & (j); sub-sect. 3.]

curing him of the falling sickness, this shall bind him.—DALE v. COPPING (1610), 1 Bulst. 39; 80 E. R. 743.

284. Medicine.]—HUGGINS v. WISEMAN (1690), Carth. 110; 90 E. R. 669.

285. —.]—KEANE v. BOYCOTT (1795), 2 Hy. Bl. 511; 126 E. R. 676.

Annotations:—Conad. Walter v. Everard, [1891] 2 Q. B. 369. **Refd.** Baylis v. Dineley (1815), 3 M. & S. 477; Cooper v. Simmons (1862), 7 H. & N. 707. **Mentd.** Forbes v. Cochrane (1823), 3 Dow. & Ry. K. B. 679; The Slave, Grace, R. v. Allan (1827), 2 Hag. Adm. 94; Sykes v. Dixon (1839), 9 Ad. & El. 693; Hartley v. Cummings (1847), 5 C. B. 247; Cox v. Muncey (1859), 6 C. B. N. S. 375; Evans v. Walton (1867), L. R. 2 C. P. 615.

(e) Legal Aid.

286. Preparation of marriage settlement—Solicitor's costs.]—In the case of a settlement of personal property, the practice is for the lady's solr. to draw the settlement, & for the husband to pay for it.

Where the lady was an infant residing with & forming part of the family of her father, & the instructions for the settlement were given by the father, in circumstances from which the ct., exercising the functions of a jury, inferred that such instructions were given by her father as her agent.—**Held:** she, sued jointly with her husband, was liable for the expenses as for a debt contracted by her for necessities before the marriage.—HELPS v. CLAYTON (1864), 17 C. B. N. S. 553; 5 New Rep. 191; 34 L. J. C. P. 1; 11 L. T. 476; 29 J. P. 263; 10 Jur. N. S. 1184; 13 W. R. 161; 144 E. R. 222.

Annotations:—Refd. Steeden v. Walden, [1910] 2 Ch. 393. **Mentd.** Re Gray, [1901] 1 Ch. 239; Wales v. Carr (1902), 71 L. J. Ch. 483.

287. Protection of infants' property—Costs of.]—PRINCE v. HAWORTH (1904), 20 T. L. R. 313; **subsequent proceedings**, [1905] 2 K. B. 768.

(f) Things Supplied to Infant's Wife.

288. Board of wife.]—COTTON v. WESTCOTT (1616), 1 Roll. Rep. 381; 3 Bulst. 187; 81 E. R. 549.

289. After marriage.]—Necessaries for an infant's wife are necessities for him; but if provided in order for the marriage, he is not chargeable, though she uses them (PRATT, C.J.).—TURNER v. TRISBY (1719), 1 Stra. 168; 93 E. R. 452.

290. Before marriage—Present for future wife.]—JENNER v. WALKER, No. 231, ante.

(g) Funeral Expenses.

291. Personal benefit—Degree of affinity required.]—An infant widow is liable upon a contract by her for her deceased husband's funeral expenses,

teeth & filled seven. Another unemancipated minor son also visited resp. without the knowledge of his father, & had eighteen fillings performed. Applt. was not proved to have been aware of the work that was being done:—**Held:** the services were not necessities.—MCALLUM v. HALLEN (1916), E. D. L. —S. AF.

PART V. SECT. 6, SUB-SECT. 2.—
E. (e).

t. General rule.]—Payments or charges connected with legal expenses concerned may, in certain circumstances, come under the head of necessities.—VENKATA VIJAYA GOPALARAJU v. TIMMAYYA PANDARATHY (1899), 1 L. R. 22 Mad. 314.

PART V. SECT. 6, SUB-SECT. 2.—
E. (f).

290 i. Before marriage—Present for future wife.]—Wedding presents for the bride may be "necessaries."—JAGON RAM MARWARI v. MAHADEO PROSAD SAHU (1909), 1 L. R. 36 Calc. 768; 13 C. W. N. 643.—IND.

PART V. SECT. 6, SUB-SECT. 2.—
E. (h).

a. Riding horse—Hunter.]—Pltf. sued deft., an infant, for the price of a hunter worth £150. Deft., an English youth, was on a visit to a country hunting gentleman in Ireland, &, at the time of the bargain, he stated that he was a member of the S. Hunt,

as such a contract may be considered as made for her personal benefit. **Semble:** that a child or more distant relation, being an infant, would not be liable upon a contract for the burial of a parent or relative.

Things necessary are those without which the infant cannot reasonably exist. . . . Articles of mere luxury are always excluded, though luxurious necessities are sometimes allowed. This principle alone would not decide this case. An infant is allowed by law to make a contract of marriage. A contract for necessities to an infant's wife or children is used by Lord Bacon as an illustration of the law on this subject. There are many authorities which lay down that Christian burial is a part of a man's own rights. An infant husband could contract for the Christian burial of his wife or children as *personae conjunctae*. Then the question arises whether there is any distinction between an infant husband & an infant widow. If the husband can so contract, it is because the burial of his *persona conjuncta* is a personal benefit to him. If so, we do not see why a different rule should prevail in the case of the wife. It may be observed, that as the ground of our decision arises out of the previous contract of marriage, it does not follow that other relations would be liable (ALDERSON, B.).—CHAPPLE v. COOPER (1844), 13 M. & W. 252; 13 L. J. Ex. 286; 3 L. T. O. S. 340; 153 E. R. 105.

Annotations:—Refd. Ryder v. Wombwell (1868), L. R. 3 Exch. 90. **Mentd.** L. adshaw v. Beard (1862), 12 C. B. N. S. 344.

(h) Means of Conveyance.

292. Carriage—For army officer.]—BERNARD v. — (circa 1825), cited in 7 C. & P. at p. 52.

Annotation:—Refd. Charters v. Bayntun (1835), 7 C. & P. 52.

293. —.]—A., a minor, had held a commission in the army, but sold it by reason of not having sufficient fortune to continue to hold it. His father was a beneficed clergyman, who paid various sums for him during his minority, & gave him a further sum of £1,500 when he attained the age of twenty-one years:—**Held:** a stanhope was not necessary for him while a minor as being suitable to his state & degree.—CHARTERS v. BAYNTUN (1835), 7 C. & P. 52, N. P.

294. Riding horse—For business purposes.]—*Indebitatus assumpsit* for a horse sold; plea, infancy; replication, that it was sold to carry debt. about on necessary business; demurrer:—**Held:** the demurrer admits the necessity, & judgment must be for pltf.—BARBER v. VINCENT (1680), Freem. K. B. 531; 89 E. R. 397.

295. —. Exercise by medical advice.]—An apprentice of a chemist, who was entitled to some property when of age, bought a horse when nearly of age. He had been advised by a medical man

& that he was accustomed to hunt his step-father's horses, & talked of being allowed £600 a year by his step-father. The question whether the hunter was a "necessary" was left to the jury, who found that it was, & returned a verdict for £100:—**Held:** there was no evidence which could properly be left to the jury that the hunter was a "necessary."—SKRINE v. GORDON (1875), 1 L. R. 9 C. L. 479.—IR.

b. Bicycle.]—Where an infant owned a bicycle, which he used for periodically travelling a distance of 12 or 14 miles from his work to his home & bought another bicycle giving the first one in part payment:—**Held:** the bicycle was an article of utility & was a necessary.—SCARBOROUGH v.

to take exercise on horseback. The jury found that the horse was a necessary. The ct. refused a new trial.—*HART v. PRATER* (1837), 1 Jur. 623.

296. — *Hired by student.*—*HARRISON v. FANE*, No. 227, *ante*.

297. *Bicycle—Apprentice living with parents.*—A racing bicycle may be a necessary for an infant apprentice earning 21s. a week, & living with his parents.—*CLYDE CYCLE CO. v. HARGREAVES* (1898), 78 L. T. 296; 14 T. L. R. 338, D. C.

298. *Motor car—Hired at infant's risk—Effect of clause as to risk.*—*FAWCETT v. SMETHURST*, No. 392, *post*.

(i) *Things Used in Profession or Trade.*

Instruction in trade or profession.—*See MASTER & SERVANT.*

Trader—Liability for goods supplied.—*See Nos. 337, 340, 341, post.*

299. *Naval officer—Chronometer.*—A lieutenant in the Royal Navy, under the age of twenty-one, is not answerable for the price of a chronometer, in an action to which he has pleaded his infancy, & the replication is, necessities.—*BEROLLES v. RAMSAY* (1815), Holt, N. P. 77, N. P.

Military officer—Clothes for servant—& for soldiers of company.—*See No. 233, ante.*

— *Purchase of uniform.*—*See No. 277, ante.*

300. *Barber—Lease of house.*—*LOWE v. GRIFFITH*, No. 564, *post*.

301. *Farmer—Riding equipment.*—An infant, who was sole manager of a farm belonging to his father, & had some expectations, bought on credit from deft. one pair of spurs, a suit of best made kersey horse clothing, a breastplate, set of best plated harness, etc. At the trial a verdict was found for pltf., but leave was given to deft. to move for a nonsuit on the ground that there was no evidence to go to the jury that any of the articles were necessities:—*Held*: there was reasonable evidence, considering the position of deft., that the goods supplied were necessities.—*HILL v. ARBON* (1876), 34 L. T. 125; 40 J. P. 391, D. C.

302. *Music hall artist—Theatrical agent.*—*LOTHOUSE v. BROWN*, [1898] W N. 52, D. C.

303. *Vocalist—Business manager.*—*MACKINLAY v. BATHURST*, No. 140, *ante*.

Compare No. 171, ante.

(j) *Luxuries, Liquors and Ornaments.*

304. *Luxury may be a "necessary."*—*CHAPLE v. COOPER*, No. 291, *ante*.

305. — *Under medical prescription—Exercise on horseback.*—*HART v. PRATER*, No. 295, *ante*.

306. — *Table delicacies.*—*WHARTON v. MACKENZIE*, *CRIPPS v. HILLS*, No. 219, *ante*.

STURZAKER (1905), 1 Tas. L. R. 117.—*AUS.*

c. *Motor car—For business purposes.*—*Held*: deft., an infant, was not liable for the price of a motor car bought for the purpose of aiding him in carrying on a trade or business: the fact that the car was "necessary" in his business did not make it a "necessary" for the price of which the infant could bind himself by contract.—*PYETT v. LAMPMAN*, [1923] 1 D. L. R. 249; 53 O. L. R. 149.—*CAN.*

PART V. SECT. 6, SUB-SECT. 3.

310 i. *Liability.*—In a contract entered into on behalf of a minor by his guardian under which the guardian borrows money, but no charge is created on the minor's estate, no decree can be passed against the minor on his attaining his majority or his estate, except in cases in which the minor's estate would have been

liable for the obligation incurred by the guardian under the personal law to which he is subject.—*PATCHU RAMAJOGAYYA v. VAJJULA JAGANNADEAN* (1919), 1 L. R. 42 Mad. 185.—*IND.*

318 i. — *If expended on necessities.*—On Apr. 20, 1886, a sum of money was advanced by A. to a minor, who executed a bond in respect thereof & duly registered the same. The money was required by the minor to provide for his defence in certain criminal proceedings then pending against him on a charge of *dacoity*, & was used by him for that purpose. On June 18, 1892, A. instituted a suit against the minor for the amount due on the bond. It was urged on behalf of the minor, who had not attained majority at the time the suit was filed, that he was not liable to A. for the amount advanced; that it was not advanced for "necessaries": that he

307. *Intoxicating liquors.*—*BLACKSTONE'S CASE* (1619), cited Noy, 85; 74 E. R. 1052.

308. — *—*—*BROOKE v. GALLY*, No. 71, *ante*.

309. — *—*—In the case of an infant, who was entitled to an income of between £7 & £8 a week during his minority, such things as cartridges, champagne, & jewellery presented to a lady, to whom the infant was engaged without the consent of his guardian, but who did not become his bride, will not be allowed as "necessaries."—*HEWLINGS v. GRAHAM* (1901), 70 L. J. Ch. 568; 84 L. T. 497.

310. *Tobacco.*—Cigars & tobacco cannot, under ordinary circumstances, & in the absence of evidence of any special circumstances rendering them necessary medicinally or otherwise, be considered "necessaries" for an infant. In such a case the proper course is for the judge to withdraw the case from the consideration of the jury: but where there are such special circumstances it is a mixed question of law & fact, & must be left to the jury with proper directions.—*BRYANT v. RICHARDSON* (1866), L. R. 3 Exch. 93, n.; 14 L. T. 24; 12 Jur. N. S. 300; 14 W. R. 401. *Annotation*:—*Consd. Ryder v. Wombwell* (1868), L. R. 3 Exch. 90.

311. *Ornaments.*—*PETERS v. FLEMING*, No. 236, *ante*.

312. *Jewellery—Suitable to station in life.*—*RYDER v. WOMBWELL*, No. 216, *ante*.

313. — *Infant already supplied.*—*GORER v. READON*, No. 225, *ante*.

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319. — *—*—*Liability of estate.*—One borrows money during his infancy, & applies it to the buying of necessities, & afterwards coming to age,

was not liable under the bond:—*Held*: the liberty of the minor being at stake, the money advanced must be taken to have been borrowed for necessities; in such a case the bond being the basis of the suit, could not be ignored & treated as non-existent, & on its being proved to have been executed by the minor in respect of money advanced for necessities, pltf. was entitled to a decree.—*SHAM CHARAN MAL v. CHOWDERY DEBYA SINGH PAHRAJ* (1894), 1 L. R. 21 Cal. 872.—*IND.*

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**Sect. 6.—Contracts for necessities: Sub-sects. 3, 4
5. Sects. 7 & 8: Sub-sects. 1 & 2.]**

devises his lands for payment of his debts; this debt contracted during infancy is within the trust.—*MARLOW v. PITFIELD* (1719), 1 P. Wms. 558; 2 Eq. Cas. Abr. 516; 24 E. R. 516.

Annotations:—*Consd.* *Cory v. Gertcken* (1816), 2 Madd. 40. *Expld.* *Re National Permanent Benefit Bldg. Soc., Ex p. Williamson* (1869), 5 Ch. App. 309. *Consd.* *Yorkshire Ry. Wagon Co. v. Maclure* (1881), 19 Ch. D. 478. *Refd.* *May v. Skey* (1849), 16 Sim. 588. *Mentd.* *Re Howarth* (1873), 8 Ch. App. 416, n.

320. — Advance by army agents to officer — For regimental purposes.]—(1) Army agents advancing reasonable sums of money to a minor, on the assurance that he required them for regimental purposes:—*Held*: in the absence of fraud, entitled to a lien for the amount upon the proceeds of the sale of his commission, the agent not being fixed with notice of any impropriety in the sale, or other *mala fides* in the transaction.

(2) Proceeds of the sale by an infant of his commission in the army, purchased three months previously at his request by his trustees, under a power to raise money for his maintenance & advancement out of a fund in which he had only a contingent interest:—*Held*: in the absence of fraud, to belong to the infant, although the trustees' object in exercising the power had failed *ab initio*.—*LAWRIE v. BANKES* (1858), 4 K. & J. 142; 27 L. J. Ch. 265; 32 L. T. O. S. 18; 4 Jur. N. S. 299; 6 W. R. 244; 70 E. R. 59.

Annotation:—*As to* (2) *Consd.* *Re Fox, Wodehouse v. Fox*, [1904] 1 Ch. 480.

321. — Lender subrogated to rights of supplier.]—Where there was a loan to an infant & the money was spent in paying for necessities . . . it has been held that although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a ct. of equity & stand in the place of those creditors whose debts had been so paid. . . . It is a very clear & definite principle & a principle which ought not to be departed from (*GIFFORD, L.J.*).—*Re NATIONAL PERMANENT BENEFIT BUILDING SOCIETY, Ex p. WILLIAMSON* (1869), 5 Ch. App. 309; 22 L. T. 284; 34 J. P. 341; 18 W. R. 388, L. J.

Annotations:—*Consd.* *Yorkshire Ry. Wagon Co. v. Maclure* (1881), 19 Ch. D. 478. *Mentd.* *Re Victoria Permanent Benefit Building Investment & Freehold Land Soc., Hill's Case, Jones' Case* (1870), L. R. 9 Eq. 605; *Re South Wales Atlantic S.S. Co.* (1876), 2 Ch. D. 763; *Chapleo v. Brunswick Benefit Bldg. Soc.* (1880), 5 C. P. D. 331; *Blackburn Bldg. Soc. v. Cunliffe, Brooks* (1882), 22 Ch. D. 64, n.; *Re Guardian Permanent Benefit Bldg. Soc.* (1882), 23 Ch. D. 444, n.; *Murray v. Scott, Agnew v. Murray, Brimelow v. Murray* (1884), 9 App. Cas. 519; *Re Birkbeck Permanent Benefit Bldg. Soc.*, [1912] 2 Ch. 183; *Reversion Fund & Insce. v. Malson Cosway*, [1913] 1 K. B. 364; *Sinclair v. Brougham*, [1914] A. C. 398.

322. —]—The principle upon which Cts. of Equity enforced claims like these was not

founded upon a contractual obligation. The view was that the person who advanced necessities to an infant was in the position of a legal creditor, & any one who advanced money to an infant for procuring necessities took over the legal debt & was entitled to stand in the position of the legal creditor (*LINDLEY, L.J.*).—*LEWIS v. ALLEYNE* (1888), 4 T. L. R. 560, C. A.

323. —]—*GARDNER v. WAINFUR*, No. 197, *ante*.

SUB-SECT. 4.—ACCOUNTS STATED IN RESPECT OF NECESSARIES SUPPLIED.

See, now, Infants Relief Act, 1874 (c. 62), s. 1.

SUB-SECT. 5.—SECURITIES GIVEN FOR NECESSARIES SUPPLIED.

See, generally, Infants Relief Act, 1874 (c. 62).

324. Bonds—Whether valid—Penalty annexed.]—*AYLIFF v. ARCHDALE*, No. 75, *ante*.

325. —]—*RUSSEL v. LEE* (1662), 1 Lev. 86; 1 Keb. 416; 83 E. R. 310.

Annotations:—*Consd.* *Walter v. Everard*, [1891] 2 Q. B. 369. *Refd.* *Holt v. Ward Clarendieux* (1732), 2 Stra. 937.

326. —]—*BLACKSTONE'S CASE* (1619), cited in *Noy*, at p. 85; 74 E. R. 1052.

327. —]—An infant is liable for necessities, but cannot give a bond for them (*LORD MANSFIELD, C.J.*).—*READ v. JEWSON* (1773), cited in 4 Term Rep. at p. 362; 100 E. R. 1065.

Annotations:—*Consd.* *Beard v. Webb* (1800), 2 Bos. & P. 93. *Refd.* *Caudell v. Shaw* (1791), 4 Term Rep. 361. *Mentd.* *Hyde v. Price* (1797), 3 Ves. 437.

328. —]—*REARSBY & CUFFER'S CASE* (1613), *Godb.* 219; 78 E. R. 133.

329. Grant of annuity.]—Money lent & paid at different times for the education & advancement of debt., is a good consideration for the grant of an annuity within 17 Geo. 3, c. 26, s. 3. Such a consideration is sufficiently expressed in the deeds for securing the annuity under the description of "money lent & advanced, & also paid, laid out & expended to & for the maintenance, education & advancement in the world of debt."—*KELFE v. AMBROSSE* (1798), 7 Term Rep. 551; 101 E. R. 1127.

Annotations:—*Mentd.* *Marriage v. Marriage* (1845), 1 C. B. 761; *Hall v. Lack* (1847), 1 Exch. 300.

330. Deed of assignment — Of reversionary interest.]—(1) A deed by an infant to secure the repayment of money advanced for necessities is voidable.

Where pltf. had advanced money to an infant partly in order to pay for necessities, & he had by deed assigned to pltf. his reversionary interest as a security, in an action brought against the infant on his attaining twenty-one, for an account

liable. Where the promise is to pay money, which has been expended on necessities, the estate of the minor may be liable, not on the promise, but because the money has been supplied.—*BHAWAL SAHU v. BAJNATH PERTAB NARAIN SINGH* (1907), I. L. R. 35 Calc. 320; 12 C. W. N. 256.—IND.

d. — If not expended on necessities—Liability of estate.]—A pltf. who has advanced money to relieve the necessities of a minor must make all reasonable inquiries as to the facts of such necessities, & having made such inquiries & reasonably entertaining a *bona fide* belief in the existence of such necessities, he can advance his money in safety, even though the sum borrowed by the guardian upon the

security of the minor's estate is not in point of fact used for his necessities or his benefit. On the other hand, a pltf. who lends money without such inquiries cannot thereafter successfully have recourse to the minor's estate for the satisfaction of the debt.—*KANDHIA LAL v. MUNA BIBI* (1897), I. L. R. 20 All. 135.—IND.

e. Duty of lender.]—*KANDHIA LAL v. MUNA BIBI* (1897), I. L. R. 20 All. 135.—IND.

f. —]—When a third person enters into dealings with the guardian of a minor, & advances money for necessities for the minor or for the benefit of the estate, & takes a bond for the debt from the guardian, the responsibility rests on him to take

care that the bond is so drawn as to render the estate of the minor liable in law for the debt.—*BHAWAL SAHU v. BAJNATH PERTAB NARAIN SINGH* (1907), I. L. R. 35 Calc. 320; 12 C. W. N. 256.—IND.

PART V. SECT. 6, SUB-SECT. 5.

g. Whether valid.]—In an action on foot of promissory notes bearing interest one of the makers of the notes pleaded infancy. Reply, that the consideration for the notes consisted of money lent for the purpose of being applied & afterwards in fact expended for necessities for such debt.:—*Held*: the reply was bad.—*BATEMAN v. KINGSTON* (1880), 6 L. R. Ir. 328.—IR.

of moneys advanced to him & expended on necessities, & for repayment, & also claiming that same might be declared to be a charge on his reversionary interest:—*Held*: though pltf. was entitled to an account & an order for repayment the deed was not binding on the infant, & the security could not be enforced.

(2) The ct. may, by acting under a delegated power which the Crown possessed, being the guardian of all infants, be enabled to charge an infant's property when he could not charge it himself; & the very reason which may render it necessary for the ct. to do it is that the infant cannot do it without; therefore, if the ct. could not do it, nobody could do it (JESSEL, M.R.).—*MARTIN v. GALE* (1876), 4 Ch. D. 428; 46 L. J. Ch. 84; 36 L. T. 357; 25 W. R. 406.

Annotations:—*As to* (1) *Appld.* *Walkden v. Hartley & Cavell* (1886), 2 T. L. R. 767. *Refd.* *Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482.

331. — Interest under insurance policy.—An infant deposited a deed, appointing to him certain insurance moneys to become due on the death of his father, to secure advances by debt., some of which were for providing necessities. After he had attained 21, he assigned the property to which the deed related to pltf. for value:—*Held*: debt. was not entitled to retain the deed for the advances nor as a lieu for costs.—*WALKDEN v. HARTLEY & CAVELL* (1886), 2 T. L. R. 767.

332. Acceptance of bill of exchange.—An infant cannot accept a bill of exchange for necessities.—*WILLIAMSON v. WATTS* (1808), 1 Camp. 552, N. P.

333. ——An infant cannot bind himself by the acceptance of a bill of exchange, even although the bill be given for the price of necessities supplied to him during infancy.—*Re SOLTYKOFF, Ex p. MARGRETT*, [1891] 1 Q. B. 413; 60 L. J. Q. B. 339; 55 J. P. 100; 39 W. R. 337; 7 T. L. R. 197; 8 Morr. 27, C. A.

Compare Part III., Sect. 5, *ante*.

SECT. 7.—CONTRACTS OF APPRENTICESHIP AND SERVICE.

See MASTER & SERVANT.

SECT. 8.—TRADING CONTRACTS.

SUB-SECT. 1.—IN GENERAL.

334. Competency.—*BRUCE v. WARWICK*, No. 178, *ante*.

335. ——An infant, for his own benefit, may carry on trade & business, &, by his *prochein ami*, may maintain an action for slanderous words in respect of such trade & business.—*WILD v. TOMKINSON* (1827), 5 L. J. O. S. K. B. 265.

336. — Contract not beneficial.—An agreement by which debt., an infant, who was a professional boxer, appointed pltf. his sole manager on commission, & agreed not to take engagements under any other management without pltf's consent for three years:—*Held*: unenforceable against the infant, as it was a trading contract & as it could not be construed as being beneficial to him.—*SHEARS v. MENDELOFF* (1914), 30 T. L. R. 342.

Infant partner in trading partnership.—*See* PARTNERSHIP.

Street trading by children.—*See* Part XVI., Sect. 1, *post*.

SUB-SECT. 2.—LIABILITY FOR TRADING DEBTS.

337. Liability of infant—Price of trade stock purchased.—*WHITTINGHAM v. HILL* (1619), Cro. JAC. 494; 79 E. R. 421; *sub nom.* *HILL v. WHITTINGHAM*, 2 Roll. Rep. 45; *sub nom.* *HILL & WITTINGTON'S CASE*, 2 Dyer, 104 b, n.

Annotations:—*Refd.* *Corpe v. Overton* (1833), 10 Bing. 252; *Walter v. Everard* (1891), 65 L. T. 443.

338. ——Where an infant trader enters into a contract for the sale of goods & is paid the price by the purchaser but subsequently fails to deliver the goods, the purchaser cannot recover the price in an action for money had & received, even though the contract was for the infant's benefit, unless it can be proved that in substance the cause of action arose *ex delicto*.

An infant is not necessarily liable on a contract merely because it is for his benefit. I am satisfied . . . that the only contracts which, if for the infant's benefit, are enforceable against him, are contracts relating to the infant's person, such as contracts for necessities, food, clothing & lodging, contracts of marriage, & contracts of apprenticeship & service. In my opinion a trading contract does not come within that category (PHILLIMORE, J.).—*COWERN v. NIELD*, [1912] 2 K. B. 419; 81 L. J. K. B. 865; 106 L. T. 984; 28 T. L. R. 423; 56 Sol. Jo. 552, D. C.

Annotations:—*Consd.* *Stocks v. Wilson*, [1913] 2 K. B. 235. *Refd.* *Roberts v. Gray*, [1913] 1 K. B. 520; *Leslie v. Shiell*, [1914] 3 K. B. 607.

339. ——*SMALLY v. SMALLY*, No. 36, *ante*.

340. ——An infant cannot be charged for goods delivered to trade with.—*WHYWALL v. CHAMPION* (1738), 2 Stra. 1083; 93 E. R. 1047.

Annotations:—*Refd.* *Belton v. Hodges* (1832), 9 Bing. 365; *Corpe v. Overton* (1833), 10 Bing. 252.

341. ——Where a tradesman, who had purchased goods to stock his shop as a grocer, pleaded infancy to the action for goods sold, & pltf. replied that the goods were necessities:—*Held*: (1) debt. supplied his family out of the shop; (2) the articles were necessities; (3) the evidence was sufficient to support a verdict for pltf. for a part of the amount of his demand.—*TURBERVILLE v. WHITEHOUSE* (1823), 12 Price, 692; 147 E. R. 848; *previous proceedings*, 1 C. & P. 94, N. P.

342. — Judgment recovered—When set aside.—To entitle a debt. to relief from a judgment signed on a warrant of attorney, given by him for the price of goods supplied by pltf., on the ground of infancy, debt. at the time keeping a shop, & acting as if he were of age, he ought to make out a clear case; merely swearing that he is an infant of the age of twenty years, & giving an extract is not sufficient for the ct. to act upon.

The ct. refused to set aside a warrant of attorney, dated Aug. 1, 1835, on the affidavit of debt., that when he gave it "he was an infant of the age of twenty years or thereabouts," together with proof of his register of baptism, dated in Sept. 1815.—*WEAVER v. STOKES* (1836), 1 M. & W. 203; 4 Dowl. 724; 1 Gale, 380; Tyr. & Gr. 512; 150 E. R. 406.

Annotation:—*Refd.* *Oliver v. Woodroffe* (1839), 4 M. & W. 650.

Compare No. 345, *post*.

343. — To refund purchase money received—Goods sold but not delivered by infant—Liability arising ex delicto.—*COWERN v. NIELD*, No. 338, *ante*.

344. — For work done.—Where an infant carries on trade, an action is not maintainable against him for work done for him in the course

8.—Trading contracts: Sub-sects. 2 & 3. | an annuity is not avoided by the infancy
Sect. 9. Part VI. Sect. 1.]
 who grants in the same deed.

of that trade which he so carries on, on his own account, & whereby he gains his living.—*DILK v. KEIGHLEY* (1796), 2 Esp. 480, N. P.

345. — Trade debt — Judgment by default—Whether set aside.]—If an infant is sued for a debt, which he has contracted in the course of trade, & has suffered judgment to be signed by default, the ct. will not set it aside.—*WRIGHT v. HUNTER* (1823), 1 L. J. O. S. K. B. 248.

Compare No. 342, *ante*.

346. — —.]—An infant, who has been dealt with as a trader, is not consequently liable in respect of a trade debt.—*MILLER v. BLANKLEY* (1878), 38 L. T. 527.

Annotations:—Refd. Re Jones, Ex p. Jones (1881), 45 L. T. 193; *Leslie v. Sheill*, [1914] 3 K. B. 607.

347. — —.]—Two infants in partnership commenced business as fishmongers, & in July, 1925, filed their own petition in bkpcy. The Official Receiver was appointed trustee. On the preliminary examination it appeared that both the debtors were infants. There was no evidence that any of the debts were for necessities, or that the infants had expressly held themselves out as adults. The Official Receiver applied that the adjudication should be annulled, but the registrar refused to make an order. The Official Receiver appealed to the Div. Ct.:—*Held*: in the case of an infant trader there could be no valid debt on which a receiving order could be made; it made no difference that the debtors had presented their own petition, & the order of the registrar should be reversed, & the adjudication annulled.—*Re L. A. & B. F. M., Ex p. OFFICIAL RECEIVER v. DEBTORS* (1926), 134 L. T. 539, D. C.

— — Bankruptcy of infants.]—See Sub-sect. 3, *post*.

348. Liability to infant — Election by infant to enforce.]—*BRUCE v. WARWICK*, No. 178, *ante*.

Effect of misrepresentation of age.]—See Part VI., *post*.

SUB-SECT. 3.—BANKRUPTCY OF INFANT TRADER.

See *BANKRUPTCY*, Vol. IV., pp. 28–30, Nos. 227–229, 234–236.

SECT. 9.—JOINT CONTRACTS OF INFANT AND ADULT.

349. Voidable as to infant—Validity as to adult—How tested.]—An infant & one of full age A. join in a bond to perform an award & it is awarded that they or either of them shall pay £10 & that pltf. shall release to them after they have released to him. The bond is valid as to A. although voidable as to the infant, & the award good & mutual, although the infant cannot make a good release. If an infant & man of full age seal an obligation, it is voidable as to the infant & valid as to the other. An award that one of the parties & a stranger shall do an act, is binding on the party, & void as to the stranger.—*GILL v. RUSSELL* (1673), *FREEM. K. B.* 62, 139; 89 E. R. 48, 101.

350. — — Several covenants — Grant of annuity.]—The several covenant of one grantor of

an annuity is not avoided by the infancy who grants in the same deed.

Suppose a young man left with £10,000 *per annum*, which is directed to accumulate until he is of age, & if a guardian for the necessary subsistence of the young man & his education agrees to raise money by this mode of annuity & the guardian joins therein for security it would be very hard if this security could be vacated (*LORD MANSFIELD, C.J.*).—*HAW v. OGLE* (1811), 4 Taunt. 10; 128 E. R. 230.

351. — — — —.]—Deft. & an infant who had granted an annuity, covenanted jointly & severally for the due payment of the same:—*Held*: the infancy of the grantor did not avoid & exonerate deft. from his separate contract.—*GILLOW v. LILLIE* (1835), 1 Bing. N. C. 695; 1 Hodg. 160; 1 Scott, 597; 4 L. J. C. P. 222; 131 E. R. 1285.

352. — — Acceptance of bill by partners.]—If one of two partners is an infant, the holder of a bill accepted by both partners may declare on it as accepted by the adult only in the names of both; & if deft. pleads in abatement that the other partner ought also to be sued, pltf. may reply his infancy, & it is no departure.

There is a binding contract as to the adult though void as to the infant (*LORD MANSFIELD, C.J.*).—*BURGESS v. MERRILL* (1812), 4 Taunt. 468; 128 E. R. 410.

Annotation:—Refd. Boyle v. Webster (1852), 17 Q. B. 950.

353. — — Promissory note by father & son.]—Pltf. sued defts., father & son, on a promissory note given in respect of a loan to the son, who was under age when the money was advanced to him. The father joined in the note in order to facilitate the transaction, understanding that the debt would be paid when the son came of age. It appeared that in all probability pltf. knew that the son was under age:—*Held*: the true meaning of the transaction was that the father acted as principal borrower, & therefore, although by the Infants' Relief Act, 1874 (c. 62), the son was not liable, the father was liable as principal.—*WAUTHIER v. WILSON* (1912), 28 T. L. R. 239, C. A.

354. — — Enforcement against adult—Whether infant must be joined—Discontinuance against infant.]—Where pltf. declares on a joint contract, & one deft. pleads infancy, pltf. cannot enter a *nolle prosequi* & proceed against the other deft. in that action, but should commence a new action against the adult deft. only.—*CHANDLER v. PARKES* (1800), 3 Esp. 76, N. P.

Annotations:—Folld. Jaffray v. Frebain (1803), 5 Esp. 47. *Consd. Burgess v. Merrill* (1812), 4 Taunt. 468.

355. — — — —.]—In a joint action, where one deft. pleads infancy, pltf. cannot enter a *nolle prosequi* as to him, & proceed against the others.—*JAFFRAY v. FREBAIN* (1803), 5 Esp. 47, N. P.

356. — — — —.]—In an action against two on joint promises, defts. pleaded severally. Both pleaded *non assumpsit*, & one infancy. Pltf., in answer to the latter plea, admitted on the record that he could not deny the infancy; & he entered a *nolle prosequi* as to deft. pleading it, but went to trial against the other:—*Held*: he could not recover against this last, his admission on the record being conclusive evidence that there was no joint promise. The effect of such admission

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h. Enforcement against insane adult dorse of promissory note.]—J., infant, gave to M. a promissory

note for the purchase-money of a buggy, indorsed by his father, who was of unsound mind, & unable to understand what he was doing. The father

received no consideration, & M. was not aware of his condition:—*Held*: the father's estate was not liable.—*Re JAMES* (1881), 9 P. R. 88.—CAN.

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is not altered by the new rules, making infancy a distinct plea from *non assumpsit*.—**BOYLE v. WEBSTER** (1852), 17 Q. B. 950; 21 L. J. Q. B. 202; 18 L. T. O. S. 273; 16 Jur. 683; 117 E. R. 1545.

See, now, R. S. C., Ord. 16; Ord. 26.

357. ——— Infant's repudiation must be proved.]—In *assumpsit* a plea in abatement that deft. made the promise jointly with another, is supported by evidence that the promise was made by deft. jointly with an infant. It is for pltf. to plead & prove that the infant has avoided his

promise, if he would reduce the joint contract to a sole contract.—**GIBBS v. MERRILL** (1810) Taunt. 307; 128 E. R. 122.

358. ———.] — **BOYLE v. WEBSTER** No. 356, *ante*.

359. ——— By specific performance injunction — Effect of infancy.] — **LUMLEY RAVENSCROFT**, No. 199, *ante*.

Bill of exchange—By infant as agent for adult.] See No. 70, *ante*.

—— Drawn by partners.]—See No. 352, *ante*.

Part VI.—Misrepresentation as to Age.

SECT. 1.—IN GENERAL.

360. Liability of infant for fraud.] — **JOHNSON v. PYE** (1665), 1 Sid. 258; 1 Keb. 905, 913; 1 Lev. 169; 82 E. R. 1091.

Annotations:—**Appld.** **Jennings v. Rundall** (1799), 8 Term Rep. 335. **Consd.** **Stikeman v. Dawson** (1847), 1 De G. & Sm. 90. **Appld.** **Liverpool, Adelphi Loan Assocn. v. Fairhurst** (1854), 9 Exch. 422. **Consd.** **Wright v. Leonard** (1861), 11 C. B. N. S. 258. **Foll.** **Leslie v. Sheill**, [1914] 3 K. B. 607. **Refd.** **Price v. Hewett** (1852), 8 Exch. 146; **Bartlett v. Wells** (1862), 1 B. & S. 836; **Edwards v. Porter**, [1925] A. C. 1. **Mentd.** **R. v. Grantham** (1708), 11 Mod. Rep. 222.

361. ———.] — An infant is not liable for a fraudulent representation that he was of full age, whereby a party has been induced to contract with him.—**LIVERPOOL ADELPHI LOAN ASSOCN. v. FAIRHURST** (1854), 9 Exch. 422; 2 C. L. R. 512; 22 L. T. O. S. 318; 18 Jur. 191; 2 W. R. 233; *sub nom.* **FAIRHURST v. LIVERPOOL ADELPHI LOAN ASSOCN.**, 23 L. J. Ex. 163.

Annotations:—**Consd.** **Bartlett v. Wells** (1862), 1 B. & S. 836. **Appld.** **Leslie v. Sheill**, [1914] 3 K. B. 607. **Refd.** **Wright v. Leonard** (1861), 11 C. B. N. S. 258; **De Roo v. Foster** (1862), 12 C. B. N. S. 272; **Earle v. Kingscote**, [1900] 2 Ch. 585; **Burdett v. Horne** (1911), 27 T. L. R. 402; **Cole v. De Trafford**, [1917] 1 K. B. 911; **McNeill v. Hawes**, [1923] 2 K. B. 538; **Edwards v. Porter**, [1925] A. C. 1. **Mentd.** **Re Beauchamp, Ex p. Beauchamp** (1904), 73 L. J. K. B. 311.

362. ———.] — The law is settled, that a married woman is liable with her husband for her torts, but that, on the other hand, she is not liable on her contracts made during coverture. The law is the same as to infants: they are liable for their torts, but not (with certain exceptions) on their contracts. There is a class of intermediate cases, partaking partly of the nature of contracts & partly of the nature of torts, in which the question arises to which category they are to be referred.

PART VI. SECT. 1.

360 i. Liability of infant for fraud.] — If a minor fraudulently represents himself to be of age, for the purpose of effecting a loan of money, he will not be permitted afterwards to set up the fact of his infancy as a defence to a suit to enforce payment of a security created by him on effecting such loan.—**GOYER v. MORRISON** (1878), 26 Gr. 69.—CAN.

360 ii. ———.] — To make an infant liable upon a mtge. of his property there must be a direct misrepresentation by him as to his age, the execution of the instrument not being in itself a sufficient representation.—**CONFEDERATION LIFE ASSOCN. v. KINNEAR** (1896), 23 A. R. 497.—CAN.

360 iii. ———.] — Unless for necessities, the contract of an infant is not binding on him, nor is he liable for a fraudulent representation that he is of full age whereby the pltf. is induced to contract with him; & he is entitled to plead infancy in order to escape from

a contract procured by his fraud when an infant.—**JEWELL v. BROAD** (1909), 19 O. L. R. 1; *affd.* 20 O. L. R. 176.—CAN.

360 iv. ———.] — Pltf., when an infant, conveyed land to deft. L., & made an acknowledgment representing herself to be of full age, L. did not know that pltf. was an infant. Pltf. knew her own age & knowingly withheld the truth, being aware of the position in law:—**Held:** the ct. should not assist pltf. to take advantage of her own fraud, to recover the land which she had conveyed.—**GREGSON v. LAW & BARRY** (1914), 26 W. L. R. 576; 5 W. W. R. 1017; 19 B. C. R. 240.—CAN.

360 v. ———.] — A sum of money was advanced to a minor by a mtgee. secured by a mtge. of house property on the representation by the minor that he was of age, & the mtgee. was deceived by such false representation:—**Held:** the mtgee. was entitled to a mtge. decree against the property of

the infant.—**SARAL CHAND MITTER v. MOHUN BIBI** (1898), 1 L. R. 25 Calo. 371; 2 C. W. N. 18, 201.—IND.

360 vi. ———.] — Where deft. represented himself to be of full age, & pltf. was misled by the false representation:—**Held:** Evidence Act, s. 115, is applicable & deft.'s plea of minority could not be heard.—**WASINDA RAM v. SITA RAM** (1920), 1 L. R. 1 Lah. 389.—IND.

360 vii. ———.] — In an action on foot of promissory notes bearing interest one of the makers of the notes pleaded infancy. Reply, that the consideration for the notes consisted of money lent for the purpose of being applied & afterwards in fact expended for necessities for such deft. & at the time of the loan & of the making of the notes deft. fraudulently represented himself to be of full age & thereby induced pltf. to advance the money:—**Held:** on demurrer that both replies were bad.—**BATEMAN v. KINGSTON** (1880), 6 L. R. Ir. 328.—IR.

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certain conditions, averring that deft. at the time of making the representation was an infant, as he himself well knew, & that he refused to repay the loan or comply with the conditions, to the damage of pltf. The ct. granted leave to deft., under C. L. P. Act, 1852 (c. 76), s. 80, to demur to this declaration, & plead not guilty, with a traverse that pltf. confided in the alleged fraudulent representation: on an affidavit of deft.'s attorney, that he was informed & believed that deft. had just cause to plead those pleas, & that the declaration would be held bad in substance on demurrer, & that the objections raised to it by demurrer were good & valid objections in law. *Semble*: the action would not lie.—**PRICE v. HEWETT** (1853), 8 Exch. 146; 20 L. T. O. S. 191; 17 Jur. 4; 1 W. R. 114.

Annotation:—**Reid**. *De Roo v. Foster* (1862), 12 C. B. N. S. 272.

366. — Contract void under statute—Whether infant estopped from relying on statute.]—Deft., when under 21 years of age, obtained an advance from pltf. & signed a promissory note for £700 in respect thereof. Deft., at the time of the loan, represented to pltf. that he was over 21 years of age:—*Held*: the contract was void under Infants Relief Act, 1874 (c. 62), & deft. was not estopped from relying on the statute by the fact that he had made a misrepresentation as to his age.—**LEVENE v. BROUGHAM** (1909), 25 T. L. R. 265; 53 Sol. Jo. 243, C. A.

Annotations:—**Reid**. *Stocks v. Wilson*, [1913] 2 K. B. 235; *Leslie v. Sheill*, [1914] 3 K. B. 607.

SECT. 2.—LIABILITY IN EQUITY.**SUB-SECT. 1.—IN GENERAL.**

367. No advantage from own fraud.]—I must also deny what has been advanced in the argument of the present case, that either by the law of England, or any other law, every contract made by an infant is void.

By our law some agreements bind absolutely, some are void, some are voidable. Contracts for necessities, such as diet, education, etc., are good, & the infant's body liable to be taken in execution for them. So of a sum advanced for taking an infant out of gaol. Infancy never authorises fraud; as, if goods were delivered to an infant, & he embezzle them, trover would lie against him; or if he took an estate, & was to pay rent for it, he should not hold the estate, & defend himself against payment of the rent, by pretence of infancy. If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again. If he receives rents, he cannot demand them again when of age.

Better terms may be obtained for infants by parents & guardians than when they are of full age; by much the greatest number of women are married when under age; but they are not thereby to be made an instrument to defraud others, for there is no difference in effect whether the fraud be premeditated, or the circumstances by subsequent events be turned into fraud. If the statute of Hen. 8 had never been made, cts. of equity would have given relief; but I am clearly of opinion that infants are barred under

that statute. That act was made for uses, not for jointures: this is a provision arising out of the general consequences of uses (**LORD MANSFIELD**).

An infant so near of age, wanting only two months, might bind herself as to personal rights. She was capable of devising away all her own personal estate. This is not so strong. It is not to deprive her of her own, but to exclude her of the contingency of any part of her husband's personal estate (**LORD HARDWICKE**).—**BUCKINGHAMSHIRE (EARL) v. DRURY** (1762), as reported in 2 Eden, 60; 28 E. R. 818, H. L.

Annotations:—**Consd.** *Caruthers v. Caruthers* (1794), 4 Bro. C. C. 500; *Holmes v. Blogg* (1818), 2 Moore, C. P. 552; *Seaton v. Seaton* (1888), 13 App. Cas. 61; *Cowern v. Nield*, [1912] 2 K. B. 419. **Reid**. *Durnford v. Lane* (1781), 1 Bro. C. C. 106; *Maddon v. White* (1787), 2 Term Rep. 159; *R. v. Shinfield* (1811), 14 East, 541; *Corbet v. Corbet* (1824), 1 Sim. & St. 612; *Corpe v. Overton* (1833), 3 Moo. & S. 738; *Hobson v. Ferraby* (1846), 2 Coll. 412; *N. W. Ry. v. M'Michael*, *Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher* (1851), 5 Exch. 114; *Dyke v. Rendall* (1852), 2 De G. M. & G. 209; *Field v. Moore* (1855), 7 De G. M. & G. 691; *Cooper v. Simmons* (1862), 7 H. & N. 707; *Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482; *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.* (1894), 43 W. R. 126; *Leslie v. Sheill*, [1914] 3 K. B. 607. **Mentd.** *Daniel v. Adams* (1765), Amb. 495; *Beckford v. Wade* (1805), 17 Ves. 87; *Smith v. Jersey* (1821), 3 Bl. 290.

368. —.]—(1) A man cannot be charged in equity, after his majority, on a purchase or sale, or contract, made during his minority, on the mere ground, that, without any false assertion by the infant, the other party believed he was not a minor, & dealt with him on the supposition that only adults could enter into such transactions. The ct., therefore, refused to entertain a bill for an injunction to restrain an action brought to recover certain railway shares which had been sold & assigned, by deed, to pltf. in equity, by pltf. at law, during the infancy of pltf. at law, there being no evidence against pltf. at law of misrepresentation as to his infancy.

(2) Unquestionably it is the law of England, that an infant, however generally for his own sake protected by an incapacity to bind himself by contracts, may be *doli capax* in a civil sense, & for civil purposes, in the view of a ct. of equity, though perhaps only when *pubertati proximus* or older, & not, I suppose, at so early an age as in a criminal sense, & for criminal purposes, & may therefore commit a fraud for which, or the consequences of which, he may after his majority be made civilly answerable in equity. I am not now speaking of cases in which infants, if liable at all, are liable at law only, or in which adults, if suable in respect of acts done during infancy, are suable at law only. But as far as equity is concerned, the practical application of the rule or doctrine to which I have been just referring must not seldom, I conceive, be matter of much delicacy & difficulty. I agree with a learned author, who says, that in what cases in particular a ct. of equity will thus exert itself it is not easy to determine (**KNIGHT BRUCE, V.-O.**).

(3) Pltfs. seem substantially to contend for not less than this general proposition, that if a minor deals in a matter of contract with a person, who, having no notice of the minority, does, without any representation to him on the subject, believe the minor to be of full age, the minor is, after his majority at least, answerable in equity to that person for the contract or the consequences, or liable in equity to be compelled to restore him to

PART VI. SECT. 2, SUB-SECT. 1.

367 i. No advantage from own fraud.]
—In a ct. of equity an infant stands

in no different position from a person of full age in relation to matters of fraud, & therefore if he makes a representation upon which another

person acts, he will not be allowed to impeach the validity of it on the ground of his minority.—**WILBUR v. JONES** (1881), 21 N. B. R. 4.—**CAN.**

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his original position. Not referring, as I do not refer, to a case of necessities, or any case where the law permits an infant to contract, or any case where the point is purely & merely legal, I am not aware that such a proposition is founded in principle, or supported by authority that binds the ct. It seems to me full of danger & evil—as was said at law in a case already mentioned, where it was held that an action of deceit would not lie upon an assertion by a minor that he was of full age (KNIGHT BRUCE, V.-C.).—STIKEMAN v. DAWSON (1847), 1 De G. & Sm. 90; 4 Ry. & Can. Cas. 585; 16 L. J. Ch. 205; 8 L. T. O. S. 551; 11 Jur. 214; 63 E. R. 984.

Annotations:—As to (1) *Consd.* Miller v. Blankley (1878), 38 L. T. 527. As to (2) *Refd.* Stocks v. Wilson, [1913] 2 K. B. 235; Leslie v. Shiell, [1914] 3 K. B. 607. *Generally*, *Mentd.* Wright v. Leonard (1861), 11 C. B. N. S. 258.

369. —.]—A young man of the age of seventeen, previous to his marriage with a woman possessed of personal property, executed a marriage settlement, by which he covenanted to pay £1,000 to the trustee. Before executing it, being asked by the solr. of the intended wife whether he was of age, he said he believed he was. The intended wife, however, knew that he was not. After the marriage he received the wife's personal estate, & after her death refused to pay the £1,000:—*Held*: as the wife was not misled by the misrepresentation, the settlement was not binding upon the husband when he came of age.—NELSON v. STOCKER (1859), 4 De G. & J. 458; 28 L. J. Ch. 760; 33 L. T. O. S. 277; 5 Jur. N. S. 751; 7 W. R. 603; 45 E. R. 178, L. JJ.

Annotations:—*Apld.* Mohori Bibee v. Dharmodas Ghose (1903), 19 T. L. R. 295. *Consd.* Leslie v. Shiell, [1914] 3 K. B. 607. *Refd.* Burton v. Levey (1891), 7 T. L. R. 248. *Mentd.* Wright v. Leonard (1861), 5 L. T. 110.

370. — Assurance of land—Whether set aside.]—If an infant *feme covert*, with intent to levy a fine to the uses of herself & husband, declare herself of age, when examined by comrs. under a *dedimus potestatem*, when in fact she was greatly under age, yet the fine cannot be set aside, although there is strong grounds that the examination was collusive.—BARROW v. PARROT (1677), 1 Mod. Rep. 246; 86 E. R. 858; *sub nom.* PERROT'S CASE, 2 Vent. 30.

371. Creditor not misled.]—STIKEMAN v. DAWSON, No. 368, *ante*.

372. —.]—NELSON v. STOCKER, No. 369, *ante*.

373. —.]—If persons choose to supply goods to an infant on credit, they take the chance of being paid. Such is the law, & I am not prepared to say that there is any absurdity or hardship in it, or that it ought to be altered. That is not my province. It is said, however, that a different

rule prevails in equity, & that when an infant has committed a fraud by representing that he is not an infant in order to obtain possession of goods he can be made liable in equity for the misrepresentation. In such cases the ct. has taken into consideration the appearance of the infant for that is a very material matter. If the representation were made by a boy of ten years old, it would be impossible that the person to whom it was made could have relied on it. But if a man who is apparently of full age represents that he is of full age, the person to whom he makes the representation may well be deceived by it. An infant is capable of committing a fraud in equity just as he is capable of committing a crime, & may be made liable for it (JESSEL, M.R.).

An infant does not by filing a liquidation petition acquire full age. . . . He cannot . . . either obtain advantages or entail on himself the disadvantages of such a proceeding. By adopting a proceeding which would only be valid if he was an adult he does not make himself an adult; he cannot in that way alter his status of infancy (JESSEL, M.R.).—*Re* JONES, *Ex p.* JONES (1881), 18 Ch. D. 109; 50 L. J. Ch. 673; 45 L. T. 193; 29 W. R. 747, C. A.

Annotations:—*Refd.* Taylor v. Johnston (1882), 19 Ch. D. 602; Duncan v. Dixon (1890), 44 Ch. D. 211; Woolf v. Woolf, [1899] 1 Ch. 343; Stocks v. Wilson, [1913] 2 K. B. 235; Leslie v. Shiell, [1914] 3 K. B. 607.

374. Knowledge of infant.]—WRIGHT v. SNOWE, No. 380, *post*.

375. Charge given during infancy—Subsequent charge—Knowledge of mortgagee.]—An infant charged his reversionary interest in a fund with payment of a sum lent to him upon his promissory note, & executed a statutory declaration stating, untruly, that he was then of full age. After attaining twenty-one, he mortgaged his interest in the fund for an amount, exceeding what was ultimately available without disclosing the fact of the prior charge:—*Held*: the charge given by the infant during his infancy & incapacity to contract was avoided by the subsequent mtge. executed by him when of full age & capable of contracting to a mtgee. without notice.—INMAN v. INMAN (1873), L. R. 15 Eq. 260; 21 W. R. 433.

SUB-SECT. 2.—RESTITUTION.

376. Whether ordered against infant—Money lent.]—STOCKS v. WILSON, No. 213, *ante*.

377. —.]—An infant obtained loans from a firm of money-lenders by a fraudulent misrepresentation that he was of full age:—*Held*: the infant was not liable to repay the loans either

374 i. Knowledge of infant.]—Where an infant obtained a loan upon the representation, which he knew to be false, that he was of age:—*Held*: no suit to recover the money could be maintained against him, there being no obligation binding upon the infant which could be enforced upon the contract either at law or in equity.—DHANMULL v. RAM CHUNDER GHOSE (1890), I. L. R. 24 Calc. 265; 1 C. W. N. 270.—IND.

374 ii. —.]—A minor representing himself to be of full age sold certain property to A. & executed a registered deed of sale. The deed contained a recital that he was 22 years of age:—*Held*: in a suit by him to set aside the sale on the ground of his minority, he was estopped.—GANESH LALA v. BAPU (1895), I. L. R. 21 Bom. 198.—IND.

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375 i. Charge given during infancy—Subsequent charge—Knowledge of mortgagee.]—A married woman under twenty-one but representing herself to be of full age, conveyed land to a *bona fide* purchaser for value, & the conveyance was duly registered. After attaining majority, the married woman & her husband joined in a voluntary deed to another person as trustee for her, & he subsequently sold the land, & his vendee, on the same day, gave a mtge. thereon:—*Held*: the married woman, notwithstanding her nonage, was bound by her representations as to her being of age; & the other parties having acquired their interests with full knowledge of the existence of the deed by her to the purchaser, & after the registration thereof, took subject to all the rights of the purchaser.—BENNETTO v. HOLDEN (1874), 21 Gr. 222.—CAN.

PART VI. SECT. 2, SUB-SECT. 2.

376 i. Whether ordered against infant—Money lent.]—Where a minor has obtained money by misrepresenting his age, that amounts to fraud & he may be made to refund it, but in the absence of fraud a refund cannot be ordered.—VAIKUNTARAMA PILLAI v. AUTHIMOOLAMCHETTIAR (1914), I. L. R. 38 Mad. 1071.—IND.

376 ii. —.]—Whether or not the doctrine of estoppel applies to a contract entered into by a minor, where persons who are in fact under age by false & fraudulent misrepresentations as to their age induce others to purchase property from them, they are liable in equity to make restitution to the purchasers for the benefit they have obtained before they can recover possession of the property sold.—JAGAR NATH SINGH v. LALTA PRASAD (1908), I. L. R. 31 All. 21.—IND.

Sect. 2.—Liability in equity: Sub-sects. 2, 3 & 4.
Sect. 3. Part VII. Sect. 1.]

as damages for fraudulent misrepresentation, or as moneys had & received by the infant to the use of the lenders, or on the ground that the infant was compellable in equity to refund the moneys which he had obtained by fraud.—**LESLIE (R.) LTD. v. SHEILL**, [1914] 3 K. B. 607; 83 L. J. K. B. 1145; 111 L. T. 106; 30 T. L. R. 460; 58 Sol. Jo. 453, C. A.

*Annotations:—***Reid. Fawcett v. Smethurst** (1914), 84 L. J. K. B. 473; **Mahomed Syedol Ariffin v. Yeoh Ooi Gark**, [1916] 2 A. C. 575.

SUB-SECT. 3.—MISREPRESENTATION TO TRUSTEES AND EXECUTORS.

378. Payment of funds by trustees — Whether infant entitled to repayment.]—A married infant, by the solicitation of himself & his brother, an attorney, obtained a transfer of stock from trustees, a few months before he came of age, & after coming of age, received a transfer of the residue of the stock to which he was entitled; & then assigned all his property to two creditors, who had struck a docket against him, they agreeing not to prosecute the docket:—**Held**: to be a fraud in the infant; he recognised the payment when of age, & therefore, & because the agreement was contrary to the spirit of the bkpt. laws, such assignees were not entitled to call for a repayment of the money paid during the infancy.

Though in general a payment to an infant may be bad, yet if the infant practices a fraud, he is liable for the consequences. . . . The concealment of his infancy, under such circumstances, certainly was a fraud & precludes him or his assigns, who

stand precisely in his situation from calling for a repayment (**PLUMER, V.-O.**).—**CORY v. GERTCKEN** (1816), 2 Madd. 40; 56 E. R. 250.

*Annotations:—***Apld. Chubb v. Griffiths** (1865), 35 Beav. 127. **Expld. Leslie v. Sheill**, [1914] 3 K. B. 607. **Reid. Stikeman v. Dawson** (1847), 1 De G. & Sm. 90; **Hannah v. Hodgson** (1861), 30 Beav. 19; **Woolf v. Woolf**, [1899] 1 Ch. 343.

379. — Representation by parents.] —**OVERTON v. BANISTER**, No. 116, *ante*.

380. — Release to executor.] —(1) Where a person represents to another that he is of age, & executes to him a release, upon which the latter acts:—**Held**: he could not afterwards impeach the validity of the release on the ground of his minority; & it was immaterial whether he was aware or not of the incorrectness of the representation.

(2) Where the answer of an extrix. alleged a release to have been executed by pltf., a legatee, & that he had then stated that he was of age, but contained admissions from which his minority at the time might be inferred:—**Held**: such admissions did not entitle pltf. to an inquiry whether he was a minor at the date of the transaction.—**WRIGHT v. SNOWE** (1848), 2 De G. & Sm. 321; 64 E. R. 144.

*Annotations:—***As to (1) Consd. Millor v. Blankley** (1878), 38 L. T. 527. **Reid. Hannah v. Hodgson** (1861), 30 Beav. 19; **Cornwall v. Hawkins** (1872), 26 L. T. 607; **Leslie v. Sheill**, [1914] 3 K. B. 607.

SUB-SECT. 4.—MISREPRESENTATION TO LESSOR.

See No. 367, *ante*; No. 566, *post*.

SECT. 3.—BANKRUPTCY PROCEEDINGS.

See **BANKRUPTCY**, Vol. IV., p. 29, Nos. 231–236.

Part VII.—Torts.

SECT. 1.—IN GENERAL.

381. Tort independent of contract — Infant liable.]—**SMALLY v. SMALLY**, No. 36, *ante*.

382. — — —.]—**BRISTOW v. EASTMAN**, No. 403, *post*.

383. — — —.]—**STIKEMAN v. DAWSON**, No. 368, *ante*.

384. — — —.]—**WRIGHT v. LEONARD**, No. 362, *ante*.

385. Tort arising out of or connected with contract—Liability dependent on substantial nature of action—Warranty of horse.]—Infancy is a good defence to an action on the warranty of a horse.—**HOWLETT v. HASWELL** (1814), 4 Camp. 118, N. P.

386. — — —.]—Where the substantial ground of action is contract, pltf's. cannot, by declaring in tort, render a person liable who would not have been liable on his promise. Therefore, where pltf. declared that, having agreed to exchange mares with deft., deft., by falsely warranting his mare to be sound, well knowing her to be unsound,

falsely & fraudulently deceived pltf., etc.:—**Held**: infancy was a good plea in bar.—**GREEN v. GREEN-BANK** (1816), 2 Marsh. 485.

*Annotations:—***Expld. Bartlett v. Wells** (1862), 1 B. & S. 836. **Reid. Lopes v. De Tastet** (1820), 1 Brod. & Bing. 538; **Marzetti v. Williams** (1830), 1 B. & Ad. 415; **Godefroy v. Jay** (1831), 7 Bing. 413; **Stikeman v. Dawson** (1847), 1 De G. & Sm. 90; **Alton v. Mid. Ry.** (1865), 19 C. B. N. S. 213.

387. — Damage to hired horse.]—

Pltf. cannot convert an action founded on a contract into a tort so as to charge an infant deft.; therefore where pltf. declared that at deft.'s request he had delivered a mare to deft. to be moderately ridden & that deft. maliciously intending, etc., wrongfully & injuriously rode the mare so that she was damaged, etc.:—**Held**: deft. might plead his infancy in bar, the action being founded on a contract.—**JENNINGS v. RUNDALL** (1799), 8 Term Rep. 335; 101 E. R. 1419.

*Annotations:—***Consd. Cranch v. White** (1835), 1 Bing. N. C. 414. **Expld. Bartlett v. Wells** (1862), 1 B. & S. 836. **Consd. Walley v. Holt** (1876), 35 L. T. 631; **Fawcett v.**

PART VII. SECT. 1.

k. Liability of parent.]—The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of master & servant sometimes existing between parent & child, but as in the case of master & servant so in that of parent & child there is no liability if at the time the negligent act is committed the child is engaged in his own affairs

& not on the parent's behalf.—**FILE v. UNGER** (1900), 27 A. R. 468.—**CAN.**

l. —.]—A father is not liable for negligence in allowing his fourteen year old son to go out alone with a gun to shoot game, if the boy has been carefully trained in the use of a gun & ordinarily exercises great care in handling it; but the son will be liable in damages for the consequences of carelessness in firing the gun so as to

start a prairie fire which destroys pltf.'s property.—**TURNER v. SNIDER** (1906), 16 Man. L. R. 79.—**CAN.**

m. —.]—Apart from the principles of the law of agency, a parent is not responsible in the absence of negligence on his own part, for the negligence of his child.—**KENEALY v. KARAKA** (1906), 26 N. Z. L. R. 1118.—**N.Z.**

—.]—**Held**: there was no

(1914), 84 L. J. K. B. 473; *Leslie v. Sheill* B. 607. *Reid. Green v. Greenbank* (1816), 1 B. 485; *Pozzi v. Shipton* (1838), 8 L. J. Q. B. 1; *v. Dawson* (1847), 1 De G. & Sm. 90; *Liverpool Adelphi Loan Assoon. v. Fairhurst* (1864), 9 Exch. 422; *Re King & King, Ex p. Unity Joint Stock Mutual Banking Assoon.* (1868), 31 L. T. O. S. 124; *Morgan v. Ravey* (1861), 30 L. J. Ex. 131; *Burnard v. Haggis* (1863), 14 C. B. N. S. 45; *Earle v. Kingscote*, [1900] 1 Ch. 203; *Edwards v. Porter*, [1925] A. C. 1.

388. *J.*—An infant, a Cambridge undergraduate, hired a mare for a ride along the road, being expressly told that she was not fit for leaping. The mare was put to a fence, & in taking it fell upon a stake & was so injured that she died:—*Held*: the infant was guilty of an actionable wrong, & therefore liable irrespective of the question of necessities.

(2) The nature & extent of the liability of an infant or a married woman cannot be changed by suing *ex delicto* in respect of a claim arising on a contract.—*BURNARD v. HAGGIS* (1863), 14 C. B. N. S. 45; 2 New Rep. 126; 32 L. J. C. P. 189; 8 L. T. 320; 9 Jur. N. S. 1325; 11 W. R. 644; 143 E. R. 360.

Annotations:—As to (1) *Folld. Walley v. Holt* (1876), 35 L. T. 631. *Consd. Earle v. Kingscote*, [1900] 1 Ch. 203. *Reid. Fawcett v. Smethurst* (1914), 84 L. J. K. B. 473. As to (2) *Reid. Fawcett v. Smethurst* (1914), 84 L. J. K. B. 473; *Leslie v. Sheill*, [1914] 3 K. B. 607.

389. *J.*—In an action to recover damages for injuries to a mare of pltf., whilst let on hire to deft., the statement of claim alleged that deft. hired from pltf. a mare & dogcart, to go from M. to C. & back, on the express conditions that only one other person besides deft. should be carried on any part of the journey in the dogcart, & that the mare should be driven from M. to C. & back, & nowhere else; that in violation of the conditions deft. carried on his return journey three other persons besides himself in the dogcart, & also drove the mare a greater distance than from M. to C. & back, viz. to B., four miles beyond C., & back to M.; & deft. also, instead of using due care & diligence in driving the mare at a reasonable pace, as it was his duty to do, drove her furiously, carelessly, & negligently, & beat & otherwise ill-treated her, that the mare on her return was found to be badly cut, bruised, & injured, & was suffering greatly, owing to having been overdriven, & that her injuries, by reason of the negligence, misuser, & improper conduct of deft. were so great, that pltf. was obliged to have her destroyed. In his statement of defence, deft. did not admit pltf.'s statement of claim, or his claim or any part of it, & he denied the want of due care, etc., in driving, or that he drove furiously, etc., or beat or otherwise ill-treated the mare, or that any injury was done to her by reason of any negligence on his part; & he said that at the time of the supposed contract & letting to hire he was, & still is, an infant under twenty-one years; & it was contended on the part of deft. that, being an infant, he was not liable in the present action. The facts as set forth in the statement of claim were proved at the trial, & a

liability on the ground of culpable negligence on the part of a parent in putting into the hands of his son & pupil a loaded gun which might do mischief though none such was intended.—*DAVIE v. WILSON* (1854), 16 Dunl. (Ct. of Sess.) 956.—*SCOT.*

o. — *J.*—In an action of damages for injury alleged to have been caused to a foot-passenger by a horse ridden by a boy of fourteen, against the boy & his father, the pursuer averred that the horse was powerful & spirited, that the father, who was owner of the horse, carelessly or culpably authorised or allowed the boy to take out the horse, which he had neither the

requisite strength nor experience to manage, & that he had on a former occasion been unable to manage it, & that this was known to the father:—*Held*: the pursuer was entitled to an issue against both defenders.—*BROWN v. FULTON* (1881), 9 R. (Ct. of Sess.) 36.—*SCOT.*

p. — *J.*—Parents are not personally answerable in damages for the torts of their children.—*JANUARY v. KILPATRICK* (1881), 2 E. D. O. 18.—*S. AF.*

q. — *J.*—A father is not liable for the tortious act of his minor son where such act is not committed in the execution of the father's work or

verdict was found for pltf. for \$25, & on a rule to set that verdict aside, & for a new trial, on the ground that the evidence did not establish deft.'s liability:—*Held*: it was clear from the statement of claim, the whole of which must be looked at in order to see whether the case was substantially in contract or in tort, that pltf. claimed damages for a tort; & in addition to breaking the contract, deft., by driving the mare at an excessive speed, & unduly flogging, & otherwise ill-treating, & negligently, & carelessly using her, committed a separate & independent wrong beyond & apart from the contract, & was liable for that wrong in the present action, to which, being in tort, the plea of infancy afforded no defence.—*WALLEY v. HOLT* (1876), 35 L. T. 631; 41 J. P. 56.

390. — *— Acknowledgment of debt—Misappropriation of money.*—*B.*, a journeyman butcher, an infant, received money from customers of *D.* his master, & did not account for the sums received. On Oct. 27, 1888, *D.* accused *B.* of this misconduct, & *B.* admitted the fact, & it was also proved by some of the customers. In Nov. 1888 *D.*'s wife made out an account of money so received & not accounted for, namely, £74 19s. 1½d. On Dec. 27, 1888, *B.* came of age, & became entitled to a sum of £426 under a will. *B.* then signed a memorandum in which he acknowledged that he owed *D.* £77 1s. 7½d., being the amount above stated & £2 2s. 6d. costs, & promised to pay the sum within a week; he also charged the sum due to him under the will, & authorised the trustees to pay the sum of money owing to *D.* On summons by *D.* for payment:—*Held*: (1) this was no ratification of a contract made during infancy, & Infants Relief Act, 1874 (c. 62) did not apply, to the case; (2) the boy was liable to an action of tort; & he gave the charge to avoid being sued in tort, therefore there was good consideration, & the summons must be allowed with costs.—*Re SEAGER, SEELEY v. BRIGGS* (1889), 60 L. T. 665.

Annotations:—As to (2) *Reid. Cower v. Nield*, [1912] 2 K. B. 419; *Leslie v. Sheill*, [1914] 3 K. B. 607.

391. — *— Action for money had & received.*—*COWERN v. NIELD*, No. 338, *ante*.

392. — *— Damage to hired motor car.*—(1) An infant receiving an allowance of £80 a year hired a motor-car to drive to a place six miles away to fetch his bag. The infant, after arriving at his destination, drove a friend twelve miles farther on, in the course of which additional journey the car was damaged without any negligence on the part of the infant. In an action against the infant for damages for the wrongful use of the car:—*Held*: nothing done by the infant rendered him liable as an independent tort-feasor.

(2) Although the hiring of the car for the purpose in question by an infant in the position of deft. might be a necessary, it would not be so if an onerous term, such as that the car should be at the infant's risk, formed part of the contract of hiring.—*FAWCETT v. SMETHURST* (1914), 84 L. J.

in the discharge of a duty imposed upon the son by the father.—*CONRADIE v. WIRHAHN*, [1911] C. P. D. 704; 5 Biss. & Sm. 643.—*S. AF.*

r. Liability under statute.—An infant is liable for his torts, & may be a master or employer; & the Alberta Workmen's Compensation Act, 1908, having made all employers under the Act liable for injuries causing death to their workmen, irrespective of negligence, & having made no exception of infants, an infant employer may be liable under the Act.—*Re SMITH & LINK* (1911), 17 W. L. R. 550.—*CAN.*

t. Liability of guardian.—Guardians of a minor cannot be held personally

Sect. 1.—In general. Sects. 2, 3 & 4. Part VIII.

Sect. 1: Sub-sect. 1, A. & B. (a) & (b).]

K. B. 473; 112 L. T. 309; 31 T. L. R. 85; 59 Sol. Jo. 220.

393. — Wright v. LEONARD, No. 362, ante.

394. Liability of parent—Savage dog kept by daughter—Knowledge of vicious character.]—A father allowed his daughter, aged seventeen, who resided with him, to keep in his house a dog which he knew to be savage. The dog was her property, & she paid for its food & licence out of her earnings. While so kept there it attacked & killed a valuable dog belonging to a third person:—*Held*: as the daughter was of a sufficient age to allow of her exercising control over her dog, her father was not responsible for the damage done.—**NORTH v. WOOD** [1914] 1 K. B. 629; 83 L. J. K. B. 587; 110 L. T. 703; 30 T. L. R. 258, D. C.

395. — Damage by infant's user of air gun—Previous warning by parent.]—Deft. gave a present of an air gun to his son who was about fifteen years old, & his son when shooting at a mill broke a window. Deft. in consequence of a complaint from the miller promised to smash the air gun but did not do so. Afterwards deft.'s son, when playing with pltf., another boy, shot him in the eye. In an action by pltf. against deft. for negligence in allowing the boy to have the gun the judge held that after the warning received by deft. it was negligence to allow the boy to use the gun, & he awarded pltf. damages:—*Held*: there was evidence to justify the judge's conclusion.—**BEBEE v. SALES** (1910), 32 T. L. R. 413, D. C.

Negligence & contributory negligence of infant.]—See NEGLIGENCE.

SECT. 2.—FRAUDULENT MISREPRESENTATION AS TO AGE.

See Part VI., Sect 2, ante

SECT. 3.—FRAUD.

396. Infant cannot retain advantage.]—**PIGOT v. RUSSEL** (1593), Cro. Eliz. 124; 78 E. R. 381; *sub nom.* **PIGGOT & RUSSEL'S CASE**, 2 Leon. 108.

Annotations:—*Consd.* **Buckinghamshire v. Drury** (1762), Wilm. 177; **Zouch d Abbot & Hallet v. Parsons** (1765), 3 Burr. 1794.

397. —.]—A woman at the time of her marriage was indebted on two promissory notes. After the marriage, the husband gave his bond for the amount to the creditor, who thereupon delivered up the notes. The bond having been put in suit the husband pleaded his infancy at the time of giving the bond. On a bill filed in this ct. for relief, the ct. ordered the notes to be returned to pltf. with directions that deft. should not plead Stat. Limitations to any action pltf. should bring on the notes or any other plea which deft. could not have pleaded at the time the bond was given. But this ct. will not order the immediate payment of the money. An infant shall not take advantage

liable for torts committed by such minor.—**LUCHMUN DAS v. NARAYAN** (1871), 3 N. W. 191.—IND.

a. Tort committed by manager of estate—Not in connection with management—Infant not liable.]—A minor is not responsible for a tort committed by the manager of his estate, provided the tortious act was not in connection with the management of the estate.—**MAHARAJ BAHADUR SINGH v. PARESH**

NATH SINGH (1904), I. L. R. 31 Calc. 839.—IND.

PART VII. SECT. 3.

b. Effect of knowledge of fraud—By party supposed to be deceived.]—Evidence Act, I of 1872, s. 115, does not apply to a case where the statement relied upon is made to a person who knows the real facts & is not misled by the untrue statement. A false

of his own fraud (**ARDEN, M.R.**).—**CLARKE v. COBLEY** (1789), 2 Cox, Eq. Cas. 173; 30 E. R. 80.

Annotations:—*Consd.* **Stikeman v. Dawson** (1847), 1 De G. & Sm. 90; **Leslie v. Sheill**, [1914] 3 K. B. 607.

398. —.]—An infant is not permitted to take advantage of inability to contract to effect a fraud, & upon avoidance of a contract, he will be compelled, upon equitable grounds, to make restitution of the benefits obtained under it (**WRIGHT, J.**).—**BURTON v. LEVEY** (1891), 7 T. L. R. 248.

399. Liability for consequences.]—**CORY v. GERTCKEN**, No. 378, ante.

400. False assertion of title—Inducing loan on mortgage.]—**WATTS v. CRESWELL** (1714), 2 Eq. Cas. Abr. 515; 9 Vin. Abr. 415; 22 E. R. 435, L. C.

Annotations:—*Consd.* **Savage v. Foster** (1723), 9 Mod. Rep. 35; **Buckinghamshire v. Drury** (1761), 2 Eden, 60; **Cory v. Gertcken** (1816), 2 Madd. 40; **Stikeman v. Dawson** (1847), 1 De G. & Sm. 90; **Barrow v. Barrow** (1858), 4 K. & J. 409; **Leslie v. Sheill**, [1914] 3 K. B. 607. *Refd.* **Bartlett v. Wells** (1862), 26 J. P. 228; **Stocks v. Wilson**, [1913] 2 K. B. 235.

401. Concealment of existing mortgage in own favour—Postponement.]—**CLERE v. BEDFORD (EARL)** (prior to 1690), cited in 9 Mod. Rep. at p. 38; 88 E. R. 300; *sub nom.* **CLARE v. BEDFORD (EARL)**, 2 Vern. at p. 151; 13 Vin. Abr. 536.

Annotations:—*Consd.* **Albemarle & Monk v. Bath** (1693), 2 Freem. Ch. 193; **Savage v. Foster** (1723), 9 Mod. Rep. 35. *Expld.* **Beckett v. Cordley** (1784), 1 Bro. C. C. 353. *Apld.* **Cory v. Gertcken** (1816), 2 Madd. 40. *Refd.* **Hemsden v. Cheyney** (1690), 2 Vern. 150; **Buckinghamshire v. Drury** (1761), 2 Eden, 60.

402. —.]—**TEYNHAM (LORD) v. WEBB** (1751), 2 Ves. Sen. 198; 28 E. R. 128, L. C.

Annotations:—*Refd.* **Windham v. Graham** (1826), 1 Russ. 331. *Mentd.* **Lawrence v. Maggs** (1759), 1 Eden, 453; **Northumberland v. Egremont** (1759), 1 Eden, 435; **Lincoln v. Pelham** (1804), 10 Ves. 166; **Matthews v. Paul** (1819), 3 Swan. 328; **Cholmondeley v. Clinton** (1820), 2 Jac. & W. 1; **Scarisbrick v. Skelmersdale** (1840), 4 Y. & C. Ex. 78; **Lyddon v. Ellison** (1854), 19 Beav. 565; **Sandeman v. Mackenzie** (1861), 1 John. & H. 613; **Ellison v. Thomas** (1862), 1 De G. J. & Sm. 18; **Reid v. Hoare** (1884), 26 Ch. D. 363; **Re Stawell's Trusts**, **Poole v. Riversdale**, [1909] 1 Ch. 534.

Misrepresentation as to age.]—See Part VI., ante.

SECT. 4.—PARTICULAR TORTS.

403. Trover.]—*Assumpsit* for money had & received, lies against an infant to recover money embezzled by him.

This action, though in form arising *ex contractu*, in fact arose *ex delicto*, & as he could not have defended himself by reason of his infancy if an action of trover has been brought for the money, so he ought not to be permitted to defend himself on that ground, in this action (**LORD KENYON, C.J.**).—**BRISTOW v. EASTMAN** (1794), 1 Esp. 172; **Peake**, 291, N. P.

Annotations:—*Expld.* **Re Seager**, **Seeley v. Briggs** (1889), 60 L. T. 665. *Consd.* **Cowern v. Nield**, [1912] 2 K. B. 419; **Leslie v. Sheill**, [1914] 3 K. B. 607. *Refd.* **Stikeman v. Dawson** (1847), 1 De G. & Sm. 90; **Bartlett v. Wells** (1862), 1 B. & S. 836; **Stocks v. Wilson**, [1913] 2 K. B. 235.

404. Detinue & conversion—Liability for restitution.]—**BURTON v. LEVEY** (1891) 7 T. L. R. 248.

representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy.—**MOHORI BIBEE v. DEARMODAS GHOSE** (1902), I. L. R. 30 Calc. 539; 7 C. W. N. 441; L. R. 30 Ind. App. 114.—IND.

PART VII. SECT. 4.

a. Devastavit.]—An infant, whether exor. or exor. *de son tort*, is not liable

Fraudulent conversion.]—See CRIMINAL LAW, Vol. XV., p. 895, No. 9825.

405. Slander.]—An action upon the case for words lies against an infant of 17 years. For *malitia supplet aetatem*.—HODSMAN v. GRISSEL (1608), Noy, 129; 74 E. R. 1092.

406. — Damages & costs.]—The ct. refused to discharge an infant deft. in an action of slander from execution for damages & costs, although the Insolvent Ct. had refused to relieve him, because on account of his infancy he was unable to make the assignment of property required by 7 Geo. 4,

c. 57.—DEERIES v. DAVIS (1835), 1 Bing. N. C. 692; 3 Dowl. 629; 1 Hodg. 103; 1 Scott, 594; 4 L. J. C. P. 191; 131 E. R. 1284.

407. Passing off — Costs of injunction.]—An infant who had sold spurious articles, representing them to have been manufactured by pltf., ordered to pay the costs of suit for an injunction.—CHUBB v. GRIFFITHS (1865), 35 Beav. 127; 55 E. R. 843.

*Annotations:—*Consd. Woolf v. Woolf, [1899] 1 Ch. 343. *Reid. Re Jones, Ex p. Jones* (1881), 18 Ch. D. 109; *Leslie v. Sheill*, [1914] 3 K. B. 607.

408. — —.]—WOOLF v. WOOLF, No. 1951, *post*.

Part VIII.—Property.

SECT. 1.—JURISDICTION OF COURT.

SUB-SECT. 1.—OVER REALTY.

A. In General.

See, now, Trustee Act, 1925 (c. 19), s. 57.

409. Power to bind property.]—An infant's inheritance never bound by acts of the ct.—TAYLOR v. PHILIPS (1750), 2 Ves. Sen. 23; 28 E. R. 16, L. C.

410. Power to sever joint tenancy.]—ARCHER-BURTON v. ARCHER-BURTON, [1879] W. N. 217.

Power to allow timber to be cut.]—See AGRICULTURE, Vol. I., pp. 84, 88, 102, 103, Nos. 648, 693, 694, 828, 829, 841.

B. Charges on Property.

(a) In General.

411. Sanction of charge on property — Costs of action.]—Where an action had been brought by an infant tenant in tail, by his next friend, for the benefit of the entailed estate, which was approved by the ct., the ct. made an order sanctioning a charge upon the infant's interest in the property for the purpose of raising a sufficient sum to pay the costs of prosecuting the action, the person advancing the money being content to accept the risk of losing it if the action failed & the infant died under age.—*Re JONES* (1883), 48 L. T. 188; 31 W. R. 399.

412. — Advancement.]—*Re SWANSTON* (1887), 31 Sol. Jo. 427, C. A.

Annotation:—Reid. Re De Teissier's S. E., Re De Teissier's Trusts, De Teissier v. De Teissier, [1893] 1 Ch. 153.

for a *devastavit*.—YOUNG v. PURVES (1886), 11 O. R. 597.—CAN.

d. Seduction.]—A minor is liable in damages for delicts committed by him, e.g. for seduction.—COLLINET v. LESLIE (1907), 17 C. T. R. 110.—S. AF.

PART VIII. SECT. 1, SUB-SECT. 1.—A.

409 i. Power to bind property.]—The power of the Equity Ct. over the real estate of infants in this Province is more extensive than any such power which has ever been exercised in England.—*Re LAWLOR'S ESTATE* (1871), 8 N. S. R. 153.—CAN.

409 ii. —.]—The Settled Estates Acts do not authorise the ct. in sanctioning an exchange of the lands of an infant *cestui que trust*; but when in such a case it can be shown that a part of the property of the infant is exposed to depreciation if the proposed exchange be not effected, the ct. may order the same to be carried out under the provisions of O. S. U. C. c. 12, s. 50.—*Re BISHOPRICK* (1874), 21 Gr. 589.—CAN.

e. Power to make vesting order.]—

Where the heirs are minors the Ct. of Ch. has jurisdiction on petition of the exor. & extrix. to make an order vesting the estate in the purchaser, or as they may direct. This course will enable a title to be made free from any doubt.—DONALDSON v. BERRY (1866), 2 Ch. Ch. 16.—CAN.

f. Power to appoint trustees.]—Conveyancing & Law of Property Act, 1881, s. 42 (1), enabling the ct. to appoint trustees on the application of a guardian or next friend of an infant beneficially entitled to the possession of any land applies to the case of an infant taking absolutely by will.—*Re BRADSHAW*, [1904] 1 I. R. 18.—IR.

g. Power to appoint curator bonis.]—An Englishman appointed guardian under an English will to pupils residing in that country, & having accepted & entered on his office, according to the forms of the English law, has no power to grant a discharge of a Scottish heritable security due to the pupils, but in order to effect such a discharge, it is necessary that a *curator bonis* should be appointed to the minors.—YOUNG & Co. v. THOMSONS (1831), 6 Fac. Coll. 618.—SCOT.

(b) For Improvements.

See, now, Trustee Act, 1925 (c. 19), s. 57, &, generally, LAND IMPROVEMENT.

413. When jurisdiction exercised — General rule.]—When an infant was absolutely entitled subject to certain trusts to the beneficial interest in real estate the legal estate being in trustees:—*Held*: the ct. had jurisdiction to direct the raising of money by means of a mtge. of the estate for the purpose of paying the cost of repairs certified by the Chief Clerk to be absolutely necessary.

I think that this jurisdiction should be jealously exercised & only in cases which amount to actual salvage (KAY, J.).—*Re JACKSON, JACKSON v. TALBOT* (1882), 21 Ch. D. 786.

*Annotations:—*Consd. Conway v. Fenton (1888), 40 Ch. D. 512. *Distd. Re De Teissier's S. E., Re De Teissier's Trusts, De Teissier v. De Teissier*, [1893] 1 Ch. 153. *Reid. Re de Tabley, Leighton v. Leighton* (1896), 75 L. T. 328; *Re Hawker's S. E.* (1897), 66 L. J. Ch. 341; *Re Montagu, Derbishire v. Montagu*, [1897] 2 Ch. 8. *Mentd. Re Willis, Willis v. Willis* (1901), 71 L. J. Ch. 73.

414. Change prejudicial to successor—Validity.]—*Ex p. GRIMSTONE* (1771), 4 Bro. C. C. 235, n.; cited 2 Ves. 75; 29 E. R. 870.

*Annotations:—*Consd. Oxenden v. Compton (1793), 4 Bro. C. C. 231. *Reid. A.-G. v. Allesbury* (1887), 12 App. Cas. 672. *Mentd. Ex p. Bromfield* (1702), 1 Ves. 453; *Re Gist*, [1904] 1 Ch. 398.

415. Cost of repairs — Inquiry.]—GLOVER v. BARLOW (1831), 21 Ch. D. 788, n.

*Annotations:—*Appld. *Re Jackson, Jackson v. Talbot* (1882), 21 Ch. D. 786. *Consd. Re Montagu, Derbishire v. Montagu*, [1897] 1 Ch. 685. *Reid. Conway v. Fenton* (1888), 40 Ch. D. 512.

PART VIII. SECT. 1, SUB-SECT. 1.—B. (a).

h. Sanction of charge on property —For salvage.]—The renovation of a vineyard of established reputation, given by a testator to his descendants with the intention that it should be enjoyed by them as such, is salvage such as will justify the Ct. of Equity in authorising a charge upon the inheritance for that purpose.—COUSINS v. COUSINS (1906), 3 C. L. R. 1198.—AUS.

k. — —.]—*Re HURST, HURST v. HURST* (1891), 29 L. R. Ir. 219.—IR.

PART VIII. SECT. 1, SUB-SECT. 1.—B. (b).

413 i. When jurisdiction exercised — General rule.]—The ct., in special circumstances, allowed money to be expended on improvements on a certain property of a testator who had directed by his will that the rents & profits of all his property should be expended in payment of debts, & in the support of his wife & children until the youngest child should come of age.—*Re* (1880), 8 P. R. 399.—CAN.

convert it, upon the notion that it would be beneficial.

A trader who had freehold, copyhold, & personal estate, died in Sept. 1832, leaving an infant heir. His estate was insufficient to pay his debts & charges. His partners, however, by deed, took upon themselves to pay all the debts, & secured the principal part of his property for his family. A suit was instituted for carrying the deed into execution, & the master found that it would be for the benefit of the infant heir, that the real estate should be sold & applied in the manner mentioned in the deed. A decree was made for sale, & the infant was declared a trustee within 1 Will. 4, c. 60:—*Held*: a sale under the decree could not be enforced; the ct. had no jurisdiction to order the sale; the infant was not a trustee within the Act.—*CALVERT v. GODFREY* (1843), 6 Beav. 97; 12 L. J. Ch. 305; 49 E. R. 761.

Annotations:—*Distd.* *Browne v. Paull* (1852), 19 L. T. O. S. 269. *Reid.* *Field v. Moore* (1855), 2 Jur. N. S. 145; *Re Howarth* (1873), 8 Ch. App. 415, n.; *Re De Teissier's S. E., Re De Teissier's Trusts, De Teissier v. De Teissier*, [1893] 1 Ch. 153. *Mentd.* *Reid v. Territt* (1844), 1 Coll. 1; *Thomas v. Townsend* (1852), 16 Jur. 736; *Lachlan v. Reynolds* (1853), Kay, 52; *Robinson v. Wheelwright* (1856), 6 De G. M. & G. 535.

estate of an infant, merely because the ancestor was indebted; it must be shown that the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit.—*Re BODDY* (1853), 4 Gr. 144.—CAN.

423 ii. ———.]—The ct., where it is considered beneficial to the interests of an infant deft., will direct a sale instead of a foreclosure, without requiring any deposit to cover the expenses of such sale.—*BANK OF UPPER CANADA v. SCOTT* (1858), 6 Gr. 451.—CAN.

423 iii. ———.]—It is the practice where the estate of infants is of small value, in order to save the expense of a sale by auction, to direct the advertisement to be inserted in a newspaper, asking tenders addressed to the registrar to be made for the property.—*Re HANSELL* (circa 1860), 1 Ch. Ch. 189.—CAN.

423 iv. ———.]—In directing the sale of infants' real estate the ct. is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit. The ct. will order a sale of a portion of an infant's estate to save the rest, for the benefit of the infant.—*Re McDONALD* (1860), 1 Ch. Ch. 97.—CAN.

423 v. ———.]—The lessee of land, with the right to purchase, devised the same to his son, if it could be paid for, & if it could not, that one-half should be sold, & the purchase-money paid for the other half, which he gave to his son, an infant; the exor. advanced out of his own moneys sufficient to pay the price of the land, & the lessors conveyed to the devisee. The personal estate of testator, being small, was exhausted in the payment of debts & funeral expenses, so that the exor. had no means of reimbursing himself, whereupon he filed a bill in this ct. praying a sale of the real estate, & payment of his advances. The ct., in the circumstances, directed a sale to be made of that portion of the lot which testator desired should be sold, if it should appear upon inquiry before the master that the payment to the lessors was for the benefit of the infant.—*LANNIN v. JERMYN* (1862), 9 Gr. 160.—CAN.

423 vi. ———.]—The holder of a mtge. on real estate & of a judgment against the mtgor., agreed, after the death of the mtgor., with his widow & two of the heirs, for the release, on certain terms, of the equity of redemp-

tion, & for the conveyance to him of another portion of the real estate in discharge of the mtge. & judgment debts. On a bill filed to enforce this agreement, it appeared that other children of the mtgor., who were infants, were interested in the estate. The ct. refused the relief prayed, but directed a reference to the master to inquire if it would be more for the advantage of the infants to adopt the agreement, or that a sale of the estate should be made under the decree of the ct.—*McDOUGALL v. BARRON* (1862), 9 Gr. 450.—CAN.

423 vii. ———.]—It must appear clearly that the master reports a sale to be beneficial for infants before a final order for sale will be made.—*EDWARDS v. BURLING* (1866), 2 Ch. Ch. 48; 2 C. L. J. N. S. 302.—CAN.

423 viii. ———.]—On motion for decree in this cause it was decided that infant defts. are not entitled, as a matter of course, to an inquiry as to whether a sale or foreclosure is most to their benefit, but that some grounds must be shown.—*GRAHAM v. DAVIS* (circa 1866), 2 Ch. Ch. 24.—CAN.

423 ix. ———.]—If it be shown that by the disposal of the property the interest of the infant will be substantially promoted on account of any portion of the property being exposed to waste or dilapidation, or being wholly unproductive, or for any other reasonable cause, the ct. has a discretionary power to order a sale.—*Re LAWLOR'S ESTATE* (1871), 8 N. S. R. 153.—CAN.

423 x. ———.]—The ct. may, under C. S. U. C. c. 12, s. 50, order a sale of infants' estate to satisfy claims of the deceased father of the infants, if it deems that course to be for the benefit of the infants.—*Re BARKER* (1875), 6 P. R. 225.—CAN.

423 xi. ———.]—An application to confirm a sale of an infant's estate was refused where it was not shown as required by C. S. U. C. c. 12, s. 50, that the sale was necessary for the maintenance of the infant, or that by reason of the property being exposed to waste or dilapidation or to depreciation from any other cause, the interests of the infant would be promoted by a sale, & where also it appeared that the proceeds of the sale would not produce as large a sum as the property could be rented for, if placed in a proper state of repair.—*Re PHALEN* (1875), 6 P. R. 259.—CAN.

423 xii. ———.]—Though on a bill filed for specific performance if the

424. ———.]—The ct. has no authority to order the sale of an infant's real estate, simply on the ground that the sale would be beneficial to the infant.—*GARMSTONE v. GAUNT* (1845), 1 Coll. 577; 14 L. J. Ch. 162; 4 L. T. O. S. 310; 9 Jur. 78; 63 E. R. 550.

425. ———.]—Generally the ct. has no authority to direct a sale of real estate of an infant, or to convert it, merely upon the notion that it would be for the benefit of the infant.—*BROWNE v. PAULL* (1852), 19 L. T. O. S. 269; 16 Jur. 707.

426. ——— R. S. C., Ord. 51, r. 1.]—Testator, devised a freehold house to trustees upon trust for his daughter for life, & after her death to the use of her children, who being sons attained twenty-one, or being daughters attained that age or married. In the events that happened, testator's daughter having died, an infant, who was the heir-at-law of a deceased son of the daughter, & six others of full age, children of the daughter, became entitled to the property as legal tenants in common. A summons was taken out under R. S. C., Ord. 55, r. 3, for the determination of certain questions arising on the will, & asking for a sale of the property, & that some person

infant children ultimately entitled under the settlement were made parties, the ct. might order the completion of the sale & payment of the money into ct. for investment, where the corpus of the estate would be protected for the children, yet on application under Vendors & Purchasers Act, in the absence of the parties to the settlement, it would not compel the purchaser to accept the title.—*Re TRELEVEN & HORNER* (1881), 28 Gr. 624.—CAN.

423 xiii. ———.]—*BLEAN v. BLEAN* (1886), 10 O. R. 693.—CAN.

423 xiv. ———.]—*Re HIBBARD* (1891), 14 P. R. 177.—CAN.

423 xv. ———.]—*Re HOPPER (INFANTS)* (1896), 1 N. B. Eq. Rep. 245.—CAN.

423 xvi. ———.]—*Re BENNETT* (1897), 17 P. R. 498.—CAN.

1. ——— *Consent of infant.*]—On an application under C. S. U. C. c. 12, s. 50, for the sale of infants' estate, the examination of the infants by the master, under consolidated order 532, as to their consent must be annexed to the petition. A certificate of the master stating that the infants have been examined by him & that they consent is insufficient.—*Re AXFORD* (1874), 6 P. R. 192.—CAN.

m. ——— *Where several infants—Consent of majority sufficient.*]—*Re HARDING* (1889), 13 P. R. 112.—CAN.

n. ——— *One being an imbecile.*]—Upon a petition under R. S. O. 1887, c. 137 (3), for the sale of lands belonging to three infants, the examination of the eldest, a girl of sixteen, was dispensed with, upon the ground that she was an imbecile.—*Re DELANTY* (1889), 13 P. R. 143.—CAN.

o. ——— *Effect of conveyance before order.*]—In an issue under Real Property Act, plffs. claimed title under a sale of a half-breed infant's land alleged to have been made pursuant to an order of the ct. The order, purporting to be made in the matter of D., an infant, & dated Nov. 9, 1880, directed that the lands be sold to P. for \$200, & that, upon payment into ct. of the purchase money to the credit of the matter, A., the father & next friend of the infant, be empowered to make & execute a proper deed of conveyance to the purchaser. A deed to P. was produced at the trial, which recited that it was made pursuant to an order of the ct. It was executed by the infant by his next friend for the

Sect. 1.—Jurisdiction of court: Sub-sect. 1, C. (a) D. & E.]

might be appointed to convey the infant's share:—*Held*: the ct. had no power to direct a sale upon such an application, as Ord. 55, r. 3 (f), only gives power to approve of a sale where there is otherwise power to sell, & Ord. 51, r. 1, does not confer a power on the ct. of selling in cases where it could not have sold before.—*Re ROBINSON, PICKARD v. WHEATER* (1885), 31 Ch. D. 247; 55 L. J. Ch. 307; 53 L. T. 865.

427 ———.]—An action was brought by the infant heir-at-law, by a next friend, of an intestate against the widow, who was the administratrix, claiming accounts of the personal estate, & of the rents & profits of the real estate received by deft. The action came on for hearing on motion for judgment, & the ct. was asked under above rule to make an order for the sale of the real estate. Deft. did not object:—*Held*: this was not "a cause or matter relating to real estate" within the meaning of the rule, & the ct. could not order a sale under that rule.—*Re STAINES, STAINES v. STAINES* (1886), 33 Ch. D. 172; 55 L. J. Ch. 913; 35 W. R. 75.

428. Conduct of sale—To whom given.]—Where a sale has been decreed in one of two concurrent suits, the fact of the party to whom has been given the conduct of the cause being an entire stranger to the family & to the property, is a sufficient reason for taking away from him the conduct of the sale, & giving it to the trustee & testamentary guardian of the infants.—*Re GARMESON'S ESTATE*,

expressed consideration of \$200, & there was a receipt for the money indorsed thereon & signed in the same way. The deed was dated Oct. 11, 1880, & there was no other evidence of the time of its execution. The money was not paid into ct. until Sept. 23, 1881, & on Aug. 30, 1881, P. had resold the land for \$546 to H., who appeared to have paid the money into ct.:—*Held*: in the absence of evidence to the contrary, the deed must be assumed to have been executed on the day it bore date; the deed of conveyance to P. was invalid, because it was executed without authority from the ct., & the order afterwards made did not provide for a conveyance already executed, & by its terms the payment of the money into ct. was a condition precedent to the exercising of the power to convey, & Half-Breed Lands Act, c. 67, ss. 10, 11, 12, did not cure these defects. Sect. 11 presupposes the existence of some order, fiat or decree authorising the sale. Its object is to cure defects, irregularities, & omissions in connection with the doing of something authorised by the ct. to be done, not to validate proceedings wholly unauthorised.—*HARDY v. DESJARLAIS, KERR v. DESJARLAIS* (1892), 8 Man. L. R. 550.—CAN.

p. — Property of joint tenants—One being an infant.]—*Re LAWS* (1912), 6 D. L. R. 912; 23 O. W. R. 408; 4 O. W. N. 304.—CAN.

q. — Approval of master.]—Although a decree for sale should direct the same to take place with the approbation of the master, the omission of such direction is no ground for moving to set aside the sale under the decree, where the same really took place with such approbation, even in a case where infants are interested.—*RICKER v. RICKER* (1880), 27 Gr. 576; *revid.* 7 A. R. 282.—CAN.

r. — Procedure must be strictly followed.]—*Re SUGDEN* (1913), 10 O. R. 780; 24 O. W. R. 212; 4 O. N. 924.—CAN.

guardian.]—A petition

was presented by a person domiciled in the province of Alberta, Canada, as guardian & administrator-in-law of his pupil son who resided with him, for authority to complete a title in the pupil's name to certain heritage in Scotland, & for authority to sell the same. The ct., on production of evidence that petitioner had been duly appointed guardian & administrator-in-law according to the law of Alberta, & that he was a person of substantial means, granted the prayer of the petition.—*McFADZEAN, PETITIONER*, [1917] S. C. 142.—SCOT.

a. —.]—Where the property of infants has been sold under order of the ct., & the purchaser applies for a vesting order, notice need not be given to the infants.—*BOULTON v. STEGMAN* (circa 1864), 1 Ch. Ch. 199.—CAN.

b. —.]—In proceedings under 12 Vict. c. 72, the mother was appointed guardian, & the sale of the greater part of the real estate of the infants was ordered, which was accordingly effected, the proceeds being applied in payment of the debts of the estate, but no investment of the surplus was made, although that course was directed by the order; the whole of such proceeds, together with \$5,321 in addition, were expended in support & education of the infants. The guardian thereupon applied for an order to sell the remainder of the real estate. The ct. refused the application, notwithstanding that the master reported the amount claimed was a proper sum to be allowed.—*Re HUNTER* (1868), 14 Gr. 680.—CAN.

c. —.]—Infant children of an intestate obtained an administration order against their mother, the administratrix, & the master found as proper to be allowed for their maintenance a sum to meet which the personal estate was inadequate, & on further directions a sale was asked of the realty to satisfy the sum so allowed. The ct. refused to sanction such a sale, being satisfied that the suit had been instituted for that purpose merely.

GARMESON v. SHARROD, GARMESON v. SHARROD (1872), 21 W. R. 98.

Sale in partition action.]—*See, generally, PARTITION.*

(b) Mortgaged Property.

See, now, Law of Property Act, 1925 (c. 20), s. 91, & generally, MORTGAGE.

429. Benefit of infant—Inquiry.]—Inquiry directed, in case the mtgees. consent to a sale, whether it will be for the benefit of the infant heir of the mtgor.—*MONDEY v. MONDEY* (1813), 1 Ves. & B. 223; 35 E. R. 87, L. C.

Annotation:—Reid. Adkins v. Graves (1824), 3 L. J. O. S. Ch. 62.

430. ———.]—Where a decree had been made in two suits, framed for the purpose of administering testator's personal estate only, & the devisee of the real estate was an infant, a suit by mtgees., for the purpose of realising their security by a sale of the mtged. premises, was properly instituted.

In a suit for realising a mtge. security, where the devisee or heir of the mtgor. is an infant, the ct. usually directs a reference to the master to inquire whether a sale of the mtged. premises will be for the benefit of the infant; but, where it is clear that such sale will be for the infant's benefit, the ct. will direct a sale in the first instance.—*DAVIS v. DOWDING* (1838), 2 Keen, 245; 7 L. J. Ch. 169; 48 E. R. 622.

431. ——— Whether necessary.]—In a foreclosure suit under 15 & 16 Vict. c. 86, s. 48, an immediate sale will be ordered, notwithstanding

—*FENWICK v. FENWICK* (1873), 20 Gr. 381.—CAN.

d. —.]—The ct. has no power under Supreme Ct. in Equity Act, 1890 (c. 4), s. 213 (1), to order the sale or disposal of land held in trust for an infant, to pay for past expenditures upon the trust property.—*Re STEEN'S ESTATE* (1896), 1 N. B. Eq. Rep. 261.—CAN.

e. —.]—*DALY v. DALY, PERSSE v. DALY* (1845), 2 Jo. & Lat. 752.—IR.

f. —.]—Sales of landed property belonging to minors must be sanctioned by the ct. before execution.—*Re ROSELT* (1877), K. 13.—S. AF.

g. —.]—Exors. must in all cases obtain an order of the ct. for the transfer of property in which minors are concerned.—*Re LEONARD* (1887), 8 N. L. R. 167.—S. AF.

h. Person conducting sale—Also purchaser—Effect of objection.]—Where the person having the conduct of a sale under a decree of the ct. is the highest bidder, & applies to be confirmed as the purchaser, the application will not be granted if any of the parties to the suit object.—*CRAWFORD v. BOYD* (1875), 6 P. R. 278.—CAN.

PART VIII. SECT. 1, SUB-SECT. 1.—C. (b).

429 i. Benefit of infant—Inquiry.]—The ct. granted a decree containing the usual reference to inquire whether a sale or foreclosure would be more beneficial to the infants; & gave liberty to the master to make the infants parties in his office.—*DICKSON v. DRAPER* (1865), 11 Gr. 362.—CAN.

429 ii. ———.]—*TRUST & LOAN Co. v. McDONELL* (1866), 12 Gr. 196.—CAN.

431 i. ——— Whether necessary.]—Where the heirs of the mtgor. are infants, & a foreclosure suit is instituted, the rule of the ct. is to grant a reference as of course, to inquire whether a foreclosure or sale is more for the benefit of the infants;

that infants are interested in the equity of redemption, without inquiring whether such sale is for their benefit.—*WIGHAM v. MEASOR* (1857), 5 W. R. 394.

432. — Immediate sale.—Trustees of a will, whereby property is devised subject to mtges. sufficiently represent the devisees; & although there are infants interested in the equity of redemption the ct. will direct an immediate sale where it appears to be for the benefit of the infants.—*COCKBURN v. ANKETT* (1855), 3 W. R. 641.

433. — No time to redeem allowed.—On a bill filed by an equitable mtgee. praying a sale, the ct. will order an immediate sale, although the heir of the mtgor. is an infant, if it appears that such a sale will be for the benefit of the infant.—*REDSHAW v. NEWBOLD* (1848), 11 L. T. O. S. 372; 12 Jur. 833.

Annotation:—*Folld. Cockburn v. Ankett* (1855), 3 W. R.

434. — Direction for sale of an infant's estate in a foreclosure suit, under circumstances showing it to be clearly for the benefit of the infant, without giving time to redeem.—*MEARS v. BEST* (1853), 10 Hare, App. II., li.; 68 E. R. 1144.

435. — Payment into court—Infants not represented.—An equity of redemption was granted by deed to trustees, upon trust for certain parties, some of whom were infants. The mtgee. filed a bill for foreclosure against the trustees of the settlement & the adult *cestuis que trust* only, as defts. One of the latter died after the filing of the bill. The ct. upon a motion for a decree for sale, made the decree in the absence of the infant *cestuis que trust*, & of the representative of deceased deft., upon an affidavit by the trustee of the settlement, that it would be for the benefit of the infants; & ordered the proceeds to be paid into ct.—*SIFFKEN v. DAVIS* (1853), Kay, XXI.; 69 E. R. 323.

D. Settlement of Property.

See, now, Trustee Act, 1925 (c. 19), s. 57.

436. Power to order settlement.—*REQUISH & REQUISHES' CASE* (1615), 2 Bulst. 320; 80 E. R. 1154.

Annotation:—*Refd. Blamford v. Blamford* (1615), 3 Bulst. 98.

437. — By ward of court.—(1) A female infant cannot contract, nor can her parents or guardians for her, for a power of appointment to her over her real estate; nor has the Ct. of Ch. any greater power to contract for its infant wards as to their real estate. No valid settlement of a female infant's real estate can be made upon her marriage by virtue of any agreement by her, or

but if affidavits are filed to satisfy the ct. as to the proper decree, or if the guardian consents, the reference may be dispensed with.—*DUDLEY v. BERCZY* (1867), 13 Gr. 141.—CAN.

k. ——The ct., where it is considered beneficial to the interests of an infant deft., will direct a sale instead of a foreclosure.—*LAWRASON v. FITZGERALD* (1862), 9 Gr. 371.—CAN.

l. ——Where it appeared to be for the benefit of the infants interested, & pltfs., who were the only incumbrancers, consented, an immediate sale was ordered at the instance of the guardian of the infants, without requiring the consent of the mtgor.—*CAYLEY v. COLBERT* (1869), 2 Ch. Ch. 431.—CAN.

m. ——The ct. will only sanction a sale upon being satisfied that it is in the interests of the infant or of all parties concerned, & upon

satisfactory evidence that the price offered was such as ought to be accepted.—*Re HOWARD* (1911), 16 W. L. R. 246; 16 B. C. R. 48.—CAN.

n. Arrears of interest.—A mtge. had been created by a married woman upon her estate. After her death a suit was brought against her husband & her children; & the ct., in directing a sale of the mtged. property, refused to make the estate of the children liable to arrears of interest for more than six years; but directed payment to the mtgee., out of any excess after payment of principal money, costs, & six years' interest, of so much of his balance as would represent the husband's interest as tenant by the curtesy in such balance.—*TAYLOR v. HARGRAVE* (1872), 19 Gr. 271.—CAN.

o. Immediate sale—No time to redeem allowed.—Although by the general rule & course of proceeding in mtge. cases the mtgor. is entitled to

her parents or guardians, or by the authority of this Ct.

That the infant could not contract is plain. Could the parents or guardians contract for her? The fee of an infant's real estate does not vest in the guardian, & during the minority of the infant, the guardian holds only as a trustee. Even if authority, therefore, were wanting on the point, it would be difficult to hold that any contract by the guardian could bind the real estate of the infant. It is, however, well settled by the authorities that the parents or guardians have no power to bind the real estate of their infant wards by settlements made upon their marriage (*TURNER, L.J.*).

(2) Upon the marriage of two infants, one being a ward of ct., the ct. has no power to compel a settlement to be made by either of them during minority, even of the infant ward's personal estate.

The jurisdiction of this ct. in the guardianship of infants has, or at least is supposed to have had its foundation in the rights which the Crown possesses as *parens patriæ* (*TURNER, L.J.*).—*FIELD v. MOORE, FIELD v. BROWN* (1855), 7 De G. M. & G. 691; 25 L. J. Ch. 66; 26 L. T. O. S. 207; 2 Jur. N. S. 145; 4 W. R. 187; 44 E. R. 269, L. JJ.

Annotations:—*As to* (1) *Folld. Campbell v. Ingilby* (1856), 21 Boav. 567. *Consd. Barrow v. Barrow* (1858), 4 K. & J. 409. *Appl. Buckmaster v. Buckmaster* (1887), 35 Ch. D. 21. *Refd. Re Howarth* (1873), 8 Ch. App. 415, n. *Generally, Refd. Re Sampson & Wall* (1884), 25 Ch. D. 482. *Mentd. Head v. Godlee, Reynolds v. Godlee* (1859), John. 536; *Cahill v. Cahill* (1883), 8 App. Cas. 420; *Dye v. Dye* (1884), 13 Q. B. D. 147.

See, further, Part XV., post.

E. Conversion of Property.

438. Power to effect conversion—Personalty into realty.—Personal property of an infant ordered to be laid out in the purchase of land; though there was no authority in the will for changing the nature of the property: but it was ordered, that the estate purchased should be conveyed in trust for the infant, his exors. & administrators, till he should attain twenty-one, & afterwards for him & his heirs.—*ASHBURTON (LORD) v. ASHBURTON (LADY)* (1801), 6 Ves. 6; 31 E. R. 910, L. C.

Annotations:—*Mentd. Re Brasher's Trust* (1858), 6 W. R. 406; *A.-G. v. Ailesbury* (1887), 12 App. Cas. 672.

439. ——*CALVERT v. GODFREY*, No. 423, ante.

440. — Realty into personalty.—There is no principle enabling this ct. to bind the real estate of a married woman, in any manner, except by those formalities required by law. Both principle

and six months to redeem, before a sale is ordered, the ct. will, in special circumstances, direct an immediate sale, even against the infant heirs of the mtgor.—*SWIFT v. MINTER* (1879), 27 Gr. 217.—CAN.

p. ——In an action of ejectment by mtgees., on the application of infant defts., an order for the immediate possession & sale of mortgaged premises was made, with a reference to the master to take the usual accounts.—*WESTERN CANADA LOAN & SAVINGS Co. v. DUNN* (1883), 9 P. R. 587.—CAN.

PART VIII. SECT. 1, SUB-SECT. 1.—E.

440 i. Power to effect conversion—Realty into personalty.—The principle of O.S.U.C. c. 12, s. 56, relating to the conversion of infants' estates sold under that Act, is also applicable to all cases where it is necessary for collateral

Sect. 1.—Jurisdiction of court: Sub-sect. 1, E.; sub-sect. 2. Sect. 2: Sub-sects. 1, 2, 3, 4, 5 & 6.]

& authority concur in showing that this ct. has no authority to alter the character of the property of an infant, & convert realty into personalty. On the marriage of a ward of ct., this ct. will compel the settlement of her real estate, as directed by its order; but if this has not been done in the lifetime of the parties themselves, in a manner binding at law, her heir-at-law is not bound.—*FIELD v. MOORE* (1854), 19 Beav. 176; 3 Eq. Rep. 215; 24 L. J. Ch. 161; 24 L. T. O. S. 179; 1 Jur. N. S. 33; 3 W. R. 98; 52 E. R. 316; *affd. sub nom. FIELD v. MOORE, FIELD v. BROWN* (1855), 7 De G. M. & G. 691, L. JJ.

Annotations:—Consd. Campbell v. Ingilby (1856), 21 Beav. 567. *Reid. Barrow v. Barrow* (1858), 4 K. & J. 409; *Re Howarth* (1873), 8 Ch. App. 415, n.; *Re Sampson & Wall* (1884), 25 Ch. D. 482; *Buckmaster v. Buckmaster* (1887), 35 Ch. D. 21. *Mentd. Head v. Godlee, Reynolds v. Godlee* (1859), John. 536; *Cahill v. Cahill* (1883), 8 App. Cas. 420; *Dye v. Dye* (1884), 13 Q. B. D. 147.

Resulting from partition.]—See PARTITION.

For conversion generally, see EQUITY, Vol. XX., pp. 335 *et seq.*

Reconversion—At election of infant.]—See EQUITY, Vol. XX., pp. 361, 396, Nos. 991, 1338–1349.

SUB-SECT. 2.—OVER PERSONALTY.

See, now, Trustee Act, 1925 (c. 19), s. 57 &, generally, SETTLEMENTS, TRUSTS & TRUSTEES, WILLS.

441. Conversion of property.]—The ct. acts for an infant as a trustee, changing property for his benefit, but so as not to affect his power over it even during infancy; for instance, his testamentary power over personal property.—*Ex p. PHILLIPS* (1812), 19 Ves. 118; 34 E. R. 463, L. C. *Annotation:—Mentd. A.-G. v. Ailsbury* (1885), 16 Q. B. D. 408.

442. To sell reversionary estate.]—A reversionary legacy, in which infants were interested, was sold by an order of the ct. in an administration suit. The particulars of sale stated that infants were interested in the property, & there was a

purposes to effect the conversion of an infant's estate from realty into personalty; the rule of the ct. in all such cases being that the conversion shall not have any greater effect than is necessary for accomplishing the immediate purpose of the conversion, so far as the rights of the next of kin & heirs-at-law of the infant are concerned.—*FITZPATRICK v. FITZPATRICK* (1874), 6 P. R. 134.—CAN.

q. — To effect partition.]—When lands are sold for the purpose of effecting a partition, the share of an infant retains its character of realty.—*THOMPSON v. MCCARTREY* (1874), 6 P. R. 193.—CAN.

PART VIII. SECT. 1, SUB-SECT. 2.

r. Investment.]—An application to invest moneys of infants pursuant to an order of the ct. should be made by the infants, & not by the persons wishing to have them invested. (circa

t. —.]—In cases where, if money belonged to an infant residing in Upper Canada, the ct. would invest it for his benefit, the ct. will, where the infant is resident in a foreign country, direct an investment for his benefit in the securities of such country.—*SANBORN v. SANBORN* (1865), 11 Gr. 359.—CAN.

ct., on the ad-

special condition that the purchaser should make no objection on the ground of want of jurisdiction:—*Held*: the condition of sale was fair & reasonable, & the purchaser was bound by it. *Semble*: the ct. had jurisdiction to make the order for sale, & the infants & all other parties were bound by it.

With respect to the objection itself, I have not been much impressed by it; for there is a great difference between a sale on reversionary personal estate & a sale of real estate belonging to an infant (*JAMES, L.J.*).—*NUNN v. HANCOCK* (1871), 6 Ch. App. 850; 40 L. J. Ch. 700; 25 L. T. 469; 19 W. R. 1041, L. JJ.

Annotations:—Consd. Re Wells, Boyer v. Maclean, [1903] 1 Ch. 848. *Mentd. Debenham v. Sawbridge* (1901), 49 W. R. 502.

443. To vary settlement.]—VICKERS v. SCOTT (1837), 1 Jur. 402.

Annotation:—Consd. Re Wells, Boyer v. Maclean, [1903] 1 Ch. 848.

444. —.]—PETO v. GARDNER, No. 1989, *post*.

445. —.]—DAY v. DAY, No. 1975, *post*.

446. —.]—W., who died in 1883, gave his residuary estate to trustees upon trust, to pay certain annuities to his two daughters & other persons for their lives, & after the death of the last surviving annuitant, for such of the children of his two daughters as should be then living & should attain twenty-one or marry.

In 1902 the two daughters, their surviving children, & all other parties interested under the will, executed a deed whereby, subject to the approval of the ct., it was agreed that the trusts of the will should be put an end to, & instead thereof the trustees should hold the property upon trust to purchase Govt. annuities for the annuitants, & pay the residue to the children then living or the trustees of those who had settled their shares, making their interests absolute instead of contingent. Two of the children had executed settlements under which infants were or might become interested:—*Held*: the ct. had jurisdiction to approve the scheme on behalf of the infants.—*Re WELLS, BOYER v. MACLEAN*, [1903] 1 Ch. 848; 72 L. J. Ch. 513; 88 L. T. 355; 51 W. R. 521.

447. To change investments—Larger rate of interest.]—Petition of tenant for life for an inquiry

justify an exception.—*MITCHELL v. RICHEY* (1867), 13 Gr. 445.—CAN.

d. Loan—On mortgage of realty.]—The ct. will not sanction a loan of infants' moneys on mtge. of realty, without a covenant by the mtgor. to procure a binding agreement with those who may be entitled to liens under Mechanics' Lien Act, 1891, to forego their rights under the Act.—*Re BROWN & BROWN (INFANTS), Ex p. BROWN* (1892), 2 B. C. R. 110.—CAN.

e. Dispute between infant & guardian—Trustees ordered to pay money into court.]—Where an infant had become entitled to a fund, the subject of an express trust in her favour under a will, & the fund was claimed in the infant's name by her guardian appointed by a surrogate ct., but the infant represented by the official guardian, opposed the claim:—*Held*: it was not a case in which an order should be made under R. S. O., 1887 (c. 110), s. 37, upon the application of the trustees of the will, determining the claim of the guardian; but the trustees should be allowed to transfer the fund into ct.—*Re MATHERS* (1897), 18 P. R. 13.—CAN.

f. Surrogate court—No jurisdiction to custody of infant's property.]—*Re MERCER* (1912), 26 O. L. R. 427.—CAN.

g. Payment of legacy—Benefit of

ministration of an estate takes charge of the share going to infants, & invests the same for their benefit, instead of the amount being left in the hands of a trustee.

Since the establishment of a Govt. Dominion Stock, the investment of infant's money by the ct. should, as a general rule, be in such stock, rather than, as formerly, in mtges.—*KINGSMILL v. MILLER* (1868), 15 Gr. 171.—CAN.

b. — Benefit of infant.]—A petition had been presented for sale of an infant's estate, fifty acres of land, which produced \$700 & upwards. On an application that the proceeds might be invested in the purchase of a farm, with the sanction of the ct., on which it seemed to be intended the father of the infant, a farm labourer, was to reside with the infant, the referee refused to sanction the purchase. The interest of the infants is the only thing that the ct. can consider.—*Re MASON* (1871), 3 Ch. Ch. 426.—CAN.

c. Transfer to guardian.]—The rule is that money belonging to infants is not ordered in equity to be paid to their guardian, whether appointed by the surrogate ct. or otherwise, but is secured for the benefit of the infants; but where the amount is small & is required for the immediate use of the infants, special circumstances may

whether it would be for the benefit of infant tenants in remainder to transpose trust fund from Consols to a mtge. security under a power, dismissed on the ground that the expenses incidental to the latter security generally more than counterbalanced the increase of income.—*BARRY v. MARRIOTT* (1848), 2 De G. & Sm. 491; 12 L. T. O. S. 64; 12 Jur. 1043; 64 E. R. 220.

448. —.]—The ct. will, generally speaking, direct the sale of railroad shares bequeathed to infant legatees, unless it is shown that a great loss will be sustained by that course, or that the retention of them is likely to be advantageous.—*HARRIMAN v. HARRIMAN* (1853), 21 L. T. O. S. 98.

Compare No. 446, *ante*.

449. Over equitable interests—Power to compromise rights & claims.]—*BROOKE v. MOSTYN* (LORD), No. 1978, *post*.

SECT. 2.—ACQUISITION.

SUB-SECT. 1.—IN GENERAL.

Legal estate in realty—Incapacity to acquire.]—*See* Law of Property Act, 1925 (c. 20), s. 1 (6); Settled Land Act, 1925 (c. 18), s. 27 (1).

—Effect of conveyance to infant.]—*See* Settled Land Act, 1925 (c. 18), s. 27 (1).

Equitable estate in realty.]—*See* Settled Land Act, 1925 (c. 18), s. 27 (2).

Settled land—Infant tenant for life.]—*See* Settled Land Act, 1925 (c. 18), s. 26, & generally, SETTLEMENTS.

By partition.]—*See* PARTITION.

As object of power of appointment.]—*See*, generally, POWERS, SETTLEMENTS.

Portions—Presumption against double portions.]—*See* EQUITY, Vol. XX., pp. 453 *et seq*.

—.]—*See*, further, SETTLEMENTS.

SUB-SECT. 2.—UNDER INTESTACY.

See DESCENT, Vol. XVIII., pp. 3 *et seq.*, but, *see*, now, Administration of Estates Act, 1925 (c. 23), ss. 45–49, 51 (3).

Settlement deemed to have been made.]—*See* Settled Land Act, 1925 (c. 18), s. 1 (2).

infant.]—Order made to pay to the guardian of an infant a small legacy, on an undertaking to apply it for an outfit & for his passage to New Zealand.—*Re SALTER'S TRUSTS* (1866), 17 I. Ch. R. 176.—IR.

h. Transfer of funds—From Free State to Northern Ireland—Benefit of infant.]—The mother of two minors, who were domiciled in Northern Ireland, had been appointed their guardian by the Chief Justice of Northern Ireland, & had been given liberty to apply to the Chief Justice of the Irish Free State to have transferred to the High Ct. in Northern Ireland funds standing to the credit of the minors in the High Ct. in the Irish Free State. These funds were the only property the minors possessed. The mother applied accordingly to have these funds transferred to the respective credits of the minors in the High Ct. in Northern Ireland:—*Held*: as the welfare of the minors required that the scheme of the Chief Justice of Northern Ireland for their maintenance should be financed out of the funds in ct., three-fourths of the funds be transferred to the High Ct. in Northern Ireland, & the income of the balance of the funds, which remained in the High Ct. in the Irish Free State,

be paid to the mother of the minors & to the General Solr. for Minors in the Irish Free State, who were appointed guardians of the fortunes of the minors.—*Re DUDDY*, [1925] 1 I. R. 196.—IR.

PART VIII. SECT. 2, SUB-SECT. 5.

k. Bound by conditions precedent.]—*GRIFFIN v. GRIFFIN* (1804), 1 Sch. & Lef. 352.—IR.

PART VIII. SECT. 2, SUB-SECT. 6.

l. To infant—When ordered—Before majority.]—Where a female was entitled at majority to payment out of ct. of a sum of money, & it appeared that, although only nineteen years of age, she was married & domiciled in a foreign country, by the laws of which a female is entitled upon marriage to receive money due to her, an order was made for immediate payment out.—*KAVANAGH v. LENNON* (1894), 16 P. R. 229.—CAN.

m. ————.]—An order was made for payment, out of a fund in ct. to which an infant was contingently entitled, of an allowance for his maintenance, upon security being given by way of life insurance for the benefit of those who would be entitled

SUB-SECT. 8.—BY ADVANCEMENT.

What constitutes advancement.]—*See* EQUITY, Vol. XX., pp. 457–465, Nos. 1821–1912.

When advancement presumed.]—*See* GIFTS, Vol. XXV., pp. 510–517.

Powers of trustees to advance.]—*See* Trustee Act, 1925 (c. 19), ss. 31, 32.

SUB-SECT. 4.—BY GIFT.

Gifts by will.]—*See* WILLS.

Gift inter vivos or mortis causa.]—*See*, generally, GIFTS, Vol. XXV., pp. 505 *et seq*.

SUB-SECT. 5.—ACQUISITION SUBJECT TO CONDITIONS.

Onerous condition in will.]—*See* WILLS.

Onerous condition in settlements.]—*See* SETTLEMENTS.

450. Condition attached to gift—Capable of performance.]—Where an estate is given to an infant upon a condition, such act as an infant can perform, must be done by him; & infancy is such case is no excuse.—*FALKLAND (VISCOUNT) v. BERTIE* (1698), 2 Vern. 333; Holt, K. B. 230; 23 E. R. 814; *sub nom.* *BERTIE v. FAULKLAND*, 1 Eq. Cas. Abr. 110; Freem. Ch. 220; 3 Cas. in Ch. 129; 12 Mod. Rep. 182; 1 Salk. 231; *on appeal*, Colles, 10, H. L.

Annotations:—*Reid*. *Shaftsbury v. Shaftsbury* (1725), Gilb. Ch. 172; *Harvey v. Aston* (1737), 1 Atk. 361; *Acherley v. Vernon* (1739), Willes, 153. *Mentd.* *Bromley v. Fettiplace* (1700), Freem. Ch. 245.

Liability to repair highway.]—*See* HIGHWAYS, Vol. XXVI., p. 580, No. 2703.

Right to repudiate.]—*See* EXECUTORS, Vol. XXIII., p. 459, No. 5327; GIFTS, Vol. XXV., p. 523, No. 165.

—Stocks & shares.]—*See* COMPANIES, Vol. IX., pp. 276, 399, 400, Nos. 1699, 2546–2561.

SUB-SECT. 6.—PAYMENT OUT OF FUNDS IN COURT.

451. To infant—Into savings bank.]—Small sums of money representing shares of infants in a

upon the death of the infant under full age.—*Re CAMPBELL* (1899), 18 P. R. 400.—CAN.

n. ————.]—The administrator of an estate in distributing it paid into ct. the share of an infant, one of the next of kin of intestate. The infant now applied for an amount to be paid out necessary for her support & maintenance, she being in ill-health & unable to work:—*Held*: the application could be maintained if brought in proper way by petition duly verified, setting out amount in ct., in what way she is next of kin, the administrator, father or mother or relatives should be notified, & circumstances of father & mother if any.—*Re GREEN* (1908), 9 W. L. R. 630.—CAN.

o. To guardian.]—Money paid into ct. to the credit of infants will not be paid out to their guardian appointed by a surrogate ct., upon his application, as a matter of right; though, in a proper case, an allowance for their maintenance & education may be made to him out of such moneys.—*Re HARRISON* (1899), 18 P. R. 303.—CAN.

p. ————.]—Testator by his will provided for payment of specified legacies to his children, & that the

Sect. 2.—Acquisition: Sub-sect. 6. Sect. 3: Sub-sects. 1, 2 & 3.]

fund in ct. may be directed to be paid out by the Paymaster-General into the Post Office Savings Bank to accounts in the names of the infants.—*ELLIOTT v. ELLIOTT* (1885), 54 L. J. Ch. 1142.

452. — When ordered.]—An infant was entitled on her attaining her majority to a share of a fund in ct., & within one month of that time an application was made for the payment of the fund out of ct.

The ct. declined to order the infant's share to be immediately paid to her solr. on his undertaking to pay it to her on her attaining twenty-one; but gave liberty to apply in chambers for payment, on a certificate of the chief clerk to the effect that she had so become entitled.—*Re SOTHERN* (1863), 9 L. T. 534; 12 W. R. 45.

453. To guardian—Whether receipt by guardian valid.]—A testamentary guardian is not entitled as such to obtain payment out of ct. of funds, the property of his infant ward, which have been paid into ct. under the Legacy Duty Act, 1796 (c. 52). *Semble*: in ordinary cases, which do not depend upon a special Act, a testamentary guardian is entitled to give a receipt for funds coming to his infant ward.—*Re CRESSWELL* (1881), 45 L. T. 468; 30 W. R. 244.

SECT. 3.—ALIENATION.

SUB-SECT. 1.—IN GENERAL.

454. Power to alienate—General rule.]—*ZOUCH d. ABBOT & HALLET v. PARSONS*, No. 28, *ante*.

455. — By exchange.]—*CECIL v. SALISBURY (EARL)*, No. 1904, *post*.

456. — By deed.]—*MAY v. HOOK* (1773), 2 Co. Litt. 246a; 1 Jac. & W. 663, n.; 37 E. R. 521, L. C.

Annotations:—*Consd. & Expld. Burnaby v. Equitable Reversionary Interest Soc.* (1885), 28 Ch. D. 416 *Mentd.* *Frowd v. Lawrence* (1820), 1 Jac. & W. 655; *Ex p. Clarke*, (1830) 1 Russ. & M. 563; *Ex p. Helsby* (1832), Mont. & B. 79; *Aston v. Heron* (1834), 2 My. & K. 390.

residue of his estate should be turned into money, invested by the exors., the income paid to the widow, & on her death "that all the residue of my estate is to be equally divided among all my children living at that time (the death of the widow) & the lawful issue of such as may be dead, *per stirpes*." There was also a provision that the shares to go to three of the children (one being H.) were to be dealt with according to the discretion of the exors. The son H. was advanced to the extent of \$4,000 in his & his father's lifetime, & it was agreed between them that these advances were to be deducted from H.'s share of the father's estate. The other children also received advances on the same terms. The will was dated in 1887; testator died in Apr. 1897; H. died in Aug. 1898, leaving one child, born in Nov. 1897; & the widow of testator died in 1908:—*Held*: the payment out of ct. of the infant's share, \$30,000, to his mother & surrogate guardian, though she was of ample means, should not be sanctioned.—*Re CARTER* (1909), 20 O. L. R. —CAN.

q. Loans on property.]—As a general rule, loans of money in ct. cannot be made on property on which there is any prior charge, however small, unless all parties interested consent.—*ANDREWS v. HEMPSTREET* (circa 1864), 1 Ch. Ch. 347.—CAN.

PART VIII. SECT. 3, SUB-SECT. 1.

456 1. Power to alienate—By deed.]

457. — — —.]—A marriage settlement contained a proviso for the settlement of the present & after-acquired property of the intended wife, who was an infant. She was then entitled in remainder jointly with two others to a share in bank annuities standing in the names of trustees:—*Held*: the joint tenancy was severed.

The disability of infancy goes no further than is necessary for the protection of the infant, it leaves the infant the power to make the deed in the first instance; but, for the protection of the infant, it gives the infant also the right to avoid that deed if the infant finds it right & proper to do so when the infant comes of age (*PEARSON, J.*).

—*BURNABY v. EQUITABLE REVERSIONARY INTEREST SOCIETY* (1885), 28 Ch. D. 416; 54 L. J. Ch. 466; 52 L. T. 350; 33 W. R. 639.

Annotations:—*Consd. Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421. *Reid. Re Hewett, Hewett v. Hallett* (1893), 63 L. J. Ch. 182; *Viditz v. O'Hagan* (1899), 68 L. J. Ch. 553.

458. — Insufficiency of consideration — Purchase price of land.]—C., who was possessed of real property held by gavelkind tenure, died in Aug. 1892, leaving his widow & three sons, his co-heirs in gavelkind. In Nov. 1893, the widow & eldest son, as beneficial owners, conveyed their interest in the property to M. by deed, reciting an agreement for sale for £750, that the two other sons were infants & would convey their shares by customary feoffment on attaining fifteen, & that, of the purchase-money £375 had been apportioned to the widow & £125 to the eldest son, in consideration of which sums the conveyance was expressed to be made. In Dec. 1893, the younger sons, having attained fifteen, assured their shares by feoffment in consideration of £125 to each. M. having agreed to sell the property, the purchaser refused to accept the vendor's title, on the ground that the widow had received too much of the consideration money, & the consent of the infants to her receiving it was not binding, they being under age & able to withdraw their consent on attaining majority:—*Held*: the purchaser's objection was a valid one.—*Re MASKELL & GOLD-FINCH'S CONTRACT*, [1895] 2 Ch. 525; 64 L. J. Ch.

man & his wife (she owning the estate) under C.S.U.C. c. 85, while the wife was under twenty-one:—*Held*: good & valid, independently of the statute, to pass the husband's interest in the land, although not sufficient to bar the wife's.—*DORAN v. REID* (1863), 13 C. P. 393.—CAN.

a. Conveyance by parent not being guardian—Parent & child tenants in common.]—The mother of infant children, resident with her, being entitled to a third undivided interest in the land, they owning the residue, by deed agreed with a railway co., in consideration of an extension by them of their line of railway from R. to P., & for one dollar, to grant to them in fee the right of way "through my land in P., consisting of such portion of lots 18 & 19 as may be required to carry the railway across said lots," & conveyed to them accordingly. At the time of the conveyance she had not been appointed guardian to her children:—*Held*: her deed barred the children's interest in the land as well as her own, & they were therefore not entitled to compensation from the co.—*DUNLOP v. CANADA CENTRAL RY. Co.* (1880), 45 U. C. R. 74.—CAN.

b. Benefit of infant.]—*Held*: the onus of proving that a sale by his guardians of a minor's property was necessary & for his benefit lies upon the purchaser, & adequacy of price is an important point to be considered in determining this question.—*DAGDU BIN DAUD TELI PARDESHI v. SHEKH*

In 1840 J. who was tenant in tail in remainder of certain lands, & was supposed to be of full age, agreed with his father, T. for a re-settlement, under which J. was to become tenant for life, with remainder to his first & other sons successively in tail male, with remainders over in favour of T.'s other children & with ultimate remainder to T. in fee, in consideration of T.'s bringing into the new settlement lands of which he was owner in fee, & deeds were executed accordingly. J. discovered in 1850 for the first time that he was in fact under age at the date of the re-settlement, which he thereupon repudiated, & in 1852 T. made a new settlement for value of his own lands:—*Held*: by J.'s repudiation the re-settlement of the lands in 1840 was rendered void *ab initio* & the consideration for the settlement then made by T. having thus failed, T.'s lands were thereby wholly liberated from the re-settlement of 1840 so as to enable him to give a good title to the grantees of 1852.—*PAGET v. PAGET* (1882), 11 L. R. Ir. 26.—IR.

r. —.]—Mere delay on the part of a ward, after attainment of majority, in repudiating an alienation made by his guardian, cannot be treated as a ratification of the guardian's act, but only as evidence of ratification.—*RAJ NARAIN DEB CHOWDHRY v. KASSEE CHUNDER CHOWDHRY* (1872), 10 B. L. R. 324; 18 W. R. 404.—IND.

t. Deed executed by husband & infant wife.]—A deed executed by a

678; 72 L. T. 836; 43 W. R. 620; 39 Sol. Jo. 601; 13 R. 685.

— By way of gift.]—See Sub-sect. 2, *post*.

— Recovery of deposits paid under voidable contracts.]—See Part V., Sect. 5, *ante*.

— Copyholds—Surrender & admittance.]—See COPYHOLDS, Vol. XIII., p. 127, Nos. 1580–1584, & Law of Property Act, 1922 (c. 16), s. 128, sched. 12 (e) (iii).

459. Infant shipowner — Power of guardian to sell or mortgage.]—The guardian of a registered infant owner of a ship has no power under the M. S. Act, s. 99, to sell or mortgage the ship on behalf of the infant.—MICHAEL v. FRIPP (1868), L. R. 7 Eq. 95; 38 L. J. Ch. 29; 19 L. T. 257; 17 W. R. 23; 3 Mar. L. C. 162.

Mortgages by infants.]—See Infants Relief Act, 1874 (c. 62), s. 1.

Transactions between parent & child.]—See CONTRACT, Vol. XII., pp. 101–105, Nos. 618–647.

Completion of sale of land—Under contract by deceased vendor.]—See SALE OF LAND, SPECIFIC PERFORMANCE.

Compulsory sale of land.]—See COMPULSORY PURCHASE OF LAND, Vol. XIII., pp. 165, 172, 218, 235, 244, 246, 249, 265, Nos. 436, 501, 1023, 1254, 1430, 1459, 1510, 1832.

Election by infants.]—See EQUITY, Vol. XX., pp. 446–447, Nos. 1712–1724.

Partition.]—See PARTITION.

Transactions between husband & wife.]—See HUSBAND & WIFE.

Unconsonable bargains with minors.]—See MONEY & MONEY-LENDING.

SUB-SECT. 2.—BY GIFT.

460. Capacity to make valid gift.]—ZOUCH d. ABBOT & HALLET v. PARSONS, No. 28, *ante*.

461. —.]—BURNABY v. EQUITABLE REVERSIONARY INTEREST SOCIETY, No. 457, *ante*.

462. — Chattels in possession.]—There is no law which prevents an infant from making a

SAHEB VALAD BADRUDDIN KAMBLE (1864), 2 Bom. 348.—IND.

c. —.]—MAKUNDI v. SARABSUKH (1884), I. L. R. 6 All. 417.—IND.

d. *Power of guardian to sell.]*—*Held*: the contract in this case which a guardian had entered into on behalf of a minor, can be specifically enforced.—MIR SARWARJAN v. FAKHRUDIN MAHOMED CHOUDRY (1906), 11 C. W. N. 207; I. L. R. 34 Calc. 163.—IND.

e. *Power of guardian to consent to transfer—Third person holding out as owner.]*—*Held*: the guardian of a minor owner of immovable property is incapable of consenting, even though such consent be express, to a third person holding himself out as owner of the minor's property, so as to enable a transferee from such person to claim the benefit of Transfer of Property Act, 1882, s. 41.—DAMBAR SINGH v. JAWITRI KUNWAR (1907), I. L. R. 29 All. 292.—IND.

PART VIII. SECT. 3, SUB-SECT. 2.

460 i. Capacity to make valid gift.]—The gift of an infant is not void but voidable; the infant may ratify the gift after majority; & he may do so without any positive act; length of time may be sufficient, or it may be otherwise made to appear that there was a fixed, deliberate, & unbiassed determination that the transaction should not be impeached; but, when the infant has derived no benefit from what has been done, & the position of

donation of chattels or personal property in his actual possession.—TAYLOR v. JOHNSTON (1882), 19 Ch. D. 603; 51 L. J. Ch. 879; 46 L. T. 219; 30 W. R. 508.

463. Alienation by infant married woman — Whether court will take consent.]—The ct. will take the consent of a married woman, though a minor, to the payment to her husband of a sum to which she is entitled.—GULLIN v. GULLIN (1835), 7 Sim. 236; 58 E. R. 827.

Annotations:—N.F. Stubbs v. Sargon (1839), 3 Jur. 1118; Abraham v. Newcombe (1842), 6 Jur. 433.

464. —.]—The ct. declined taking the consent of a married woman, who was a minor, to the payment out of ct. of money to which she was entitled.—STUBBS v. SARGON (1839), 2 Beav. 496; 3 Jur. 1118; 48 E. R. 1274.

Annotation:—Folld. Shipway v. Ball (1881), 50 L. J. Ch. 263.

465. —.]—The ct. will not take the consent of a married woman who is under age, to the payment of money to which she is entitled, to her husband. *Gullin v. Gullin*, No. 463, *ante*, overd.—ABRAHAM v. NEWCOMBE (1842), 12 Sim. 566; 6 Jur. 433; 59 E. R. 1250.

466. —.]—When a married woman is under twenty-one her consent to waive her equity to a settlement will not be taken.—SHIPWAY v. BALL (1881), 16 Ch. D. 376; 50 L. J. Ch. 263; 44 L. T. 49; 29 W. R. 302.

Donee in fiduciary position.]—See CONTRACT, Vol. XII., pp. 101 *et seq*.

SUB-SECT. 3.—TRANSACTIONS BETWEEN PARENT AND CHILD.

467. Fiduciary relationship.]—The fiduciary relationship as it is called does not depend upon any particular circumstances . . . it exists in the case of parent & child, guardian & ward (FIELD, J.).—FLOWRIGHT v. LAMBERT (1885), 52 L. T. 646.

Undue influence.]—See CONTRACT, Vol. XII., p. 101.

the donee has not been affected by delay, the donor, when he comes of age, may repudiate after a very considerable time; & what is a reasonable time is a question, upon the facts, for the opinion of the ct.—MURRAY v. MCKENZIE (1910), 23 O. L. R. 287.—CAN.

PART VIII. SECT. 3, SUB-SECT. 3.

467 i. Fiduciary relationship.]—A parent stands in a fiduciary relation towards his child; & any transaction between them by which any benefit is procured by the parent to himself or to a third party at the expense of the child will be viewed with jealousy by cts. of equity & the burden will lie on the parent or third party claiming the benefit of showing that the child in entering into the transaction had the independent advice of persons who acted in his interests, that he thoroughly understood the nature of the transaction, & that he was removed from all undue influence when the gift was made.—LAKSHMI DOSS v. ROOP LAUL (1906), I. L. R. 30 Mad. 169.—IND.

i. Mutual bonds — Child to work farm—Father to convey to son before death.]—A father & son entered into mutual bonds, the father agreeing that just before his death he would convey his farm to the son in fee; & the son agreeing that he would, during his father's life, work the farm in a good & farmer-like manner, & would consult his father in all things reasonable. Quarrels took place; the son treated

his father badly, though he did nothing which at law would be a breach of the condition of his bond; & ultimately the father left the farm, the son retaining possession until ejected at the father's suit. In a suit by the son against his father:—*Held*: the contract should not be enforced against the father.—MCDONALD v. ROSE (1870), 17 Gr. 657. CAN.

g. Gift.]—S., entitled to a lease for lives, by lease & release of Mar. 5, 1833, in consideration of love & affection for his eldest son, J., & in order to advance him in life, & to entitle him to a wife & fortune "now in contemplation," conveyed the lands to J. & his heirs. This deed was executed by S. & J. & was registered by S. nine months afterwards; but S. retained it in his possession; & with the assent of the son, continued to his death to act as owner of the lands. S., by his will, devised all such real, freehold, & personal property of which he should die seised or possessed to J., "in case he shall recover from his present illness"; & appointed E. his residuary legatee. There was no particular marriage in contemplation when the conveyance of 1833 was executed. J. survived testator, & afterwards died of the illness with which he was afflicted when testator made his will:—*Held*: the conveyance of 1833 was not conditional, executed for a specific purpose which had not been performed; & on its execution the legal estate was vested in J.; that estate was not divested by the son not afterwards

**Sect. 3.—Alienation: Sub-sect. 4. Sect. 4:
sect. 1.]**

**SUB-SECT. 4.—TRANSACTIONS BETWEEN GUARDIAN
AND WARD.**

Guardianship generally, *See* Part XIII., *post*.

468. Purchase by guardian—Arrears of rent.]—Decreed if a guardian to an infant, whose lands are incumbered with arrears of rent to the value of £800 & he has in his hands of the infant's estate £100, & buys the £800 arrears, for £100 he shall not charge the infant with the £800.—*HENLY v.* — (1678), 2 Cas. in Ch. 245; 22 E. R. 928.

469. — Reversionary interest after infant.]—*COMBES v. THROCKMORTON* (undated), cited, *Freem. Ch.* at p. 52; 22 E. R. 1053.

Annotation:—Fold. Lesley's Case (1680), *Freem. Ch.* 52.

470. — —.]—A man is guardian or trustee for an infant to whom lands are descended or devised, but the title is *revera* in a third person; of the trustee or guardian buy in the title of this third person, this shall not be taken to be a trust for the infant for he is at liberty to purchase it as well as anybody else.—*LESLEY'S CASE* (1680), *Freem. Ch.* 52; 22 E. R. 1053.

471. — Full value given for purchase.]—What acts of a guardian with respect to an infant's estate shall be good. If he gave a full consideration for his ward's estate, it will not be set aside.—*OLDIN v. SAMBORNE* (1737), 2 Atk. 15; 26 E. R. 406.

See, further, CONTRACT, Vol. XII., p. 106, Nos. 656–660.

**SECT. 4.—PROTECTION OF PROPERTY—
LIABILITY TO ACCOUNT.**

SUB-SECT. 1.—BY STRANGER.

472. Person entering liable to account to infant.]—Account lies against a stranger as guardian, who enters & receives the profits.—*HUGHES v. HARRYS* (1631), *Cro. Car.* 229; 79 E. R. 800.

473. —.]—*NEWBURGH v. BICKERSTAFFE*, No. 493, *post*.

474. —.]—*TILLY v. BRIDGES* (1705), *Proc. Ch.* 252; 2 Vern. 519; 24 E. R. 122.

Annotation:—Mentd. Curtis v. Curtis (1789), 2 Bro. C. C. 620.

475. —.]—An infant may bring a bill for an account of rents & profits, against a person who keeps possession, after the death of the infant's ancestor.—*ROBERDEAU v. ROUS* (1738), 1 Atk. 543; 26 E. R. 342, L. C.

Annotation:—Mentd. Black Point Syndicate v. Eastern Concessions (1898), 70 L. T. 658.

476. —.]—Whoever enters in the estate of an infant enters as guardian or bailiff for the infant.—*DORMER v. FORTESCUE* (1744), 3 Atk. 124; *Ridg. temp. H.* 176; 26 E. R. 875, L. C.

Annotations:—Refd. Curtis v. Curtis (1789), 2 Bro. C. C. 620; *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782; *Howard v. Shrewsbury* (1874), L. R. 17 Eq. 378. *Mentd. Townsend v. Ash* (1745), 3 Atk. 336; *Shields v. Atkins* (1747), 3 Atk. 560; *A.-G. v. Plymouth Corp.* (1754), *Wight.* 134; *Taylor d. Atkins v. Horde* (1755), 1 Keny. 143; *Oates d. Wigfall v. Brydon* (1766), 3 Burr. 1895; *Aston v. Exeter* (1801), 6 Ves. 288; *Hylton v. Morgan* (1801), 6 Ves. 293; *Pulteney v. Warren* (1801), 6 Ves. 73; *Pettward v. Prescott* (1802), 7 Ves. 541; *Oliver v. Richardson* (1803), 9 Ves. 222; *Edwards v. Morgan, Morgan v. Edwards* (1824), *M'Cle.* 541; *Small v. Attwood* (1834), 1 Y. & C. Ex. 37; *Hodson v. Ball* (1842), 1 Ph. 177.

inarrying; the circumstances of the case did not establish a trust for S.; & the true construction of the devise to J. was that it was a gift to him, in case he did not die from his then present illness in the life-time of testator.—*ALLEYNE v. ALLEYN* (1845), 2 Jo. & Lat. 544.—*IR.*

PART VIII. SECT. 4, SUB-SECT. 1.

h. Partner.]—D. & W. were partners in a certain joint stock savings bank, under articles which provided that the partnership should last during their joint lives, & that they should share the profits & expenses.

477. —.]—Nothing can be clearer than that an infant may consider whoever enters on his estate as entering for his use (*LORD KENYON, C.J.*).—*DOE d. BARNETT v. KEEN* (1797), 7 Term Rep. 386; 101 E. R. 1034.

Annotation:—Mentd. Clarence v. Marshall (1834), 2 Cr. & M. 495.

478. —.]—A stranger who gets into receipt of the rents of an infant's estate shall upon bill filed be compelled to come to an account (*LORD ELDON, C.*).—*PULTENEY v. WARREN* (1801), as reported in 1 *Coop. temp. Cott.* 480; 47 E. R. 955, L. C.

Annotations:—Mentd. Cupit v. Jackson (1824), *M'Cle.* 495; *Grant v. Grant* (1830), 3 Sim. 340; *Brown v. Newall* (1837), 2 My. & Cr. 558; *East India Co. v. Campion* (1837), 11 Bli. 158; *Howell v. Howell* (1837), 2 My. & Cr. 478; *Attwood v. Burton, Attwood v. Bailey, Attwood v. Small*, (1839), 8 L. J. Ch. 145; *Halg v. Homan* (1841), 8 Cl. & Fin. 320; *Re Franks* (1851), 16 L. T. O. S. 529; *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782; *Thomas v. Thomas* (1855), 1 Jur. N. S. 1160; *Knight v. Bowyer* (1857), 23 Beav. 609; *Wright v. Chard* (1860), 1 De G. F. & J. 667; *Sawyer v. Goodwin* (1867), 36 L. J. Ch. 578; *Phillips v. Homfray* (1883), 24 Ch. D. 439.

479. —.]—It is a maxim in law, that whoever enters land of an infant does so for the benefit of the infant.—*INGLEDEW v. RICHARDSON* (1827), 5 L. J. O. S. K. B. 246.

480. —.]—The heir must be considered to have entered upon the estate as bailiff for the infant children (*PAGE WOOD, V.-C.*).—*SCHRODER v. SCHRODER* (1854), *Kay*, 578; 2 Eq. Rep. 895; 23 L. J. Ch. 916; 23 L. T. O. S. 286; 18 Jur. 621; 2 W. R. 462; 69 E. R. 245; *affd.*, 3 Eq. Rep. 97, L. C.

Annotations:—Mentd. Hance v. Truwhitt (1862), 2 John. & H. 216; *Jacob v. Jacob* (1898), 78 L. T. 825.

481. —.]—Whoever enters on the estate of an infant enters as guardian or bailiff for the infant.—*HICKS v. SALLITT* (1854), 3 De G. M. & G. 782; 2 Eq. Rep. 818; 23 L. J. Ch. 571; 22 L. T. O. S. 322; 18 Jur. 915; 2 W. R. 173; 43 E. R. 307, L. C. & L. JJ.

Annotations:—Apld. Nanney v. Williams (1856), 22 Beav. 452. *Refd. Howard v. Shrewsbury* (1874), L. R. 17 Eq. 378. *Mentd. Schroder v. Schroder* (1854), *Kay*, 578; *Hope v. Liddell, Liddell v. Norton* (1855), 21 Beav. 183; *Hicks v. Hastings* (1857), 3 K. & J. 701; *Penny v. Allen* (1857), 7 De G. M. & G. 409; *Hickman v. Upsall* (1876), 4 Ch. D. 144; *Thomson v. Eastwood* (1877), 2 App. Cas. 215; *Re Rayner, Rayner v. Rayner*, [1904] 1 Ch. 176.

482. — Allowance for proper expenditure.]—Testator devised lands to his two infant children. The widow remarried & her second husband entered on the lands & maintained & educated the children: *Held*: in accounting to their guardians for the rate & profits of the lands, he was entitled to just allowances in respect the moneys expended by him.—*HALL v. YATES* (1673), *Cas. temp. Finch*, 2; 23 E. R. 1.

483. — Period of accountability.]—If a man, during a person's infancy, receives the profits of an estate to which the infant is entitled, & continues to do so for several years after the infant comes of age, before any entry is made upon him, yet he shall account for the profits throughout, & not during the infancy only.—*YALLOP v. HOLWORTHY* (1699), 1 Eq. Cas. Abr. 7, 280; 21 E. R. 832, 1045.

Annotations:—Refd. Skirme v. Meyrick (1739), 2 Com. 700; *Howard v. Shrewsbury* (1874), L. R. 17 Eq. 378.

484. — — Delay by infant to enter.]—An infant who neglects to enter six years after he

D. died in Apr. 1874, leaving a will, whereby he bequeathed to pltf., the son of W., the residue of his property, including his interest in the bank, & appointed L. his exor. In May, 1874, L. gave W. a general power of attorney to act for him. In July, 1879, the pltf. came of age, & soon after de-

comes of age is as much barred by Stat. Limitations from bringing a bill for an account of profits as he is from an action of account at Common Law.—*LOCKEY v. LOCKEY* (1719), Prec. Ch. 518; 1 Eq. Cas. Abr. 304; 24 E. R. 232, L. C.

Annotations:—*Reid*. *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782. *Mentd*. *Skirme v. Meyrick* (1739), 2 Com. 700; *Sturt v. Mellish* (1743), 2 Atk. 610; *Hony v. Hony* (1824), 1 Sim. & St. 568; *Knox v. Gye* (1872), L. R. 5 H. L. 656; *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Friend v. Young*, [1897] 2 Ch. 421; *Henry v. Hammond* (1913), 108 L. T. 729.

485. ———.] — One in possession of lands belonging to an infant; if the infant when of age makes out his title, he shall recover the profits in equity from the first accruing of his title, & not from the filing of his bill only.

Deft. shall account for profits from the time pltf.'s right accrued, & not from the time of filing the bill only, if deft. has concealed the deeds & writings making out pltf.'s title.—*BENNET v. WHITEHEAD* (1731), 2 P. Wms. 644; 24 E. R. 897, L. C.

Annotations:—*Mentd*. *Dormer v. Fortescue* (1744), 3 Atk. 124; *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782.

486. ———.] — *Waiver by infant of account.*—Where any person enters upon an infant's estate & continues the possession, this ct. considers him as a guardian & will decree an account & to be carried on after the infancy is determined, unless the infant after being of age waived such account.—*MORGAN v. MORGAN* (1737), West temp. Hard. 265; 1 Atk. 489; 26 E. R. 310, L. C.

Annotations:—*Reid*. *Hicks v. Sallitt* (1854), 3 De G. M. & G. 782; *Howard v. Shrewsbury* (1874), L. R. 17 Eq. 378; *Wall v. Stanwick* (1887), 34 Ch. D. 763.

487. ———.] — An infant is entitled to treat a person who enters on his estate during his infancy as his bailiff, who is accountable as such.

The jurisdiction, which this ct. has, to decree accounts of the estates of infants, against persons entering thereon during their minority, is not taken away by the fact, that at the time when the bill was filed the infant had attained twenty-one.—*BLOMFIELD v. EYRE* (1845), 8 Beav. 250; 14 L. J. Ch. 260; 9 Jur. 717; 50 E. R. 99.

Annotations:—*Reid*. *Howard v. Shrewsbury* (1874), L. R. 17 Eq. 378; *Wall v. Stanwick* (1887), 34 Ch. D. 763.

488. ———.] — *THOMAS v. THOMAS*, No. 500, post.

489. ———.] — *Entry under voidable deed.*—A party in possession of an infant's estate, under a voidable deed, treated as his bailiff, & made to account for the rents for more than six years before the filing of the bill.—*NANNEY v. WILLIAMS* (1856), 22 Beav. 452; 52 E. R. 1182.

Annotations:—*Mentd*. *Pelly v. Bascombe* (1863), 4 Giff. 390; *Hall v. Hall* (1873), 8 Ch. App. 430.

490. ———.] — Pltf.'s mother & deft. were tenants in common in fee. She died in 1851 & her interest descended on pltf. her heir, then an infant. Deft., who had previously occupied the estate, continued in possession & thenceforward excluded pltf. Pltf. attained twenty-one in 1857:—*Held*: deft. was accountable to pltf. for the whole period.—*PASCOE v. SWAN* (1859), 27 Beav. 508; 29 L. J. Ch. 159; 1 L. T. 17; 5 Jur. N. S. 1235; 8 W. R. 130; 54 E. R. 201.

Annotations:—*Reid*. *Garner v. Wingrove* (1905), 53 W. R. 588. *Mentd*. *Watson v. Gass* (1881), 45 L. T. 582.

manded of W. D. B. an account of the assets of the partnership & a settlement with him; & in Nov. 1880, W. gave pltf. a cheque for \$8,000, handing him at the same time a document for signature, which purported to be a receipt of the said sums in full of all claims on the estate of D., & pltf. signed it. He now brought this action against W. & L., alleging that after the death of D., W., with L.'s

connivance, made certain arrangements for the winding up of the partnership, & that large portions of the assets of D. & of the bank had been realised, & profits made, & converted by W. to his own use, & claiming to have the said release declared void, & an account of the estate of D., & of the partnership, & to have the same wound up, & payment of the share to which he was entitled:—*Held*: as to

491. *Property abroad—Consigned to acting executor.*—The acting exor., to whom the produce of an estate in Antigua, belonging to an infant was consigned, was directed, to account annually by affidavit.—*BROOKS v. OLIVER* (1761), Amb. 406; 27 E. R. 272.

492. ———.] — *Entry of several persons—All to be made defendants—In action for account.*—(1) A party entering upon & taking the rents & profits of an infant's estate may be sued at law as a trespasser, or in equity as the bailiff, guardian & trustee of the infant, at the election of pltf.

(2) Where it appears that several persons entered on & held the estate of an infant, one of such persons cannot be sued in equity as his bailiff, guardian or trustee for an account of the rents & profits of the estate, without making parties to the suit the others of such persons.—*WYLLIE v. ELLICE* (1848), 6 Hare, 505; 67 E. R. 1264.

Annotations:—*As to* (1) *Reid*. *Howard v. Shrewsbury* (1874), L. R. 17 Eq. 378. *Generally*, *Mentd*. *A.-G. v. Cooper* (1850), 8 Hare, 166; *Lowndes v. Garnett & Moseley Gold Mining Co. of America* (1862), 2 John. & H. 282.

493. ———.] — *Entry under adverse title.*—An infant shall have an account of profits against an intruder, etc. But where there is a verdict against the infant's title, he can have no account till he has recovered at law.—*NEWBURGH v. BICKERSTAFFE* (1684), 1 Vern. 295; 23 E. R. 478.

Annotations:—*Reid*. *Wyllie v. Ellice* (1848), 6 Hare, 505; *Hicks v. Sallitt* (1853), 23 L. J. Ch. 571; *Howard v. Shrewsbury* (1874), L. R. 17 Eq. 378.

494. ———.] — A person, who makes an adverse entry into, & take an adverse possession of an infant's estate, cannot be treated as the bailiff of that infant; nor can a bill for an account against him in that character be sustained.—*HAGLEY v. WEST* (1824), 3 L. J. O. S. Ch. 63.

495. ———.] — Though a person entering on the estate of an infant is treated, in equity, as his bailiff, the rule does not apply where the infant has never been in possession by himself, his guardian or agent, & where the estate has been held by a title adverse to the infant.—*CROWTHER v. CROWTHER* (1857), 23 Beav. 305; 26 L. J. Ch. 702; 28 L. T. O. S. 315; 5 W. R. 237; 53 E. R. 120.

Annotations:—*N.F.* *Howard v. Shrewsbury* (1874), L. R. 17 Eq. 378. *Reid*. *Garner v. Wingrove*, [1905] 2 Ch. 233.

496. ———.] — The settled estates of the Duke of Shrewsbury were, by an Act passed in 1719, settled upon the Earl of Shrewsbury, with a proviso against alienation. Two Acts were subsequently passed, one in 1803, & the other in 1843, by which portions of the settled estates, described in the schedules, were vested in trustees, upon trust to sell, & invest the purchase money in the purchase of other estates to be settled upon the same trusts. Some of the lands described in the schedules did not form part of the settled estates when the Act of 1719 was passed. In 1856 the then Earl of Shrewsbury devised all his estates over which he had a power of disposition to pltfs., who filed this bill to obtain possession of the lands which though not forming part of the settled estates in 1719 were included in the schedules to the Acts of 1803 & 1843:—*Held*:

the alleged settlement of Nov. 1880, pltf. & his father could not be said to have been on equal terms, & the document in question was not binding upon the former; it was clearly the duty of his father, before making any settlement with him, to give him the fullest possible information regarding the estate & his dealings with it, even if then, under the circumstances, a settlement binding on pltf. could have

Sect. 4.—Protection of property—liability to account: Sub-sects. 1, 2 & 3.]

where a person had intruded upon the estate of an infant, the infant might sue in equity although he had both a legal & equitable title, & was entitled to an account.—*HOWARD v. SHREWSBURY (EARL)* (1874), L. R. 17 Eq. 378; 43 L. J. Ch. 495; 29 L. T. 862; 22 W. R. 290.

*Annotations:—**Reid. Wall v. Stanwick* (1887), 34 Ch. D. 763; *Garner v. Wingrove*, [1905] 2 Ch. 233. *Mentd. Crompton v. Jarratt* (1885), 30 Ch. D. 298; *Re Durham, Grey v. Durham* (1887), 57 L. T. 164; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34.

497. Person entering liable as trespasser.]—*WYLLIE v. ELLICE*, No. 492, *ante*.

498. — Period of accountability.]—The customary heir of a copyhold tenement cannot maintain trespass without entry, but after entry there is a relation back to the actual title as against a wrongdoer & he may maintain an action for trespasses committed prior to his entry.—*BARNETT v. GUILDFORD (EARL)* (1855), 11 Exch. 19; 3 C. L. R. 1440; 24 L. J. Ex. 281; 25 L. T. O. S. 85; 1 Jur. N. S. 1142; 3 W. R. 406; 156 E. R. 728.

*Annotations:—**Mentd. Dunlop v. Macedo* (1891), 8 T. L. R. 43; *Ocean Accident & Guarantee Corp'n. v. Ilford Gas Co.*, [1905] 2 K. B. 493; *Elliott v. Boynton*, [1924] 1 Ch. 236.

SUB-SECT. 2.—BY PARENT.

499. Entry into possession by parent—As trustee—Claim to possession by curtesy barred.]—A husband survived his wife, who was one of several equitable tenants in common. He was advised by counsel that he had no title as tenant by the curtesy, his wife never having been in possession, & that if he intended to set up such a title, he ought not to sue with his infant daughter in a partition suit which was then in contemplation. The suit was nevertheless instituted by him as the next friend of the daughter, & in 1830 a decree was obtained. A partition was made under the decree, & the legal estate in the daughter's share conveyed to the use of the father during the infancy of the daughter, in trust for her maintenance, & afterwards for her own use in fee. The daughter attained twenty-one in 1843, & married in 1847. In 1852 the father filed a bill to be relieved from the trusts, on the ground of mistake, & to have his title as tenant by the curtesy established:—*Held*: (1) length of time & acquiescence, & the marriage of the daughter, although without the father's consent, before the father disputed the daughter's title, constituted a sufficient answer to the suit; (2) possession obtained in the character of trustee could not be retained as one adverse to the *cestui que trust*, after the legal estate under which the possession was taken had determined; (3) the fact of the marriage having taken place on the faith of the daughter's interest being free from any estate by the curtesy, was sufficiently put in issue by statements in the answer to the effect that up to the marriage the father always told the daughter that the moneys which he paid her were the balance of

been made; *pltf.* was entitled to the account asked, & as regarded the increase or profits in the dealings with the capital of the estate, these should be apportioned in accordance with the amount of such capital owned respectively by testator & *deft.* W., & the latter should be allowed a liberal remuneration for his exertions, care, time, & trouble in the management of the estate, which appeared to have

been skilful & successful.—*BURN v. BURN* (1885), 8 O. R. 237.—*CAN.*

PART VIII. SECT. 4, SUB-SECT. 2.

*k. Parent & children co-tenants—Liability of parent to account.]—*Although the general rule is, that the mere fact of one tenant in common holding possession of the entire estate will not render him liable to a co-

the rents after deducting the expenses of her maintenance, & that the land was her property, & never made any claim of right to them on his part.—*STONE v. GODFREY* (1854), 5 De G. M. & G. 76; 2 Eq. Rep. 866; 23 L. J. Ch. 769; 23 L. T. O. S. 289; 18 Jur. 524; 43 E. R. 798, L. JJ.

*Annotations:—**As to* (1) *Consd. Bill v. Richards* (1857), 2 H. & N. 311. *Reid. Re Saxon Life Assce. Soc., Anchor Assce. Case, Era Assce. Soc.'s Case, Re Era Assce. Soc., Williams' Case, Anchor Assce. Case* (1863), 32 L. J. Ch. 206. *Generally, Mentd. Rogers v. Ingham* (1876), 3 Ch. D. 351; *Re Bowman, Re Lay, Whytehead v. Boulton* (1889), 60 L. T. 888; *Gas Light & Coke Co. v. Met. Ry.* (1892), 9 T. L. R. 98; *Allcard v. Walker*, [1896] 2 Ch. 369; *Carnell v. Harrison*, [1916] 1 Ch. 328; *Re Musgrave, Machell v. Parry*, [1916] 2 Ch. 417; *Burroughes v. Abbott*, [1922] 1 Ch. 86.

500. — Parent holds as bailiff for infant—Possession retained beyond minority—Liability to account.]—When a father has entered upon the estate of his infant children the presumption is that he entered as their guardian & bailiff, & therefore Stat. Limitations does not begin to run against the children until they attain twenty-one, & from that time at least a child has twenty years within which he may recover possession. *Semble*: entry by a stranger might not have this effect.

If the father retain possession after the children attain twenty-one such possession will be considered to be continued in the character in which he entered, so that an account will be directed, not from the filing of the bill, but, if necessary, from the time of entry.

In an adverse suit, in the nature of an ejectment suit, against a person in no fiduciary relation to *pltf.* this account is only directed from the time of filing the bill.

If a wife concurs with her husband in mortgaging property over which she has a power, the husband is primarily liable, unless the wife received the money for her separate use; & the *ct.* will direct an inquiry as to this fact.—*THOMAS v. THOMAS* (1855), 2 K. & J. 79; 25 L. J. Ch. 159; 1 Jur. N. S. 1160; 4 W. R. 135; 69 E. R. 701.

*Annotations:—**Consd. Pelly v. Bascombe* (1863), 4 Giff. 390. *Expld. Tinker v. Rodwell* (1893), 69 L. T. 591. *Reid. Wall v. Stanwick* (1887), 34 Ch. D. 763; *Re Biss, Biss v. Biss*, [1903] 2 Ch. 40. *Mentd. Corea v. Appuhamy*, [1912] A. C. 230; *Aloysia Muttunayagam v. Brito*, [1918] A. C. 895.

501. — — — — —.]—The owner of a public-house & cottages devised them to his widow during her life or widowhood, with remainder to his four infant children. His widow married again, but continued to reside in & manage the public-house; & she received the rents of the cottages & maintained the children. One of the children whilst still an infant married, but she & her husband for some months resided in the public-house. They then left it & had not since received anything from the estate of testator. She & her husband brought an action against her mother for one-fourth of the rents & profits:—*Held*: (1) after her second marriage the mother was in possession as bailiff for her infant children, & not as guardian by nurture, or by leave of her children, or as a trespasser, & was therefore a trustee & liable to account; (2) though on the daughter's marriage the right to receive the rents passed to her husband, this did not change the

tenant, who might himself enter & enjoy the possession with the other, & the *ct.* will not in such a case interfere with the dealing of such co-tenant in regard to the property; still, where the co-tenant in possession was the mother of the other co-tenants, all of whom were infants at the time of her second marriage, the *ct.* at the instance of one of the children who had attained majority, restrained the husband &

character of the mother's possession; (3) it was not changed when the daughter came of age & the mother was liable to account to the daughter & her husband for the rents & profits.—*WALL v. STANWICK* (1887), 34 Ch. D. 763; 56 L. J. Ch. 501; 56 L. T. 309; 35 W. R. 701; 3 T. L. R. 434.

Annotations :—*Reid*. *Tinker v. Rodwell* (1893), 69 L. T. 591; *Garner v. Wingrove* (1905), 53 W. R. 588.

502. ————.]—Where a father has entered into possession of real property as natural guardian, & on behalf of his infant son, the mere fact of the coming of age of the son will not alter the nature of the father's possession: & if nothing else has been done to change the character of the possession, Stat. Limitations will not begin to run in favour of a person claiming against the son, until the death of the father.—*TINKER v. RODWELL* (1893), 69 L. T. 591; 9 T. L. R. 657; 8 R. 1.

503. ———— Infant daughter—Effect of daughter's marriage.]—*WALL v. STANWICK*, No. 501, *ante*.

504. ————.]—A father & his wife were entitled as tenants in common in fee to gavelkind land. The wife died in May 1870, leaving two sons, S. & J. At the time of his mother's death J. was an infant. He attained twenty-one in 1877, & died in May 1884. On the mother's death her moiety descended to her two sons as her co-heirs, according to the custom of gavelkind, subject to the right of the father to a moiety of the rents so long as he remained a widower. On the death of the mother the father entered into receipt of the whole of the rents of her moiety without accounting to his sons or making any acknowledgment in writing of their title for more than twelve years. In Feb. 1884, the father married again. He died in Nov. 1884:—*Held*: (1) as to the one-eighth of the property to which J. became entitled in possession on the death of his mother, the father must be presumed to have entered into receipt of the rents as bailiff for his infant son, & consequently, the title of J. was not barred by Real Property Limitation Act, 1833 (c. 27), s. 12; (2) as to S.'s own one-eighth, the same presumption did not arise, & as there was no evidence that the father had received the rents as agent for S., or had, before the expiration of twelve years, acknowledged his title in writing or accounted to him for the rents, S.'s title to that one-eighth was barred by the statute.—*Re HOBBS*, *HOBBS v. WADE* (1887), 36 Ch. D. 553; 57 L. J. Ch. 184; 58 L. T. 9; 36 W. R. 445.

Annotations :—*As to* (1) *Consd.* *Tinker v. Rodwell* (1893), 69 L. T. 591. *Reid*. *Garner v. Wingrove* (1905), 53 W. R. 588.

505. Proceedings against parent—For waste.]—*ANON.* (1308), Y. B. (Sel. Soc.) 2 Edw. 2, Vol. II. p. 35.

506. ———— Injunction.]—An injunction was granted against the father of an infant proprietor at the instance of the infant by her guardian to stay waste committed by felling timber which defts. had contracted for in the lifetime of the infant's mother who was then tenant in tail. The father was tenant by the curtesy of the lands, the remainder in tail being in the infant:—*Held*: in such a case any person might act as guardian of

the infant against the father, waste being by a forfeiture of the father's guardianship, & the contract was not of much importance in the matter.—*ROBERTS v. ROBERTS* (1657), Hard. 96 145 E. R. 399.

507. ———— Security for due performance of trust—Alternative order to hand over property.]—Money of an infant was in the hands of her father as trustee. He had remarried & there was reason to suspect that he would not fairly perform his trust. Decreed, he should give security to perform the trust if he intended to continue in the same; & if he refused, he was to pay the money to another person on security to be allowed by the master, who was to see to the money being invested.—*KERLING v. CHILD* (1678), Cas. temp. Finch, 360; 23 E. R. 197.

508. ———— Appointment of receiver—Parent of dissolute character.]—*KIFFIN v. KIFFIN* (prior to 1721), cited in 1 P. Wms. at p. 705.
Annotation :—*Reid*. *Beaufort v. Berty* (1721), 1 P. Wms. 703.

509. ———— Operation of Statute of Limitations—As against infants.]—*THOMAS v. THOMAS*, No. 500, *ante*.

510. ————.]—*Re HOBBS*, *HOBBS v. WADE*, No. 504, *ante*.

511. ———— Adverse claim of stranger.]—*TINKER v. RODWELL*, No. 502, *ante*.

See, generally, LIMITATION OF ACTIONS.

512. Liability of executors of parent.]—Defts. exors. to their father, being guardian in socage to plaintiff, are ordered to answer for profits taken by him.—*BURGH v. WENTWORTH* (1576), Cary, 54; 21 E. R. 29.

SUB-SECT. 3.—BY GUARDIANS.

513. Liability to account.]—*TYAS v. TALBOT* (1674), 2 Cas. in Ch. 199; 22 E. R. 910.

514. ———— Guardian in socage—Yearly account.]—Guardian in socage in poor circumstances ordered to account yearly, but not to give security until some default.—*HANBURY v. WALKER* (1671), Nels. 144; 3 Rep. Ch. 58; 21 E. R. 811.

515. ————.]—The law for several purposes takes notice of the age of infants. He may contract matrimony at the age of twelve, at fourteen he may choose his guardian, at the same age he may sue his guardian by socage to account as bailiff.—*R. v. WEEKS* (1734), Kel. W. 290; 25 E. R. 620.

516. ————.]—*GOODTITLE d. NEWMAN v. NEWMAN* (1774), 3 Wils. 516; 2 Wm. Bl. 938; 95 E. R. 1188.

Annotations :—*Reid*. *R. v. Sutton* (1835), 3 Ad. & El. 597; *Richards v. Richards* (1860), John. 754; *Wall v. Stanwick* (1887), 34 Ch. D. 763.

517. ———— Bond taken for arrears of rent.]—A guardian who takes a bond in his own name for arrears of rent thereby makes it his own debt.—*WALL v. BUCKLEY* (1675), 2 Rep. Ch. 97; 21 E. R. 627.

518. ———— Infant's money lent on security—Affirmation or repudiation by infant.]—If a guardian for an infant puts out money, it is at his peril, & the infant when he comes of age may elect either to take the securities or make the

wife from selling or disposing of the crops of the current year or the proceeds thereof, unless they undertook to bring into court one-third of such proceeds; but refused to interfere with the possession of the mother & her husband in respect of previous years; although as to such years the

mother might have been accountable to her infant children as trustee for them.—*BATES v. MARTIN* (1866), 12 Gr. 490.—*CAN.*

PART VIII. SECT. 4, SUB-SECT. 3.

1. Release by infant—Assignments & dealings not impugned on majority.]—

Assignments by a minor to his tutor, though voidable, impeached after a lapse of years, sustained, the evidence establishing that subsequent dealings had taken place between the minor & tutor, after the former was of age, which amounted to a release of all claims on the part of the minor. The

Sect. 4.—Protection of property—liability to account: Sub-sects. 3 & 4. Sect. 5.]

guardian account for the money; but he cannot take part of the securities & reject the rest, but must take all or none. But whatever profit the guardian makes of the infant's money he is accountable for it.—*KIRK v. WEBB* (1698), *Freem. Ch.* 229; *Prec. Ch.* 84; 2 *Eq. Cas. Abr.* 743; 22 *E. R.* 1177; *affd.* (1699), 2 *Eq. Cas. Abr.* 744, *H. L.* *Annotations:—Refd.* *Halcott v. Markant* (1701), *Prec. Ch.* 168; *Kinder v. Miller* (1701), *Prec. Ch.* 171; *Hooper v. Eyles & Rideout* (1704), 2 *Vern.* 480. *Mentd.* *Heron v. Heron* (1701), *Prec. Ch.* 163; *Lane v. Dighton* (1762), *Amb.* 409; *Taylor v. Plumer* (1815), 3 *M. & S.* 562.

519. ——— Accountability for profit made.]

—*KIRK v. WEBB*, No. 518, *ante.*

520. ——— At instance of stranger.]—DUDLEY'S (LORD) CASE (1722), cited in 2 Ves. Sen. 484; 28 E. R. 310, L. C.

Annotations:—Refd. *Eyre v. Shaftesbury* (1725), 2 *P. Wms.* 102; *Pomfret v. Windsor* (1752), 2 *Ves. Sen.* 472.

521. ———.]—(1) A guardianship devised to three without saying “& to the survivors or survivor of them” yet the survivor shall have it.

(2) Though an infant cannot bring an account against his guardian until his coming of age yet a third person may bring such bill for an account, even during the minority of the infant.

(3) That a guardianship is coupled with an interest is most apparent, in that a guardian may bring an action & avow in his own name, may make leases during the minority of the infant, & may grant copyholds even in reversion as *dominus pro tempore* (*LORD JEKYLL*).—*EYRE v. SHAFTSBURY (COUNTESS)* (1725), 2 *P. Wms.* 102; 2 *Eq. Cas. Abr.* 710, 755; 24 *E. R.* 659; *sub nom.* *SHAFTSBURY (EARL) v. SHAFTSBURY*, *Gilb. Ch.* 172.

Annotations:—As to (1) Consd. *Bell v. Holtby* (1873), *L. R.* 15 *Eq.* 178. *Refd.* *Mansell v. Mansell* (1757), *Wilm.* 36. *As to (2) Refd.* *Pomfret v. Windsor* (1752), 2 *Ves. Sen.* 472. *Generally, Mentd.* *Raymond's Case* (1734), *Cas. temp. Talb.* 58; *A.-G. v. Downing* (1767), *Wilm.* 1; *R. v. Green* (1781), 3 *Doug. K. B.* 36; *De Manneville v. De Manneville* (1804), 10 *Ves.* 52; *Re Long Wellesley* (1831), 2 *State Tr. N. S.* 911; *A.-G. v. Brodie* (1846), 11 *Jur.* 137, n.; *A.-G. v. Magdalen College, Oxford* (1854), 18 *Beav.* 223.

522. ——— Administration pendente lite.]—The guardian of a minor is obliged to exhibit an inventory & account of an administration *pendente lite*.—*BROTHERTON v. HELLIER* (1755), 2 *Lee*, 131; 161 *E. R.* 289.

523. ——— Guardian continuing to manage after full age.]—Where a guardian, after his ward attains full age, continues to manage the property at the request of the ward, & before the accounts of his receipts & payments during the minority are settled, it is, in effect, a continuance of the guardianship as to the property; & he must account on the same principle as if they were transactions during the minority.

Under these circumstances, an injunction was granted, on terms, to restrain the guardian from proceeding in an action to recover the balance claimed by him on account of the transactions after his ward came of age.—*MELLISH v. MELLISH* (1823), 1 *Sim. & St.* 138; 1 *L. J. O. S. Ch.* 120; 57 *E. R.* 56.

Annotation:—Consd. *Mathew v. Brise* (1851), 14 *Beav.* 341.

524. ——— Whether relative or not—Infant heir.]—*BARNES v. ROSS*, No. 946, *post.*

fact that such assignments & dealings had not been impugned by the minor, when of age, until after the death of the tutor, speaks strongly against the claim of the minor for an account & inventory, & to set aside the assign-

1.—*MOTZ v. MOREAU* (1859-61), 13 *Moo. P. O. C.* 376; 15 *E. R.* 142.—*CAN.*

m. No power to encumber ward's raising loan.]—*Held*: the

525. ——— After proper allowance for maintenance & education.]—By the will of testator who died in 1901 the widow was left a moiety of the estate for life, the other moiety being left in trust for his two children, a son & daughter. The will provided that the trustees in the exercise of their statutory power to pay the whole or any part of the income of property held in trust for infants to parents or guardians should not be liable to account, but should have full power to pay the whole income to the widow, who was appointed guardian; she maintaining his children thereout. An income of £3,000 a year for the maintenance of the children was agreed upon, & £18,847, paid to the widow between the death of the father & the date at which the son attained the age of twenty-one. The son was not properly maintained; he required special medical attention, but his welfare was the last consideration & economy the first. The committee of the son's estate asked for a declaration that the son had not been properly maintained during the period between the death of his father & his attaining twenty-one, & to have an account taken on that footing:—*Held*: where money was paid on a condition, the ct. would see the condition strictly fulfilled. The widow had not performed the condition upon which the money was paid, & there must be a declaration that the widow was liable to account for the £18,847, but she was entitled to be allowed a proper sum for the maintenance & education of pltf. & his sister during the same period.—*MACRAE v. HARNESS* (1910), 103 *L. T.* 629.

—Guardian also trustee.]—*See* No. 530, *post.*

526. Release by infant—Whether estopped from further account—Release by husband of infant wife.]—*OSBORNE v. CHAPMAN* (1683), 2 *Cas. in Ch.* 157; 22 *E. R.* 893.

527. ——— Expenditure ratified after majority.]—Expenditure by a guardian during minority ratified by subsequent adoption.—*NEWHAM v. NEWHAM* (1822), 1 *L. J. O. S. Ch.* 23.

528. ——— Set aside—Reopening account.] The guardian of an infant had superintended his property, & had maintained & educated him, since the age of three years, & finding his property in a dilapidated condition, had greatly & permanently improved it: but, in so doing, such guardian had expended £5,000 more than his receipts, for which excess he had provided by mortgaging the infant's property: the guardian had also, on the infant's attaining his majority in 1846, obtained from him a release:—*Held*: that as no undue influence or control had been proved, the release was binding, except so far as related to the mtge., & the settled accounts could not be opened, & the bill as to these must be dismissed with costs.—*DACRE v. STRACHAN* (1856), 27 *L. T. O. S.* 325; 4 *W. R.* 401.

—.]—*See, generally*, Part III., Sect. 15, *ante.*

SUB-SECT. 4.—BY TRUSTEES.

529. Surplus beyond requirement for maintenance.]—*BROWNE v. PAULL, HOGGINS v. PAULL*, No. 1009, *post.*

530. Trustee also co-guardian—Maintenance of infant—Discharge of liability as trustee—Vouching items of expenditure.]—Although the receipts of a

guardian of a minor had no authority to involve the ward's estate in debt for the purpose of purchasing lands to be added to his estate.—*BURRAYA v. RAMAYYA* (1923), 1 *L. R.* 47 *Mad.* 449.—*IND.*

guardian for income paid to him by a trustee for an infant's maintenance discharge the trustee, yet where that trustee is also co-guardian he does not discharge himself merely by showing that he has paid the income to his co-guardian.

It will be necessary for him to show that the infant has been reasonably & properly maintained by his co-guardian, having regard to its position but he will be allowed in his accounts as trustee the amount which is found reasonable to be allowed for the infant's maintenance, without the necessity of vouching all the items of expenditure.—*Re EVANS, WELCH v. CHANNELL* (1884), 26 Ch. D. 58; 51 L. T. 175; 32 W. R. 736; *sub nom. Re EVANS, WELSH v. CHANNELL*, 53 L. J. Ch. 709, C. A.

Maintenance generally.—See Part X., Sect. 1, *post*.

SECT. 5.—MANAGEMENT OF PROPERTY.

531. By guardian — Discharge of incumbrances on estate—Out of infant's property—Payment out of personalty.—*ZOACH v. LLOYD* (prior to 1690), cited in 2 Vern. at p. 193; 23 E. R. 726.

532. — — — — —.]—*DENNIS v. BADD* (1670), 1 Cas. in Ch. 156; 22 E. R. 740.

Annotation:—*Distd. Winchelsea v. Norcliffe* (1686), 1 Vern. 435.

533. — — — — —.]—An estate having descended to an infant, subject to incumbrances; & the question being, whether a guardian might, without the direction of a ct. of equity, apply the profits to discharge the incumbrances, or the interest of them, or whether they should not be accounted personal estate; & so the administrator of the infant be entitled to them, if the infant died in his minority:—*Held*: a guardian, without any direction, might pay the interest of any real incumbrance, & the principal of a mtge.; because that is a direct & immediate charge on the land; but not any other real incumbrance.—*PALMER v. DANBY* (1700), 1 Eq. Cas. Abr. 261; 5 Russ. 253; Prec. Ch. 137; 21 E. R. 1033.

Annotations:—*Mentd. Anon.* (1699), 12 Mod. Rep. 343; *Banks v. Sutton* (1732), 2 P. Wms. 700; *Partridge v. Osborne* (1828), 5 Russ. 195.

534. — — — — — **Keeping down interest.**—The guardian of an infant, who is in the possession of an estate mortgaged which came to the infant, must out of the profits keep down the interest, & not let it run on to increase the personal estate, which possibly the guardian may be in expectation of.—*ANON.* (1725), 2 Eq. Cas. Abr. 488; 22 E. R. 414; *sub nom. JENNINGS v. LOOKS*, 2 P. Wms. 276.

Annotations:—*Mentd. Chandos v. Talbot* (1731), 2 P. Wms. 601; *Prowse v. Abingdon* (1738), West *temp. Hard.* 312; *Anon.* (1744), 2 Eq. Cas. Abr. 551; *Basset v. Basset* (1744), 3 Atk. 203; *Reynish v. Martin* (1746), 3 Atk. 330.

535. — — — — — **Bond debts.**—A guardian is not compellable to apply the profits of the lands,

descended on the infant heir, to pay off the bond debts of the ancestor.—*WATERS v. EBRALL* (1707), 2 Vern. 606; 23 E. R. 996.

536. — — — — —.]—A. had a son & three daughters, & was seized of some lands in fee, & of others in tail, & by his will devised his fee simple lands to his daughters, & died leaving all his children infants. His widow took the profits of both estates as guardian to her children; & in a bill brought by the son & daughters against the mother for an account of the personal estate & of the rents & profits of the real estate the mother swore that she had paid bond debts due from testator out of the entailed estates, & afterwards died insolvent. As the answer could not be read against the daughters, & there was no other evidence, & since the guardian ought to have paid the bonds only out of the fee simple estate; payment should be intended to have been made only out of the fund, which ought to have borne it.—*CHAPLIN v. CHAPLIN* (1735), 3 P. Wms. 365; 24 E. R. 1103, L. C.

Annotation:—*Mentd. Price v. Carver* (1837), 3 My. & Cr. 157.

537. — — — — — **Out of money borrowed by guardian—Death of guardian before repayment.**—Guardian borrowed money of A. to pay off an incumbrance on the infant's estate, & promised to give A. a security for his money, but died before it was done. Though A.'s money was applied to pay off the incumbrance; yet the ct. would not decree him a satisfaction of his debt out of the infant's estate.—*HOOPER v. EYLES* (1704), 2 Vern. 480; 23 E. R. 908.

538. — — — — — **Right to commit waste.**—Waste by guardian turning ancient pasture into arable however beneficial.—*CLARK v. THORP* (1751), 2 Ves. Sen. 232; 28 E. R. 150, L. C.

539. — — — — — **Right to cut timber.**—Guardian or trustee for an infant, who had a contingent estate, cannot cut timber of his own authority, though it may be fit for cutting, or even for a probable benefit. Though such an act may not amount to waste, he will still be enjoined.—*KNIGHT v. DUPLESSIS* (1751), 2 Ves. Sen. 360; 28 E. R. 230, L. C.

Annotations:—*Mentd. Burges v. Lamb* (1809), 16 Ves. 174; *Dashwood v. Magniac*, [1891] 3 Ch. 306.

540. By trustees—Savings invested in purchase of land—Death of infant under age—Trustees accountable to infant's executors.—Trustees of an infant, having saved £3,000 out of the profits of his estate, lay it out in a purchase of lands lying near the infant's estate, with the consent of his grandmother; declaring the trust for the benefit of the infant, if he when at age shall agree to it. Infant dies within age; the trustees shall account to the infant's exors. for the £3,000 but the profits of the land set against the interest.—*WINCHELSEA (EARL) v. NORCLIFFE* (1686), 1 Vern. 435; Freem. Ch. 95; 2 Rep. Ch. 367; 23 E. R. 569.

Annotations:—*Held. Inwood v. Twyne* (1762), Amb. 417. *Mentd. Wallis v. Hodson* (1740), Barn. Ch. 272.

PART VIII. SECT. 5.

n. By guardian — Right to give good discharge for legacy.—When an infant is entitled to a vested legacy, payment thereof, during his minority, by the exor., to the testamentary guardian, is valid, inasmuch as the guardian is enabled by statute to give a good acquittance. Such a payment is valid, although the period directed by testator for payment of the vested legacy to the infant is the attainment of age or marriage.

A. bequeathed to his eight younger children all his property, share & share alike, on their attaining their respective ages, or marriage with consent

of their guardian; & directed that the interest arising from their respective shares should be applied in the meantime to their maintenance & education, & appointed a guardian & an exor.:—*Held*: a payment, during the minority of the children, of a part of the corpus of the personal estate of A., by the exor., to the guardian, was a valid payment.—*M'CRIGHT v. M'CRIGHT* (1849), 13 I. Eq. R. 314; 2 Ir. Jur. 17.

o. By trustees—Appointed by court.—Under the will of a testator an infant was, in the events that happened, entitled to receive one undivided share of the income of real

estate with remainder in an undivided share of the fee-simple of the lands, contingent on surviving his father & on attainment of twenty-one years or marriage. The trustees of testator's will were directed to pay his share of income to the infant, but had no power of sale of the settled land or of consenting thereto:—*Held*: the trustees of the will did not come within the enabling provisions of Conveyancing Act, 1881 (c. 41), s. 43, & the ct. had power to appoint them trustees for the purposes of sect. 42 of the Act to enable them at their discretion to apply the share of income, & accumulations thereof, to which the infant was

Sect. 5.—Management of property. Sects. 6, 7 & 8:
Sub-sect. 1, A.]

541. Right to cut timber.]—KNIGHT *v.* DUPLESSIS, No. 539, *ante*.

542. — Insurance of property—Destruction by fire—Insurance money payable to infant.]—During the infancy of a tenant in tail of freehold estates devised in strict settlement, part of which consisted of a corn-mill let on lease, the rents were received by his mother on his behalf & she thereout paid the premiums necessary for keeping up a policy which had been effected in her name for insuring the mill against fire. The will contained no provision for fire insurance. The mill having been burnt down & it not being considered for the benefit of any person interested in the settled estates that it should be rebuilt:—*Held*: the insurance moneys belonged to the infant tenant in tail as his personal estate & were not to be treated as real estate for the benefit of all persons interested in the settled estates.—WARWICKER *v.* BRETNALL (1882), 23 Ch. D. 188; 31 W. R. 520.

*Annotations:—*Reid. *Re* Quicke's Trusts, Poltimore *v.* Quicke, [1908] 1 Ch. 887. *Mentd.* Gaussen *v.* Whatman (1905), 93 L. T. 101.

Compare No. 637, *post*.

543. — Appointed by court—Infant taking by descent.]—Conveyancing & Law of Property Act, 1881 (c. 41), s. 42 (1), enabling the ct. to appoint trustees on the application of a guardian or next friend of an infant beneficially entitled to the possession of any land, applies to the case of an infant taking by descent.—*Re* COWLEY, [1901] 1 Ch. 38; 70 L. J. Ch. 88; 83 L. T. 729.

— *Settled land.]—See* Sect. 10, *post*.

544. Petition by next friend—Repairs.]—HOOD *v.* BRIDPORT (1852), 19 L. T. O. S. 244; 16 Jur. 560.

SECT. 6.—COPYHOLDS.

See, now, Law of Property Act, 1922 (c. 16), ss. 128–144, 189, Schedules 12–14.

SECT. 7.—ECCLESIASTICAL PATRONAGE.

See, generally, ECCLESIASTICAL LAW, Vol. XIX., pp. 370 et seq.

545. Infant may present to benefice.]—GRANGE *v.* TIVING, No. 103, *ante*.

546. — At whatever age—Assistance of guardian.]—An infant of one or two years old may present at law; then why may they not nominate? Does the putting of a mark & seal to a nomination require more discretion than to a presentation? The guardian is supposed to find a fit person, & the bishop to confirm his choice & if this is permitted at law, why should a ct. of equity act otherwise in equitable estates (LORD KING, C.).—ARTHINGTON *v.* COVERLY (1733), 2 Eq. Cas. Abr. 518; 22 E. R. 439, L. C.

547. — — —.]—HEARLE *v.* GREENBANK, No. 100, *ante*.

548. (1) An attachment awarded against the *prochein ami* of pltf. for non-payment of costs after judgment for debt.

(2) The *prochein amis* may have satisfaction over against the infants & generally they take security (FORTESCUE ALAND, J.).

entitled for his benefit.—TUTHILL *v.* TUTHILL, [1902] 1 I. R. 429.—IR.

P. — Right to compensation for improvements.]—The principle that

when a trustee expends his money upon the estate, & thereby increases its value, the property will not be wrested from him without repaying him the expenditure by which the estate has

(3) An infant by law may make a presentation to a benefice, though of never such tender years (WILLES, C.J.).—SLAUGHTER *v.* TALBOTT (1739), Willes, 190; 125 E. R. 1125.

*Annotations:—*As to (1) Reid. Sinclair *v.* Sinclair (1845), 13 M. & W. 640; Collins *v.* Brook (1860), 5 H. & N. 700. As to (2) Reid. Collins *v.* Brook (1860), 5 H. & N. 700.

549. — Guardian to find proper person.]—ARTHINGTON *v.* COVERLY, No. 546, *ante*.

550. —.]—ZOUCH *d.* ABBOT & HALLET *v.* PARSONS, No. 28, *ante*.

551. —.]—ODDIE *v.* WOODFORD (1825), 3 My. & Cr. 584; 40 E. R. 1052.

*Annotations:—*Mentd. Bernal *v.* Bernal (1838), 3 My. & Cr. 559; Doe *d.* Angell *v.* Angell (1846), 9 Q. B. 328; Boys *v.* Bradley (1853), 10 Hare, 389; Bythessea *v.* Bythessea (1854), 23 L. J. Ch. 1004; Thellusson *v.* Rendlesham (1859), 7 H. L. Cas. 429; Galloway *v.* London Corpn. (1865), 3 De G. J. & Sm. 59.

552. Right to grant next avoidance.]—STEVENS *v.* LINCOLN (Bp.) (1628), Het. 20; 124 E. R. 308.

553. —.]—GRANGE *v.* TIVING, No. 103, *ante*.

554. Power to consent to sale of glebe lands—Vested in guardian—Not trustees of settlement—Infant tenant in tail.]—An Act authorised the sale of glebe land with the consent of the patron to be given in case of the infancy of the patron by his guardian. An infant was tenant in tail male under a settlement which gave trustees the right of presentation during the minority of the tenant in tail:—*Held*: the trustees were not patrons within the meaning of the Act, & the guardian of the infant was the proper person to give the consent of the patron to a sale of glebe land.—LEIGH *v.* LEIGH, [1902] 1 Ch. 400; 71 L. J. Ch. 195; 86 L. T. 219; 50 W. R. 380.

SECT. 8.—LEASES AND LEASEHOLDS.

SUB-SECT. 1.—ACQUISITION AND TENURE.

A. In General.

Incapacity of infant to hold legal estate.]—*See, now, Law of Property Act, 1925 (c. 20), ss. 1 (6), 39 (3), Sched. I., Part III.*

555. Lease voidable.]—A lease to an infant is not void, but voidable only; & if it be beneficial to him, he is liable to an action of debt for the rent reserved. Where an infant lessee occupies & enjoys the land demised, he is liable to pay the rent reserved.—KETSEY'S CASE (1613), Cro. Jac. 320; 79 E. R. 274; *sub nom.* KETELEY'S CASE 1 Brownl. 120; *sub nom.* KIRTON *v.* ELIOTT, 2 Bulst. 69.

*Annotations:—*Consd. Holmes *v.* Blogg (1817), 1 Moore, C. P. 466. Newry & Enniskillen Ry. *v.* Coombe (1849), 3 Exch. 565; N. W. Ry. *v.* M'Michael, Birkenhead, Lancashire & Cheshire Junction Ry. *v.* Pilcher (1851), 5 Exch. 114; *Apld.* Lempriere *v.* Lange (1879), 41 L. T. 378. *Consd.* *Re* Jones, *Ex p.* Jones (1881), 18 Ch. D. 109. *Reid.* Evelyn *v.* Chichester (1765), 3 Burr. 1717; Leeds & Thirsk Ry. *v.* Fearnley (1849), 4 Exch. 26; Clements *v.* L. & N. W. Ry. (1894), 70 L. T. 896; Leslie *v.* Sheill, [1914] 3 K. B. 607.

556. — New lease in place of old—New lease of greater interest.]—The surrender of an infant lessee by deed is void; but his surrender in law by the acceptance of a new lease is good, if such new lease increase his term or decrease his rent.—LLOYD *v.* GREGORY (1638), Cro. Car. 501; W. Jo. 405; 79 E. R. 1032.

*Annotations:—*Consd. Zouch *d.* Abbot & Hallet *v.* Parsons (1765), 3 Burr. 1794. *Reid.* Thompson *v.* Leach (1695), 1 Ld. Raym. 313. *Mentd.* Lyn *v.* Wyn (1665), O. Bridg.

been substantially improved acted upon in the case of an infant *cestui que trust*.—BEVIS *v.* BOULTON (1858), 7 Gr. 89.—CAN.

122; *Southwell Church v. Lincoln* (Bp.) (1675), 1 Mod. Rep. 204; *Wilson v. Sewell* (1766), 4 Burr. 1794; *Roe d. Berkeley v. York* (Archbp.) (1805), 6 East, 86; *Doe d. Egremont v. Forwood* (1842), 11 L. J. Q. B. 321; *Doe d. Biddulph v. Poole* (1848), 11 Q. B. 713.

557. — Acts amounting to adoption — After attaining age.—The right of a proprietor of estates adjoining the sea to work the coal below low water mark was challenged by the Crown during the proprietor's minority. The estates to which the minor had succeeded consisted in part of entailed & in part of unentailed lands. The administration of the unentailed lands was vested in the testamentary trustees of the minor's father, who were also curators of the minor. These trustees, without the concurrence of the minor, entered into a transaction with the Crown whereby they on their part accepted a lease of the whole coal below low water mark *ex adverso* of both the entailed & unentailed lands, & the Crown agreed not to claim damages in respect of coal which had been worked in the past. After the proprietor came of age, he accepted an assignment of the lease & subsequently applied for & obtained from the Crown a reduction of the royalty payable under the lease, & a modification of the whole mode of working the coal. When the proprietor so acted in regard to the lease he was unaware that he had a claim to some of the coal below low water mark. In an action brought by the proprietor fourteen years after he had reached majority, concluding, (*inter alia*) for a declarator that he was not bound by the lease:—*Held*: the actings of the proprietor after he came of age barred him challenging the lease.—**LORD ADVOCATE v. WEMYSS**, [1900] A. C. 48, H. L.

Annotation:—**Mentd.** Secretary of State for India v. Sri Rajah Chelikani Rama Rao (1916), 85 L. J. P. C. 222.

558. Liability of infant lessee—Rent — Where possession taken.—**BOTTILLER v. NEWPORT** (1443), Y. B. 21 Hen. 6 fo. 31, b.

Annotations:—**Consd.** Keeley's Case (1613), 1 Brownl. 120; N. W. Ry. v. M'Michael, Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher (1851), 5 Exch. 121. **Refd.** Pinchon's Case (1611), 9 Co. Rep. 86 b; Ivo v. Chester (1620), Cro. Jac. 560; Gylbert v. Fletcher (1630), Cro. Car. 179; Rudston's & Yates Case (1641), March. 141; **Mentd.** R. v. Callingwood, R. v. Daniel (1704), 2 Ld. Raym. 1116; Keble v. Hickerlingell (1707), Kel. W. 273.

559. — — — — —.] — KETSEY'S CASE, No. 555, *ante*.

560. — — — — —.] — NORTH WESTERN RY. CO. v. M'MICHAEL, BIRKENHEAD, LANCASHIRE, & CHESHIRE JUNCTION RY. CO. v. PILCHER, No. 187, *ante*.

561. — — — — — Lease beneficial.] — KETSEY'S CASE, No. 555, *ante*.

562. — — — — — Distress — Tenancy by descent.] — The heir of the tenant who has the tenancy by descent may be distrained for the rent, etc. [in] arrear during his minority (per CUR.). — CONNY'S CASE (1611), 9 Co. Rep. 84, b.; 77 E. R. 854.

Annotations:—**Refd.** R. v. Dilliston (1688), 1 Show. 31;

Zouch d. Abbot & Hallet v. Parsons (1765), 3 Burr. 1794; *R. v. Sutton* (1835), 5 Nev. & M. K. B. 353.

563. — — — — — Use & occupation—Lodgings let for purposes of prostitution.] — CRISP v. CHURCHILL (1794), cited in 1 Bos. & P. at p. 340; 126 E. R. 939.

564. — — — — — Premises necessary for infant's station in life.] — Deft., an infant in low circumstances, hired of pltf. a house containing five rooms, (at the rent of £15 *per annum*), in which he carried on his business of a barber. In an action for use & occupation, it was left to the jury to say whether such a house was necessary for a person in the station of life of deft.:—The jury having found in the negative, the ct. refused to disturb the verdict.—LOWE v. GRIFFITH (1835), 1 Hodg. 30; 1 Scott. 458; 4 L. J. C. P. 94.

Annotation:—**Refd.** Brayshaw v. Eaton (1839), 8 L. J. C. P. 153.

565. Position of lessor — Misrepresentation of infant's age—Lease avoided.] — BUCKINGHAMSHIRE (EARL) v. DRURY (1762), 3 Bro. Parl. Cas. 492; 2 Eden. 60; Wilm. 177; 1 E. R. 1454, H. L.; *varying S. C. sub nom. DRURY v. DRURY*, 2 Eden. 39

Annotations:—**Fold.** Maddon v. White (1787), 2 Term Rep. 159. **Consd.** Caruthers v. Caruthers (1794), 4 Bro. C. C. 500; Holmes v. Blogg (1818), 2 Moore, C. P. 552; Corpe v. Overton (1833), 3 Moo. & S. 738; Seaton v. Seaton (1888), 13 App. Cas. 61; Cowern v. Nield, [1912] 2 K. B. 419. **Refd.** Durnford v. Lane (1781), 1 Bro. C. C. 106; R. v. Shinfield (1811), 14 East, 541; Corbet v. Corbet (1824), 1 Sim. & St. 612; Hobson v. Ferraby (1846), 2 Coll. 412; N. W. Ry. v. M'Michael, Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher (1851), 5 Exch. 114, 121; Field v. Moore, Field v. Brown (1855), 7 De G. M. & G. 691; Cooper v. Simmons (1862), 7 H. & N. 707; Clements v. L. & N. W. Ry., [1894] 2 Q. B. 482; Hamilton v. Vaughan-Sherrin Electric Engineering Co. (1894), 43 W. R. 126; Leslie v. Sheill, [1914] 3 K. B. 607. **Mentd.** Daniel v. Adams (1765), Amb. 495; Beckford v. Wade (1805), 17 Ves. 87; Smith v. Jersey (1821), 3 Bli. 290; Dyke v. Rendall (1852), 2 De G. M. & G. 209.

566. — — — — —.] — (1) A married infant took a lease of a furnished house, representing himself to be of full age. The lessor discovering the fact & alleging that the infant claimed not to be bound by the covenants in the lease, & was threatening to remove the furniture, brought his action to obtain the cancellation of the lease, possession of the house, & an injunction to restrain the deft. from removing the furniture; & also damages for use & occupation on the ground that the house & furniture were necessities:—*Held*: the claim for damages was an affirmation of the lease, & was inconsistent with the claim for cancellation; the lease must be declared void & possession given up, & deft. should be restrained by injunction from parting with the furniture; but he was not liable for use & occupation.

(2) Deft. ordered to pay costs of the action. — LEMPRIERE v. LANGE (1879), 12 Ch. D. 675; 41 L. T. 378; 27 W. R. 879.

Annotations:—*As to* (1) **Refd.** *Re Jones, Ex p. Jones* (1881), 18 Ch. D. 109; Stocks v. Wilson, [1913] 2 K. B. 235; Leslie v. Sheill, [1914] 3 K. B. 607. *As to* (2) **Fold.** Woolf v. Woolf, [1899] 1 Ch. 343.

PART VIII. SECT. 8, SUB-SECT. 1.— A.

558 i. Liability of infant lessee—Rent—Where possession taken.] — An assignee is liable on a covenant for non-payment of rent, though at the time of the rent accruing due he was an infant, if he continue in the enjoyment of the land after attaining age. — MAHON v. O'FARRELL (1847), 10 I. L. R. 527.—**IR.**

558 ii. — — — — —.] — The receiver in a minor matter paid rent due up to a certain period in respect of lands held from year to year which had been bequeathed to the minor. The bequest had not been assented to by the exor.:—*Held*: the minor was liable to the subsequent rent only to

the extent of the profits received out of the lands notwithstanding the payment of the former rent by the receivers.—*Re FAIR* (1850), 13 I. Eq. R. 278.—**IR.**

558 iii. — — — — —.] — Certain lands were let to an infant in May, 1866. He possessed & enjoyed the lands until Apr. 20, 1867, when he, being still an infant, left the possession & on attaining his majority (which occurred shortly after) he repudiated the contract of tenancy & the tenancy under it:—*Held*: he was liable to the payment of the gale of rent which became due on Nov. 1, 1866.—BLAKE v. CONCANNON (1870), 1 I. R. 4 O. L. 323.—**IR.**

—.] — Where an estate

vests in an infant by operation of law, & he has not disclaimed, he becomes liable for rent notwithstanding his infancy. In an action for rent, upon a lease made to the ancestor of deft. for lives, pltf. alleged in his summons & plaint, that during the subsistence of the lease, the original lessee had died & that the term of the lives had descended to deft. as special occupant, as son & heir of lessee, after which descent the rent claimed became due & owing. Deft. pleaded infancy & that he had never entered into possession of the estate or made claims thereto, or done anything in respect of the same:—*Held*: the plea was bad.—**KELLY v. COOTE** (1856), 5 I. C. L. R. 469.—**IR.**

Sect. 8.—Leases and leaseholds: Sub-sect. 1, A., B. & C.; sub-sect. 2, A. (a).]

567. — Approbation & reprobation—Claims for damages & cancellation.]—LEMPRIÈRE v. LANGE, No. 566, ante.

B. Renewals.

See Infants Property Act, 1830 (c. 65), ss. 12, 14, 15, 31, 35, 36.

Incapacity of infant to hold legal estate.]—See, now, Law of Property Act, 1925 (c. 20), ss. 1 (6), 39 (3), sched. I., Part III.

568. Renewal by trustee in own name — Lease enures for infant's benefit.]—An exor. in trust for an infant residuary legatee renews a lease, part of testator's personal estate in his own name, & having mortgaged it, assigns the equity of redemption to a trustee to sell for payment of his own debts. The trustee sells to one who had notice of the infant's title. Purchase set aside.—WALLEY v. WALLEY (1687), 1 Vern. 484; 23 E. R. 609.

Annotations:—Mentd. Brown v. Blount (1830), 9 L. J. O. S. Ch. 74; Peacock v. Burt (1834), 4 L. J. Ch. 33; Willats v. Busby (1842), 5 Beav. 193; Rowley v. Ginnever, [1897] 2 Ch. 503.

569. — — — Refusal of lessor to renew to infant personally.]—I must consider this as a trust for the infant, for if a trustee, on refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, & not in the least relaxed, for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que trust* (LORD KING, C.).—KEECH v. SANDFORD (1726), 2 Eq. Cas. Abr. 741; Cas. temp. King, 61; 25 E. R. 223.

Annotations:—Distd. Longton v. Willsby (1897), 76 L. T. 770. Consd. Re Biss, Biss v. Biss, [1903] 2 Ch. 40. Apld. Griffith v. Owen, [1907] 1 Ch. 195. Rejd. Aberdeen Ry. v. Blaikie (1854), 2 Eq. Rep. 1281; Re Anderson's Estate (1869), 18 W. R. 248; Re Adams & St. Mary Abbots, Kensington (1884), 51 L. T. 382; Bevan v. Webb, [1905] 1 Ch. 620; Lloyd-Jones v. Clark-Lloyd, [1919] 1 Ch. 424.

570. — — — .]—If a trustee can buy in an honest case, he may in a case having that appearance: but which from the infirmity of human testimony may be grossly otherwise: & I cannot otherwise account for the case where the trustee who applied for a renewal of a lease for an infant, which the lessor refused to grant if the infant was to have any interest, nevertheless did renew; & the cts. said he should throw back the lease to the lessor, for in no case should he purchase for his own benefit (LORD ELDON, C.).—Ex p. BENNETT (1805), 10 Ves. 381; 32 E. R. 893, L. C.

Annotations:—Rejd. Sanderson v. Walker (1807), 13 Ves. 801. Re Biss, Biss v. Biss, [1903] 2 Ch. 40. p. Badcock (1829), Mont. & M. 231.

(1840)
& G

.]—Nothing is better established than that where a trustee for an infant renews a lease in his own

name, the renewed lease shall enure for the infant's benefit. This is a doctrine founded on general policy to prevent frauds, & has long been an established rule in cts. of equity.—BLEWETT v. MILLETT (1774), 7 Bro. Parl. Cas. 367; 3 E. R. 238, H. L.

Annotation:—Consd. Re Biss, Biss v. Biss, [1903] 2 Ch. 40.

572. — — — .]—A trustee, purchasing a leasehold farm, devised to him for the use of pltf., at an appraisement, afterwards renewing the lease in his own name, & purchasing part of testator's stock; declared to be trustee, & to be accountable for the same to pltf.—KILLICK v. FLEXNEY (1792), 4 Bro. C. C. 161; 29 E. R. 830.

— — — .]—See, generally, TRUSTS & TRUSTEES.

573. Renewal by party jointly interested with infant.]—If a person jointly interested with an infant in a lease, obtain a renewal to himself only, & the lease prove beneficial, he shall be held to have acted as trustee, & the infant may claim his share of the benefit; but if it do not prove beneficial he must take it upon himself.—Ex p. GRACE (1799), 1 Bos. & P. 376; 126 E. R. 962.

Annotation:—Distd. Re Biss, Biss v. Biss, [1903] 2 Ch. 40.

574. — — — No fiduciary relationship between them.]—There is no authority for the general proposition that if a person only partly interested in an old lease obtains from the lessor a renewal, he must be held a constructive trustee of the new lease, whatever may be the nature of his interest or the circumstances under which he obtained the new lease. A person renewing is only held to be a constructive trustee of the new lease if, in respect of the old lease, he occupied some special position by virtue of which he owed a duty towards the other persons interested: as, for example, in the case of a renewal by a tenant for life of settled leaseholds, or by a partner of a partnership lease, or by a mtgee. of a mtged. lease. In all such cases the new lease is treated as engrafted on or as forming part of the original lease.

A lessor granted a lease for seven years of a house in which the lessee carried on a profitable business. On the expiration of the term the lessor refused to renew, but allowed the lessee to remain as tenant from year to year at an increased rent. During that tenancy the lessee died intestate, leaving a widow & three children, one being an infant. The widow took out administration to her husband's estate, & she & the two adult children, one or whom was a son, continued to carry on the business under the existing yearly tenancy. The widow & son each applied to the lessor for a new lease for the benefit of the estate, which he refused to grant, but, having determined the yearly tenancy by notice, he granted to the son "personally" a new lease for three years at a still further increased rent.

In an action which had in the meantime been instituted by the three children, including the infant, against the administratrix for administration of intestate's estate, the administratrix applied to have the new lease treated as having been taken by the son for the benefit of the estate, & for an account of the rents & profits received by him:—**Held:** the evidence took the case out of *Ex p. Grace*, No. 573, ante, in that it showed that the right or hope of renewal had been determined by the lessor himself before the son intervened, so that the new lease could not be treated as an accretion to the estate of the deceased, & also

PART VIII. SECT. 8, SUB-SECT. 1.—B.

568 i. Renewal shall enure to in the

for infant's benefit.]—Renewal of a lease taken by a trustee. v. GRIFFIN (1804), 1 Sch. & Lef. 352.—IR.

that the son had in no way abused his position nor stood in any fiduciary relation towards nor owed any duty to the other persons interested in the estate; & that he was therefore entitled to retain the lease for his own benefit.—*Re Biss*, *Biss v. Biss*, [1903] 2 Ch. 40; 72 L. J. Ch. 473; 88 L. T. 403; 51 W. R. 504; 47 Sol. Jo. 383, O. A.

Annotation :—*Consd. Griffith v. Owen*, [1907] 1 Ch. 195.

575. Renewal by guardian—Follows nature of original lease.—A lease renewed by a guardian for an infant's benefit shall follow the nature of the original lease.—*WITTER v. WITTER* (1730), 3 P. Wms. 99; 24 E. R. 985, L. C.

Annotations :—*Reid. Inwood v. Twyne* (1762), Amb. 417; *Rawe v. Chichester* (1773), Amb. 715; *Whittaker v. Whittaker* (1792), 4 Bro. C. C. 31; *A.-G. v. Allesbury* (1887), 12 App. Cas. 672.

C. Surrenders.

576. Validity.—*LLOYD v. GREGORY*, No. 556, *ante*.

577. —.]—*GRANGE v. TIVING*, No. 103, *ante*.

SUB-SECT. 2.—LEASES OF INFANTS' PROPERTY.

A. By Infant.

(a) In General.

Incapacity of infant to hold legal estate.—*See*, now, Law of Property Act, 1925 (c. 20), ss. 1 (6), 39 (3), sched. I., Part III.

578. Whether void or voidable—Reservation of rent.—*LANE v. COWPER* (1575), Moore, K. B. 103; 72 E. R. 469.

Annotation :—*Mentd. Barker v. Keete* (1678), Freem. K. B. 249.

579. —.]—Lease by an infant is void.—*SMY v. JUNE* (1591), Cro. Eliz. 219; 78 E. R. 476.

Annotations :—*Mentd. Foot v. Berkley* (1670), 1 Vent. 83; *Dighton v. Greenvil* (1693), 2 Vent. 321; *Bagshaw v. Spencer* (1743), 2 Atk. 570; *Goodright d. Fowler v. Forrester* (1807), 8 East, 552.

580. —.]—If at the time of the first delivery the lessor be an infant, or *feme covert*, & at the time of his second delivery he is of full age, or sole, in both these cases the deed shall not bind; for at the time of the first delivery he was not a person who had ability in law to make a contract.—*BUTLER & BAKER'S CASE* (1591), as reported in 3 Co. Rep. 25 a, 35 b; 76 E. R. 684, 707, Ex. Ch.

Annotations :—*Reid. Jennings v. Bragg* (1595), Cro. Eliz. 447; *Buckinghamshire v. Drury* (1762), Wilm. 177. *Mentd. Mountjoy's Case* (1589), 5 Co. Rep. 3 b; *Fitzwilliam's Case* (1605), 6 Co. Rep. 32 a; *Pexhall's Case* (1609), 8 Co. Rep. 83 b; *Lovies's Case* (1614), 10 Co. Rep. 78 a; *Court of Wards Case* (1627), Cro. Car. 33; *Sydowne v. Holme* (1635), Cro. Car. 422; *R. v. Hampden* (1637), 3 State Tr. 826; *Norrice & Norrice's Case* (1640), March, 23; *Berry v. White* (1662), O. Bridg. 82; *Geary v. Bearcroft* (1666), O. Bridg. 484; *Thompson v. Leach* (1690), 2 Vent. 198; *Wankford v. Wankford* (1702), 1 Salk. 299; *Arthur v. Bokenham* (1708), 11 Mod. Rep.

148; *Brunker v. Cook* (1708), 11 Mod. Rep. 121; *Atkin v. Berwick* (1719), 10 Mod. Rep. 431; *Bunker v. Cooke* (1731), Fitz-G. 225; *Windham v. Chetwynd* (1757), 1 Burr. 414; *Graham v. Graham* (1791), 1 Ves. 272; *Brydges v. Chandos* (1794), 2 Ves. 417; *Goodtitle d. Holford v. Otway* (1796), 1 Bos. & P. 576; *Cave v. Holford* (1798), 3 Ves. 650; *Goodright d. Fowler v. Forrester* (1807), 8 East, 552; *Doe d. Tofield v. Tofield* (1809), 11 East, 246; *Doe d. Garnons v. Knight* (1826), 5 B. & C. 671; *Balme v. Hutton* (1831), 2 Tyr. 17; *Lucas v. Nockells* (1838), 10 Bing. 157; *Bramah v. Roberts* (1835), 1 Bing. N. C. 481; *Mills v. Oddy* (1835), 2 Cr. M. & R. 103; *Garland v. Carlisle* (1837), 4 Cl. & Fin. 693; *Doe d. Chidgley v. Harris* (1847), 16 M. & W. 517; *Siggers v. Evans* (1855), 5 E. & B. 367; *Xenos v. Wickham* (1867), L. R. 2 H. L. 296; *Standing v. Bowring* (1885), 31 Ch. D. 282; *London & County Banking Co. v. London & River Plate Bank* (1888), 21 Q. B. D. 535; *Re Arbib & Class's Contract*, [1891] 1 Ch. 601; *Smith v. Kerr* (1902), 18 T. L. R. 456; *Mallott v. Wilson*, [1903] 2 Ch. 494.

581. —.]—A lease made by an infant copyholder is not void but voidable, & acceptance of bond after full age bars the avoidance of it.—*ASHFIELD v. ASHFIELD* (1627), W. Jo. 157; Benl. 188; *Godb. 364*; Lat. 199; *Noy, 92*; 82 E. R. 84, Ex. Ch.

Annotations :—*Reid. King v. Dilliston* (1688), 1 Show. 83; *Baylis v. Dineley* (1815), 3 M. & S. 477; *Williams v. Taperell* (1892), 8 T. L. R. 241. *Mentd. Shardelow v. Naylor* (1702), 1 Salk. 313.

582. —.]—*BLUNDEN v. BAUGH*, No. 587, *post*.

583. — Infant no present interest in premises.]—(1) L. devised some land & houses built thereon to his six children; the mother as guardian to the children, who were all infants, demised the premises on a building lease for forty-one years. The eldest son joined in making the lease & covenanted that the rest of the children when of age should confirm it.

They all attained twenty-one & accepted the rent for above ten years, after the youngest came of age, & then brought their ejectment against the lessee, who by his bill prays to have his lease established.

Under the circumstances of this case, & particularly the acceptance of the rent for so long a continuance, the ct. decreed the lease to be established during the residue of the term.

(2) Where a person is of age when he makes a lease, & has nothing in the premises, but they after descend to him, the lease shall enure by way of estoppel, otherwise if he had been an infant.—*SMITH v. Low* (1739), 1 Atk. 489; *West temp. Hard. 669*; 26 E. R. 310, L. C.

584. —.]—*ZOUCH d. ABBOT & HALLET v. PARSONS*, No. 28, *ante*.

Leases of land in Duchy of Lancaster—During minority of the King.—*See* CONSTITUTIONAL LAW, Vol. II., p. 590, No. 913.

Adoption on attaining majority—What amounts to.—*See* Sub-sect. 2, A. (b), *post*.

By direction of the court.—*See* Sub-sect. 2, C., *post*.

Void & voidable contracts by infants generally.—*See* Part V., Sects. 2-4, *ante*.

PART VIII. SECT. 3, SUB-SECT. 2.—A. (a).

578 i. Whether void or voidable—Reservation of rent.—A lease made by an infant is not void but voidable only notwithstanding that the rent reserved is not the best obtainable.—*SLATOR v. BRADY* (1863), 14 I. C. L. R. 61.—IR.

r. Right of infant to repudiate—Not until majority.—An infant cannot during infancy avoid a lease by him, reserving rent for his benefit, & possession of the demised premises will be ordered to be given in an action by the lessee for that purpose.—*LIPSETT v. PERDUE* (1889), 18 O. R. 575.—CAN.

—.]—Where an infant makes a lease, reserving a rent, he cannot avoid it until of full age.—*SLATOR v. TRIMBLE* (1861), 14 I. C. L. R. 342.—IR.

a. —.]—*MONRO v. TORONTO RY. Co.* (1902), 22 C. L. T. 231; 4 O. L. R. 36; 1 O. W. R. 313, 316; 2 O. W. R. 207; 3 O. W. R. 14, 299; 4 O. W. R. 392.—CAN.

b. — *What amounts to repudiation—Execution of second lease.*—*SLATOR v. TRIMBLE* (1861), 14 I. C. L. R. 342.—IR.

c. — — — —.]—A lease made by an infant, reserving a rent, is

not avoided by a lease of the same lands, made to a third party by the infant upon his attaining his full age. To avoid a lease made by an infant under which the lessee is in possession, upon the lessor attaining twenty-one years of age, some act of notoriety, viz. ejectment, entry, or demand of possession, is requisite. Mere execution of a second lease by the lessor will not divest the estate created by the first lease.—*SLATOR v. BRADY* (1863), 14 I. C. L. R. 61.—IR.

d. — — — — *Necessity for notorious act.*—*SLATOR v. BRADY* (1863), 14 I. C. L. R. 61.—IR.

Sect. 8.—Leases and leaseholds: Sub-sect. 2, A.
B. (a) & (b), & C.]

(b) Adoption on Attaining Majority.

585. What amounts to adoption—Verbal adoption.]—An infant made a lease for years, rendering rent, & when he came to his full age he said to his lessee, "God give you joy of it":—*Held*: the lease was affirmed & made good.—*ANON.* (1582), 4 Leon. 4; 74 E. R. 687.

586. — Acceptance of rent.] —ASHFIELD v. ASHFIELD, No. 581, *ante*.

587. — —.]—A being seised of an estate in fee, permits his son to enter into the lands & to occupy them as a tenant at will; the son afterwards leases the lands by indenture for twenty-one years, rendering rent; the father may at his option construe this demise to be a disseisin or not a disseisin.

If an infant makes a lease for years, rendering rent, & the lessee enter, it is at the election of the infant to charge him in assise or to bring debt for the rent or to accept the rent at his full age (*per CUR.*).—*BLUNDEN v. BAUGH* (1634), Cro. Car. 302; W. Jo. 315; 79 E. R. 864.

Annotations:—Mentd. Freeman v. Banes (1670), 1 Vent. 80; Blackmore v. Cumberford (1680), Freem. K. B. 527; Symonds v. Cudmore (1692), Skin. 328; Eastcourt v. Weekes (1698), 1 Lut. 799; Macdonel v. Weldon (1722), 8 Mod. Rep. 54; Oates v. Say & Seal (1728), 1 Barn. K. B. 98; Holt v. Ward (1732), 2 Barn. K. B. 173; Townsend v. Ash (1745), 3 Atk. 336; Taylor d. Atkins v. Horde (1757), 1 Burr. 60; Goodtitle d. Newman v. Newman (1774), 3 Wils. 516; Birch v. Wright (1786), 1 Term Rep. 378; Morton v. Woods (1869), L. R. 4 Q. B. 293; Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437.

588. — —.]—SMITH v. LOW, No. 583, *ante*.

589. — —.] —BAYLIS v. DINELEY, No. 78, *ante*.

590. — — Compromise of ejectment suit—Suit brought at instance of & for benefit of infant.]—Where an ejectment has been brought on the demise of an infant, which has been compromised, & the tenant in possession has attorned to the infant; though the lessor of pltf., on his coming of age does not accept the rent or do any act to confirm the tenancy, yet as the former ejectment was brought at his suit & for his benefit, he shall not be allowed to consider the tenant as a trespasser, & bring a new ejectment without giving notice to quit.—*DOE d. MILLER v. NODEN* (1797), 2 Esp. 528, N. P.

591. — — Delay in repudiation.] —If a tenant hold under an agreement for a lease at a yearly rent, whereby it is stipulated that the agreement shall continue for the life of the lessor, & that a clause shall be inserted in the lease giving the lessor's son power to take the house for himself when he comes of age, the son must make his

election in a reasonable time after he comes of age. The delay of a year is unreasonable, & the tenant cannot be ejected upon a half-year's notice to quit, served after such a delay.—*DOE d. BROMFIELD v. SMITH* (1788), 2 Term Rep. 436; 100 E. R. 234.

Annotation:—Distd. Holmes v. Blogg (1817), 8 Taunt. 35. — — —.]—*See, generally*, Part V., Sect. 4, sub-sect. 2, 3, *ante*.

592. — — Mortgage of reversion.]—Where a party takes a lease of an infant's lands, & the infant, on coming of age, mortgages the property to the lessee by deed referring to the lease, this is a confirmation of the lease.—*STORY v. JOHNSON* (1837), 2 Y. & C. Ex. 586; 160 E. R. 529.

Annotations:—Mentd. Ackland v. Braddick (1838), 3 Y. & C. Ex. 237; Anderson v. Wallis (1842), 12 L. J. Ch. 291; Wright v. Vernon (1860), 8 W. R. 724.

B. By Guardians and Trustees.

(a) Guardians.

Incapacity of infant to hold legal estate.]—*See, now*, Law of Property Act, 1925 (c. 20), ss. 1 (6), 39 (3); sched. I., Part III.

593. By guardian in socage—Grant of new lease on surrender of old.]—A., tenant in socage, leased the lands to S. for many years, & died; his wife being guardian in socage of his infant heir leased the same land by indenture to the same S.:—*Held*: the first lease was determined, though not surrendered.

A guardian in socage has no reversion capable of taking a surrender (*ANDERSON, J.*).—*WILLIS & WHITEWOOD'S CASE* (1588), 1 Leon. 322; 74 E. R. 293.

Annotation:—Refd. Doe d. Biddulph v. Poole (1848), 11 Q. B. 713.

594. — —.] —A guardian in socage may make a lease for years of the lands over which he has the guardianship. The lessee will have *ejectione firmæ*.—*BRISDEN v. HUSSEY* (1607), 2 Roll. Abr. 41, pl. 4.

595. — — Duration of validity—Until infant attains fourteen years.]—If guardian & ward join in a lease it is the lease of the guardian till the ward is fourteen years old, & afterwards the lease of the ward.—*DUGAR v. NORTON* (1673), Freem. K. B. 102; 89 E. R. 76.

596. — —.] —There is no doubt in this case but that the mother, who was guardian in socage to her daughters had a right to elect whether she would let the estate or occupy it for their benefit (*LORD ELLENBOROUGH, C.J.*).—*R. v. OAKLEY (INHABITANTS)* (1809), 10 East, 491; 2 Bott. 527; 103 E. R. 862.

Annotations:—Refd. R. v. Sutton (1835), 3 Ad. & El. 597. *Mentd.* R. v. Toddington (1818), 1 B. & Ald. 560; R. v. Burgate (1854), 23 L. T. O. S. 155.

PART VIII. SECT. 8, SUB-SECT. 2.—
A. (b).

586 i. What amounts to adoption—Acceptance of rent.]—A., while an infant, made a lease to B. of certain lands reserving a rent & during his minority commenced an action of ejectment, by C. his next friend, against B. laying the demise on Jan. 23, 1861. A. attained full age Apr. 27, 1861, & on Apr. 29 of the same year, executed to C. a lease of all his estate of W., including the lands demised to B., & contained a covenant to lease on the W. estate him during his minority. A. 14, 1861, received from B. the rent due May

ment proceedings from the time when A. came of age until the execution of the confirmation. The ejectment having been afterwards proceeded with, & a verdict had for pltf., on motion that that verdict should be set aside & a verdict entered for deft.:—*Held*: A. was estopped by his receipt of rent from disputing B.'s title for the period between Nov. 1, 1860, & May 1, 1861; he could not maintain an action of ejectment against B. in which the demise was laid on a day within that period; by the execution of the confirmation A. was precluded from relying on the lease to C., either as an avoidance of the lease to B., or for the purpose of showing that, at the date of the confirmation, he had no estate sufficient to enable him to confirm that lease; & the confirmation although made subsequently to the commencement of the

action, related back so as to set up the lease to B. from the day of its execution.—*SLATOR v. TRIMBLE* (1861), 14 I. C. L. R. 342.—*IR.*

PART VIII. SECT. 8, SUB-SECT. 2.—
B. (a).

594 i. By guardian in socage.]—Pltf. claimed title through G., who was the grantee of V. & his wife, & D. & his wife, the said wives having been the patentees of the Crown before marriage. Deft. claimed under a lease made by E., the father of the patentees, while they were under age & before marriage, as their guardian:—*Held*: If the patentees' father was guardian in socage of the daughter under the age of twenty-one years (as contended by deft.) that guardianship ceased upon her attaining the age of fourteen, when the lease would be void.—*DORAN v. REID* (1863), 13 C. P. 393.—*CAN.*

had been in the eject

597. Guardian by nurture.]—A guardian by nurture cannot make a lease for years of the infant's land.—*PIGOT v. GARNISH* (1600), Cro. Eliz. 734; 78 E. R. 966.

Annotation:—*Reid. Daniel v. Uply* (1626), Lat. 39.

598. By testamentary guardian.]—*EYRE v. SHAFTSBURY* (COUNTRESS), No. 521, *ante*.

599. — Term extending beyond infancy.]—*ROE d. PARRY v. HODGSON* (1761), 2 Wils. 135; 95 E. R. 728.

600. Position of guardian—Trustee for infant.]—A. as the guardian of B. an infant, made a claim to certain lands before the trustees of the Irish forfeitures, which being allowed, he entered on the lands. Part of these lands being out upon lease, A. procured a derivative lease thereof to himself; but it was held to be in trust for the infant.—*ANNESLEY v. DIXON* (1706), 7 Bro. Parl. Cas. 213; Holt, K. B. 372; 11 Mod. Rep. 104; 3 E. R. 139, H. L.

Annotation:—*Mentd. Rorke v. Errington* (1859), 7 H. L. Cas. 617.

601. By guardian of infant tenant in tail—With consent of trustees of settlement.]—*Re NEWCASTLE'S (DUKE) ESTATES*, No. 628, *post*.

By direction of the court.]—See Sub-sect. 2, C., *post*.

(b) *Trustees.*

See Sect. 10, *post*.

602. Lease extending beyond infant's minority—Receipt of rent after attaining age—Failure to make inquiry.]—Trustees having power to make leases in possession, until *cestui que trust* attained twenty-one, granted a lease in reversion, & another lease after the *cestui que trust* attained twenty-one; such leases held to be bad; & that being granted by trustees, they could not take effect out of their absolute legal estate in the premises; & that the receipt of rent by the *cestui que trust* for several years after he attained twenty-one, he being ignorant of the defects in the leases, did not operate as a new agreement; but as *pltf.* had neglected to look into his rights, & the lessees might have expended money on the premises, no account directed beyond the filing of the bill, & no costs given to *pltf.*—*BOWES v. EAST LONDON WATERWORKS* (1818), 3 Madd. 375; 56 E. R. 543; *affd.* (1820), Jac. 324, L. C.

Annotation:—*Consd. Hicks v. Sallitt* (1854), 3 De G. M. & G. 782.

598 i. By testamentary guardian.]—A testamentary guardian can make a lease of the infant's lands for the minority.—*SHAW v. SHAW* (1788), Vern. & Scr. 607.—IR.

600 i. Position of guardian—Trustee for infant.]—A guardian of an infant appointed under R. S. O. 1887, c. 137, has power to lease the lands of the infant during the latter's minority, but not beyond that period. During such minority the guardian is a trustee of the lands for the infant & cannot acquire a title to them by possession, but after the majority of the infant the possession of the guardian changes its character, & becomes that of a stranger, & Stat. Limitations runs in favour of the guardian or those claiming under him.—*CLARKE v. MACDONELL* (1890), 20 O. R. 564.—CAN.

e. Guardian appointed by Vice-Chancellor.]—A guardian appointed by the Vice-Chancellor upon the petition of an infant, cannot make a demise for the purpose of trying the title to the infant's land in ejectment. The demise should be by the infant.—*DOE d. MARIANNE v. ALEXANDER* (1844), 1 U. C. R. 120.—CAN.

f. By guardian of infant tenant

for life—Without sanction of court.]—The guardian of an infant tenant for life, without the sanction of the ct., executed a lease for years, during the existence of which the infant died, & an application having been made in a cause for an order on the tenant to deliver up possession, he was ordered to do so, & on payment into ct. of the amount of rent in arrear, he was permitted to remove the buildings & erections put by him on the property (doing no damage to the realty), but the ct. refused to allow him out of such rents for any improvements made by him upon the premises.—*TOWNSLEY v. NEIL* (1863), 10 Gr. 72.—CAN.

g. Effect of death of guardian.]—In replevin *deft.* avowed for rent, alleging that *pltf.* held the premises as tenant thereof to one L., as guardian of M., under a demise at a yearly rent of \$350; that L., after making the lease, & about Apr. 2, 1877, died intestate, without appointing any guardian to M.; & *deft.* was, on May 21, 1877, appointed by the surrogate ct. guardian of M. in place of L. & because \$272 of the rent was due from *pltf.* to *deft.* as such guardian, *deft.* took the goods as a distress therefor:—*Held*: *pltf.* must succeed, for in this

By trustees of settled land.]—See Sect. 10, sub-sect. 1, *post*.

C. *By Direction of Court.*

See Infants' Property Act, 1830 (c. 65), ss. 16, 17, 18, 20, 31.

603. Jurisdiction of court to grant.]—The ct. will, under Infants' Property Act, 1830 (c. 65), s. 17, on petition, allow the granting of a lease, for a term certain, of property in which infants take an interest.—*HARRIS v. DAVIS* (1845), 1 Holt, Eq. 294; 9 Jur. 1084; 71 E. R. 757.

604. — Infant not in possession—Father's tenancy by curtesy.]—The ct. has no jurisdiction under Infants' Property Act, 1830 (c. 65), s. 17, to lease an infant's estates, unless the infant is indefeasibly seized either in fee or in tail, in possession.—*Ex p. LEGH* (1846), 15 Sim. 445; 60 E. R. 691.

Annotations:—*N.F. Re Spenser's Estates* (1867), 37 L. J. Ch. 18. *Reid. Re Letchford* (1876), 2 Ch. D. 719.

605. — — — — —.]—Where infants were tenants in fee, but their father was in possession as tenant by the curtesy, the ct. granted a lease under Infants' Property Act, 1830 (c. 65), s. 17.—*Re SPENSER'S ESTATES* (1867), 37 L. J. Ch. 18; 17 L. T. 200; 16 W. R. 306.

Annotation:—*Reid. Re Letchford* (1876), 2 Ch. D. 719.

606. — — — — —.]—An infant, who was entitled in fee to a small share in freehold premises, subject to his father's tenancy by the curtesy, petitioned the ct. under Infants' Property Act, 1830 (c. 65), s. 17 to sanction an agreement entered into by his father & guardian, & the co-owners of the property to grant a building lease:—*Held*: the ct. would sanction the lease under the Act, although the infant was not seized in possession.—*Re LETCHFORD* (1876), 2 Ch. D. 719; 45 L. J. Ch. 530; 35 L. T. 466.

607. — Estate defeasible in certain events.]—An estate, of which A. died seized in fee, descended upon A.'s five infant sisters. The father & mother of the infants being both living, & the estate of the sisters being consequently liable to be divested by the birth of a nearer heir of A.:—*Held*: the infants were not seized of or entitled to land in fee within Infants' Property Act, 1830 (c. 65), s. 17.—*Re EVANS* (1835), 2 My. & K. 318; 39 E. R. 965.

Annotations:—*Folld. Ex p. Legh* (1846), 15 Sim. 445. *Distd. Re Clark* (1866), 1 Ch. App. 292. *N.F. Re Letchford* (1876), 2 Ch. D. 719.

Province, a guardian, having no estate in the land, as in England, cannot lease his ward's land in his own name; & if he could his lease would determine on his death or on the ward attaining full age; if the demise was by deed the personal representative of L. only could sue for the rent; & if not by deed *deft.* might recover the rent in the name of the infant, but could not avow for it in his own right as guardian.—*COLLINS v. MARTIN* (1877), 41 U. C. R. 602.—CAN.

PART VIII. SECT. 8, SUB-SECT. 2.—C.

603 i. Jurisdiction of court to grant.]—The guardian of infants cannot give a lease of their estate. Such lease is void *ab initio*, unless the sanction of the ct. has been obtained thereto.—*SWITZER v. McMILLAN* (1876), 23 Gr. 538.—CAN.

603 ii. — — — — —.]—The Supreme Ct. has power to direct the guardian of an infant to lease the infant's land. Such a lease may contain a provision that the lessee shall purchase the land at the end of the term at a fixed price.—*Re RATHBONE* (1905), 25 N. Z. L. R. 476.—N.Z.

Sect. 8.—Leases and leaseholds: Sub-sect. 2, C. & D. Sects. 9 & 10: Sub-sect. 1.]

608. — All interested parties before court.]—Where lands stand limited in fee defeasible on certain events happening, the ct. has power to grant leases of the lands under Infants' Property Act, 1830 (c. 65), if all persons who would be entitled on any of the events happening are before the ct.—*Re CLARK* (1866), 1 Ch. App. 292; 35 L. J. Ch. 314; 13 L. T. 732; 14 W. R. 378, L. C.

Annotations:—Folld. Re Spenser's Estates (1867), 37 L. J. Ch. 18; *Re Letchford* (1876), 2 Ch. D. 719.

609. — Legal estate in trustees—Surrender of existing lease.]—The provisions of Infants' Property Act, 1830 (c. 65), for the surrender of a lease to which an infant is entitled apply to a lease to which an infant is only beneficially entitled the legal estate being vested in a trustee for him.—*Re GRIFFITHS* (1885), 29 Ch. D. 248; 54 L. J. Ch. 742; 53 L. T. 262; 33 W. R. 728.

610. — Apart from statute—Mining lease.]—The ct. cannot independent of the statute authorise trustees for infants to grant a mining lease, although the legal estate is vested in such trustees, & such leases would be beneficial to the infants.—*WOOD v. PATTESON* (1847), 10 Beav. 541; 50 E. R. 690.

Annotations:—Reid. Re Howarth (1873), 8 Ch. App. 416, n. *Mentd. Re Shaw's Trusts* (1871), L. R. 12 Eq. 124.

611. Necessity for reference to master—Property small.]—Order for liberty to let an infant's estate, without a reference to the master; the property being small; but not to extend to building leases, nor beyond minority.—*P— v. BELL* (1801), 6 Ves. 419; 31 E. R. 1122, L. C.

612. — Administration of infant's estate.]—This ct. [the Ct. of Exchequer in Equity] will not, upon the administration of the real property of an infant, delegate to the master the power of approving leases of the estates.—*SYMONS v. SYMONS* (1836), 2 Y. & C. Ex. 1; 5 L. J. Ex. Eq. 95; 160 E. R. 287.

613. What term granted—Term exceeding minority.]—The guardian of an infant authorised by the ct. under Infants' Property Act, 1830 (c. 65), s. 17, to grant leases of the infant's estate for terms of years exceeding the minority, when beneficial to the infant, & approved by the ct.—*ANSTAY v. HOBSON* (1853), 1 Sm. & G. 505; 65 E. R. 221.

614. Rectification of lease approved by court—Lease not inconsistent with agreement.]—Where a lease under the sanction of the ct. had been deliberately entered into & formally executed for the benefit of an infant, a bill for the rectification of the lease, on the ground that it contained an improper demise of trade fixtures, & an improper covenant by the lessees to render up such fixtures at the end of the term; also, that it did not reserve to the outgoing lessee the growing crops, etc., conformably with the custom of the country, was dismissed with costs.—*SEATON v. STANILAND* (1862), 4 Giff. 61; 7 L. T. 347; 9 Jur. N. S. 69; 66 E. R. 620.

Under Settled Estates Act.]—See Sect. 13, sub-sect. 2, post.

PART VIII. SECT. 10, SUB-SECT. 1.

h. Exercise of powers of tenant for life by trustees—Lease.]—Where application was made to the ct. on behalf of an infant owner of descended fee lands & other hereditaments the appointment of trustees to manage the property, with power to accept surrenders of leases, give

receipts, to insure, make lettings & to make allowances to tenants:—*Held*: phrase “& generally to deal with the land in a proper & due course of management” in Conveyancing Act, 1881 (c. 41), s. 42 (2), does not include a power to make lettings of the property; if such be sought there ought to be included also in the title of the summons “& in the matter of the

D. Position of Lessee.

615. Cannot repudiate.]—*DAVIES v. MANINGTON* (1658), 2 Sid. 109; 82 E. R. 1283.

616. —.]—*CLAYTON v. ASHDOWN*, No. 176, ante.

617. —.]—*ZOUCH d. ABBOT & HALLET v. PARSONS*, No. 28, ante.

618. Entitled to confirmation of lease—Or return of premium—Repudiation by infant.]—The guardian of A., an infant, appointed by the Ecclesiastical Ct. granted a lease of the infant's lands, receiving a premium, & at the time of granting the lease the infant was present, & represented to the lessee that the lessor was his guardian. The infant was also an attesting witness to the lease. He attained his majority, & then granted a lease of the same lands to another lessee. On a bill filed by the former lessee against A. & the new lessee to have the first lease confirmed, or the premium refunded, with interest, a decree made according to the latter alternative of the prayer.—*ESRON v. NICHOLAS* (1733), 1 De G. & Sm. 118; 63 E. R. 996; *sub nom. EVROY v. NICHOLAS*, 2 Eq. Cas. Abr. 488, L. C.

Annotations:—Consd. Stikeman v. Dawson (1847), 1 De G. & Sm. 90; *Leslie v. Sheill*, [1914] 3 K. B. 607. *Reid. Stocks v. Wilson*, [1913] 2 K. B. 235.

619. Entitled to notice to quit—Lease granted by infant's predecessor.]—(1) Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given.

(2) If an agreement, made by an infant, be for his benefit at the time, it shall bind him.—*MADDON d. BAKER v. WHITE* (1787), 2 Term Rep. 159; 100 E. R. 86.

Annotations:—As to (1) Reid. Doe d. Thomas v. Roberts (1847), 16 M. & W. 778. *As to (2) Reid. N. W. Ry. v. M'Michael*, Birkenhead, Lancashire & Cheshire Junction Ry. v. Pilcher (1850), 5 Exch. 114; *Cooper v. Simmons* (1862), 7 H. & N. 707; *Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482.

620. —.]—*DOE d. MILLER v. NODEN*, No. 590, ante.

SECT. 9.—REGISTERED LAND.

, now, Land Registration Act, 1925 (c. 21), ss. 3 (iv), 91, 141, & generally, REAL PROPERTY.

SECT. 10.—SETTLED LAND.

SUB-SECT. 1.—UNDER SETTLED LAND ACTS.

See, now, Settled Land Act, 1925 (c. 18), ss. 1 (1) (ii) (d), (2), (3), 19 (3), 26, 102, sched. II., para. 3, sched. IV., 16.

Incapacity of infant to hold legal estate.]—*See, now, Law of Property Act, 1925 (c. 20), ss. 1 (6), 39 (3), sched. I., Part III.*

621. When infant deemed tenant for life—Contingent interest.]—J. by his will, devised real estate to trustees, upon trust to pay the net rents & income to his wife, who was one of the trustees, for the maintenance, education & benefit of his son W. until he should attain twenty-one,

Settled Land Acts” & the ct. may appoint the same trustees to exercise the powers of the Settled Land Acts conferred on infant tenants for life under Settled Land Act, 1882 (c. 38), s. 60, limited if necessary to the power of leasing only.—*Re LOCKE* (1913), 47 L. L. T. 147.—IR.

k. — Sale.]—Leave under Settled

& without being liable to account to his trustees or his son for the same, & upon his attaining that age, then upon trust for him absolutely, but if he should die under twenty-one, without leaving issue, then upon trust as to the rent & income for his wife during life or widowhood & after her death or second marriage upon trusts for grandchildren:—*Held*: the infant son was a person having the powers of a tenant for life under the Settled Land Act, 1882 (c. 38), s. 58 (1) (ii).

The words "in possession" in sect. 58 (1) refer to possession as contrasted with reversion or remainder, & not to possession personally as contrasted with possession by another person.—*Re MORGAN* (1883), 24 Ch. D. 114; 53 L. J. Ch. 85; 48 L. T. 964; 31 W. R. 948.

Annotations:—*Consd. A.-G. v. Coole*, [1921] 3 K. B. 607. *Reid. Re Coull's S.E.*, [1905] 1 Ch. 712.

622. ———.]—Devise in 1874 of real estates to trustees upon trust for sale, but with a direction that testator's M. estate should not be sold until the expiration of twenty-one years from the date of his will; for the purpose of transmission the real estate to be impressed with the quality of personalty from the time of his death; the rents of the real estates previous to conversion to be applied in the same manner as the income of the proceeds of sale; after payment of debts & legacies the surplus proceeds of sale to be invested & in the events that happened, the capital to be held in trust for all testator's children who being sons should attain twenty-five, & being daughters should attain twenty-five or marry under that age, & if more than one in equal shares. The trustees were empowered to apply the whole, or such part as might be required, of the annual income of the share to which any child might be entitled in expectancy for his or her maintenance or education, with a direction to accumulate the unapplied surplus of the income in augmentation of the share whence such income should have proceeded, & eventually to devolve in the same manner. Death of testator in Feb. 1888, leaving six children, two sons who had attained twenty-one, but were under twenty-five; & three sons & one daughter, who were infants:—*Held*: the children could not exercise the powers of tenants for life over the M. estate, & that estate could not be sold either under sects. 63, 58 or 59.—*Re HORNE'S SETTLED ESTATE* (1888), 39 Ch. D. 84; 57 L. J. Ch. 790; 59 L. T. 580; 37 W. R. 69, C. A.

Annotations:—*Reid. Re Goodall's Settltmt.*, *Fane v. Goodall*, [1909] 1 Ch. 440. *Mentd. Re Crips, Crips v. Todd* (1906), 95 L. T. 865; *Re Wagstaff's S.E.*, [1909] 2 Ch. 201; *Re Johnson, Cowley v. Public Trustee*, [1916] 1 Ch. 435.

623. Interest in partnership owning land.]—The interest of an infant, as one of the next of kin of his father, in land which formerly belonged to a partnership of which the father was a member, & has been retained by the administrator in specie, is settled land within Settled Land Act, 1882 (c. 38), s. 59, so as to enable the ct. under sect. 38, to appoint trustees to exercise the powers conferred by the Act. The order appointing new trustees will, however, be made without prejudice to any question as to the interests of the infants.—*Re WELLS* (1883), 48 L. T. 859; 31 W. R. 764.

624. ——— Vested interest—Liable to be divested.]—Testator, by his will, devised all the residue of his real estate in trust for his six younger children, & directed that in case any one or more of his six younger children should happen to die in his lifetime leaving issue living at his decease, &

which issue being issue male should live to attain the age of twenty-one years, or dying under that age should leave issue surviving, or being issue female should live to attain that age or be previously married, then in such case the share to which such child so dying would, if he or she had survived testator & had attained the age of twenty-one years, have become absolutely entitled should be held upon trust for such issue:—*Held*: the two infant children of one of the six younger children of testator who had died in the testator's lifetime took a vested interest in the share of their deceased parent liable to be divested on their death under the age of twenty-one years, & they had, therefore, the powers of a tenant for life under Settled Land Act, 1882 (c. 38), s. 58 (2) in respect of that share.—*Re JAMES* (1884), 51 L. T. 596; 32 W. R. 898.

625. Exercise of powers of tenant for life by trustees—Leasing—Agreement for lease by previous tenant for life.]—A tenant for life, with a power of leasing, had entered into an agreement for a building lease within the power, & the intending lessee had done everything which was necessary to entitle him to require the tenant for life to grant him a lease. The tenant for life died without having granted the lease, & was succeeded in the possession of the estates by an infant tenant in tail, during whose minority the trustees could exercise the power of leasing:—*Held*: the trustees had power to grant a lease in accordance with the agreement.—*DAVIS v. HARFORD* (1882), 22 Ch. D. 128; 52 L. J. Ch. 61; 47 L. T. 540; 31 W. R. 61.

626. ——— Consent to lease by guardians.]—*Re NEWCASTLE'S (DUKE) ESTATES*, No. 628, *post*.

627. ——— General authority to lease.]—Where an infant tenant in tail in possession was eighteen years of age, the ct. refused, on the application of the trustees of the settlement, who had the powers of a tenant for life under Settled Land Act, 1882 (c. 38), s. 60, to grant general authority to make building leases not exceeding two hundred years, but gave such authority subject to the approval of the ct. to the making of each lease.—*CECIL v. LANGDON* (1886), 54 L. T. 418.

628. ——— Sale—At request & by direction of guardians—Surplus land apart from minerals.]—(1) Summons under the Settled Land Act, 1882 (c. 38), to obtain the opinion & direction of the ct. as to the effect of the Act upon certain clauses in a settlement where an infant tenant in tail was entitled to possession, following questions were decided: The settlement gave the trustees power during the minority of any person entitled to possession to receive & apply rents & profits in management of estate & maintenance of infant, & to accumulate & apply the surplus in paying off charges or in purchase of real estate to be settled to the same uses:—*Held*: the rents & profits received by the trustees during the minority were to be treated in manner directed by the settlement & without regard to the Act.

(2) Power in the settlement to the trustees, with the consent of the tenant for life, if of age, & if not of his guardians, to sell or exchange:—*Held*: this power was exercisable by the trustees during the minority at the request & by the direction of the guardians of the infant tenant in tail.

(3) Power in the settlement for the guardians during minority to grant leases for twenty-one years, building leases for ninety-nine years &

Land Act, 1886, given to sell land on very long terms where the sale was very advantageous, the tenant for life & children who were of age

consenting. The land was land purchased by the trustees as an investment, & an indemnity was given to the trustees against claims by the infant

children.—*Re CAROLINE BELL ESTATE* (1905), 25 N. Z. L. R. 493 N.Z.

Sect. 10.—Settled land: Sub-sects. 1 & 2. Sect. 11: Sub-sect. 1, A. (a).]

mining leases for sixty years:—*Held*: this power was exercisable during minority by the guardians with the consent of the trustees.

(4) The rents derived from mining leases were to be applied by the trustees in manner directed by the settlement as coming within the term "contrary intention" expressed in sect. 11 of the Act.

(5) There being no power in the settlement to sell surplus land apart from minerals, the trustees could exercise that power under sect. 17 of the Act: & this being an execution of a statutory power, the consent of the guardians would not be necessary.—*Re NEWCASTLE'S (DUKE) ESTATES* (1883), 24 Ch. D. 129; 52 L. J. Ch. 645; 48 L. T. 779; 31 W. R. 782.

Annotations:—As to (4) *Reid. Re Rayer, Rayer v. Rayer*, [1913] 2 Ch. 210. *Generally, Mentd. Constable v. Constable* (1886), 32 Ch. D. 233; *Re Hanbury's S. E.* (1913), 57 Sol. Jo. 646.

629. Appointment of trustees for purpose of—Sale out of court.]—In appointing trustees under the Settled Land Act, 1882 (c. 38), ss. 3, 59, 60, to sell an infant's estate, the ct. has jurisdiction to authorise the sale to be made out of ct.—*Re PRICE, LEIGHTON v. PRICE* (1884), 27 Ch. D. 552; 51 L. T. 497; 32 W. R. 1009.

630. Infant domiciled abroad.]—Where an infant domiciled in Australia was entitled under a will to a small share of real property in this country, which the co-owners proposed to sell, & in order to effectuate the sale of the infant's interest it was necessary to apply to the ct. for the appointment of trustees under the Settled Land Act, 1882 (c. 38), the ct., upon proof that the sale was for the benefit of the infant appointed two persons domiciled in Australia trustees of the settlement effected by the will for the purposes of the Act.—*Re SIMPSON, Re WHITCHURCH*, [1897] 1 Ch. 256; 66 L. J. Ch. 166; 76 L. T. 131, C. A.

631. Costs & expenses of—Out of what property payable.]—*Re RUDD*, [1887] W. N.

632. No trust for sale.]—*Re HORNE'S SETTLED ESTATE*, No. 622, *ante*.

633. Not trustees for sale with Conveyancing Act, 1881 (c. 41), s. 42.]—Testator by his will appointed defts. exors. & trustees thereof & also trustees for the purposes of the Settled Land Acts. He devised certain real estate to the use of his infant son during his life, with remainders over, & appointed pltf. to be the guardian of his infant children during their respective minorities, & declared that she should be entitled to reside in a house forming part of the real estate so long as she acted as guardian:—*Held*: (1) defts. although trustees for the purposes of the Settled Land Acts, were not by implication trustees for the purposes of above sect., because they were not "trustees with power of sale of the settled land" within that sect.; (2) pltf., as testamentary guardian of the infant, was entitled as against defts. to receive the rents & profits of the real estate during his minority, by Tenures Act, 1660 (c. 24), s. 9.—*Re HELYAR, HELYAR v. BECKETT*, [1902] 1 Ch. 201; 71 L. T. 600.

See, now, Settled Land Act, 1925 (c. 18), s. 102.

634. Maintenance of infant's estate—Expenditure of capital moneys.] *SETTLED ESTATES*, No. 419, *ante*.

635. ———.]—*Re GREY'S COURT ESTATE* (1901), 45 Sol. Jo. 344.

636. ——— Expenditure out of income.]—Where during the minority of a tenant in tail trustees of the settlement execute improvements authorised by the Settled Land Acts, which under a special power contained in the settlement may be paid for out of income, they must not necessarily charge the expenses of such improvements being of a permanent character against income to the injury of the other persons interested under the settlement, merely because, owing to the interest of the infant tenant in tail in the income being cut down to an annuity it may be to his advantage to have them raised out of surplus income.—*Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY*, [1916] 1 Ch. 404; 85 L. J. Ch. 241; 114 L. T. 551.

Insurance of property—Destruction by fire—To whom insurance moneys payable.]

During the minority of a life tenant of settled estates in Devonshire, the trustees, acting under the powers of the Conveyancing & Law of Property Act, 1881 (c. 41), s. 42 (2), & the Trustee Act, 1893 (c. 53), s. 18, insured (a) the mansion-house & (b) certain settled chattels & furniture against fire. The policies were taken in the names of the trustees, & the premiums were paid out of income. The house & chattels were for the most part destroyed by fire, & the trustees recovered £7,000 on the house policy, & £1,244 on the chattel policy.

The trustees, the infant life tenant, aged twenty, & the remaindermen all desired the house to be rebuilt & refurnished, but the infant life tenant, who was not bound to insure, claimed that, as the premiums had been paid out of his income, the policy moneys in the hands of the trustees were his, & that he was entitled to a charge for any amount expended.

The remaindermen appeared, but took no part in the argument:—*Held*: (1) under the Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83, the remaindermen were entitled to have the £7,000 recovered on the house policy applied in rebuilding, & the infant tenant was not entitled to a charge; (2) the infant life tenant was entitled to the £1,244 recovered on the chattel policy, to which the Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 83, did not apply.—*Re QUICKE'S TRUSTS, POLTIMORE v. QUICKE*, [1908] 1 Ch. 887; 77 L. J. Ch. 523; 98 L. T. 610; 24 T. L. R. 23.

638. Necessity for consent of testamentary guardian.]—*Re NEWCASTLE'S (DUKE) ESTATES*, No. 628, *ante*.

639. Exercise of powers of tenant for life by persons authorised by court—Power to make good title—Payment of purchase-money into court.]—Where, in the absence of any trustees of a settlement within the meaning of the Settled Land Act, 1882 (c. 38), capable of exercising powers of sale over the settled land, an appointment has been made under sect. 60 of persons to exercise on behalf of an infant tenant for life the powers of a tenant for life, & to sell part of the settled estate, the persons so appointed can make a good title without the necessity of appointing under sect. 38 trustees of the settlement to whom notice of the intended sale can be given under sect. 45.

The order made under sect. 60 ought in such a case to direct that the purchase-money be paid into ct.—*Re DUDLEY'S (COUNTESS) CONTRACT* (1887), 35 Ch. D. 338.

640. Rent & profits accruing during minority—Application as directed by settlement.]—*Re NEWCASTLE'S (DUKE) ESTATES*, No. 628, *ante*.

641. Testamentary guardian entitled as

against trustees.]—*Re HELYAR, HELYAR v. BECKETT*, No. 633, *ante*.

642. Entry by trustees into possession—Discretionary power—Liability for non-entry.]—Conveyancing & Law of Property Act, 1881 (c. 41), s. 42 merely gives to trustees of land to which an infant is entitled in possession as tenant in tail a discretion as to whether they shall enter into possession of such land during the minority of such infant, & does not impose upon them any responsibility if they do not enter into possession.

It is not necessary for title deeds of a property of which an infant is tenant in tail in possession to be deposited in the bank in the names of the trustees of the settlement & the guardians of the infant. It is sufficient if they are deposited in the names of the guardians of the infant.—*Re LETHBRIDGE, COULDWELL v. LETHBRIDGE* (1917), 61 Sol. Jo. 630.

643. Title deeds—Deposited in name of guardians only.]—*Re LETHBRIDGE, COULDWELL v. LETHBRIDGE*, No. 642, *ante*.

SUB-SECT. 2.—UNDER SETTLED ESTATES ACTS.

See, now, Settled Land Act, 1925 (c. 18); Conveyancing & Law of Property Act, 1881 (c. 41), s. 41, & generally, SETTLEMENTS.

644. What deemed a settled estate—Realty with discretionary trust for sale.]—Testator devised his real estate & bequeathed the residue of his personal estate to trustees, upon trust, at their discretion, to sell the real estate & convert the personalty, & invest the proceeds & to pay the income to his wife, during her life or widowhood, for the maintenance of his children during their minorities; & upon the death or marriage of his wife the fund & the income thereof were to be in trust for his children absolutely, in equal shares, as tenants in common:—*Held*: as the period of sale was discretionary & as the rents until sale must by implication go as the income of the proceeds of sale was directed to be applied, this was a settled estate within the meaning of [Settled Estates] Acts.—*Re LAING'S TRUSTS* (1866), L. R. 1 Eq. 416; 35 L. J. Ch. 282; 14 L. T. 56.

Annotation:—*Mentd. Re Searle, Searle v. Baker*, [1900] 2 Ch. 829.

645. ——— Contingent interest of infant.]—Property was devised by will to the sons & daughters of testator successively on their attaining the age of twenty-one years, & on the death of the children under age to W. After testator's death a petition was presented by the children, of whom two were infants, for the sale of the property as a settled estate:—*Held*: the property was a settled estate within Conveyancing & Law of Property Act, 1881 (c. 41), s. 41.—*Re LIDDELL, LIDDELL v. LIDDELL* (1882), 52 L. J. Ch. 207; 31 W. R. 238.

Annotation:—*Folld. Re Sparrow's S. E.*, [1892] 1 Ch. 412.

646. ———.]—Testator devised real estate to trustees in fee, upon trust "to receive the rents & annual proceeds, including mining royalties, if any, arising from the same, & to invest the same until my son C. shall attain twenty-four, or die leaving issue, whichever event shall first happen; & thereupon I declare that my trustees shall stand possessed thereof, & of the rents & proceeds received by them as aforesaid, in trust for C. absolutely & beneficially, & testator devised & bequeathed to his trustees the residue of his real

& personal estate, upon trust to sell & convert the same into money & to pay & divide the same equally between such of his sons, I., W., & C., as should attain twenty-four, or die under that age leaving issue; & if there should be only one such son, then upon trust for such one son absolutely & beneficially. The will did not contain any power of sale of specifically devised real estate. The son I. had attained twenty-one; the sons W. & C. were both under twenty-one:—*Held*: on the authority of *Re Liddell, Liddell v. Liddell*, No. 645, *ante*, that by virtue of Conveyancing Act, 1881 (c. 41), s. 41, the estate devised on trust for the son C. was a "settled estate" within the Settled Estates Act, 1877 (c. 18), & consequently the ct. had under the latter Act jurisdiction to sanction a sale of the estate.—*Re SPARROW'S SETTLED ESTATE*, [1892] 1 Ch. 412; 61 L. J. Ch. 260; 66 L. T. 276; 40 W. R. 326; 36 Sol. Jo. 271.

647. Who may act for infant—Testamentary guardian.]—*Re NOLLESTON* (circa 1860), cited in 2 Ch. D. p. 39; 34 L. T. p. 8; 24 W. R. p. 382. *Annotation*:—*Refd. Re Salisbury & Eccl. Comrs.* (1875), 2 Ch. D. 29.

—*In a petition under the Settled Estates Act for a sale of property in which an infant is interested in remainder, the consent of the testamentary guardian of the infant is not sufficient, & a guardian must be appointed for the purpose of consenting on behalf of the infant.*—*Re JAMES* (1868), L. R. 5 Eq. 334.

649. ———.]—Where there is an infant tenant for life & infant remainderman, the ct. will, in certain circumstances, make an order under the Settled Estates Act, 1877 (c. 18), for the sale of freehold property out of ct. where there is no power under Settled Land Acts.—*Re MOUNTGARRET SETTLED ESTATES* (1920), 64 Sol. Jo. 498.

650. ——— Father.]—In a petition presented under the Leases & Sales of Settled Estates Act, [1874: repealed by 1877 Act], when there are infant petitioners, the concurrence of the father is not sufficient, though he has no adverse interest, but a guardian must be appointed in the regular manner on a summons at Chambers.—*Re CAD-DICK'S SETTLED ESTATES* (1859), 7 W. R. 334. *Annotation*:—*Refd. Re Salisbury & Eccl. Comrs.* (1875), 2 Ch. D. 29.

651. ——— Trustees of settlement—Under which infant's interests derived.]—In a petition under the Settled Estates Act, 1856 (c. 120), & the Acts amending the same, to obtain the approval of the ct. to a conditional contract for sale of settled property, trustees of a marriage settlement with a trust for sale were held not sufficiently to represent infants interested under the settlement so as to be able to consent for them under section 17.—*Re DENDY* (1877), 4 Ch. D. 879; 46 L. J. Ch. 417; 25 W. R. 410.

Annotation:—*Refd. Re Hodge's S. E.*, [1895] W. N. 69.

Power of trustees to sell.]—*See* SETTLEMENTS.

SECT. 11.—SETTLEMENTS AND COVENANTS TO SETTLE ON MARRIAGE.

SUB-SECT. 1.—AT COMMON LAW.

A. Validity.

(a) In General.

Voidable contracts in general.]—*See* Part V., sect. 4, *ante*.

652. Settlement voidable—Settlement of realty

PART VIII. SECT. 10, SUB-SECT. 2.

1. Who may act for infant—Guardian appointed by court.]—Where

a guardian to an infant has already been appointed by the ct., it is not necessary to appoint a guardian for the special purpose of presenting a

petition for sale of the infant's estate under Settled Estates Act, 1887, s. 49.—*Re ASH ESTATE* (1897), 5 B. C. R. 672.—CAN.

Sect. 11.—Settlements and covenants to settle on marriage: Sub-sect. 1, A. (a).]

by female infant.]—The marriage settlement of a female infant is binding upon her & no act done by her & the husband can avoid it; mtges. by them to persons who had notice of the settlement ordered to be assigned to the trustee in the settlement, but the interest during the life of the husband & wife, to be applied to the payment of the mtges., without prejudice to her remedy against the husband.

They take the husband's estate as well as hers, the husband is an active party in making the conveyance. Where the wife levies the fine, without the husband, it operates as a conveyance, not as an estoppel to the husband (LORD THURLOW, C.).

To decree a specific performance of the articles, the ct. must carry the principle to this length, that a wife making a wise settlement in her infancy, on the marriage, without any estate settled on the other side, is bound by the agreement, & that even if the husband had died, she must have continued to be bound. I cannot think an infant, only covenanting as to her estate, can be bound. If she is so at all, it must be in reference to her marriage. Nobody has yet said that merely by its being upon marriage she is bound. . . . I think she is not bound unless she has availed herself of the settlement of the husband (LORD THURLOW, C.).

I cannot conceive that the parent's or guardian's consent can make an essential difference (LORD THURLOW, C.).—*DURNFORD v. LANE* (1780), 1 Bro. C. C. 106; 28 E. R. 1015, L. C.

Annotations:—*Consd.* *Caruthers v. Caruthers* (1794), 4 Bro. C. C. 500; *Milner v. Harewood* (1811), 18 Ves. 259. *Refd.* *Field v. Moore*, *Field v. Brown* (1855), 7 De G. M. & G. 691.

653. ———.]—*CLOUGH v. CLOUGH* (1801), 5 Ves. 710; 31 E. R. 818.

Annotations:—*Refd.* *Pimm v. Insall* (1849), 1 H. & Tw. 487; *Field v. Moore*, *Field v. Brown* (1855), 7 De G. M. & G. 691.

654. ———.]—Female infant not bound by agreement to settle her freehold estate on marriage without an option, when twenty-one, to refuse; but her heir bound under the circumstances claiming as special occupant, the subject being leaseholds for lives, frequently during & since the coverture renewed by the husband, who had settled his own estate: the settlement confirmed by her repeated acts & fines, though not of the life estates, & by orders of ct., children having existed, though deceased under age, no claim for many years, & during eighteen an adverse possession against a former heir by the husband. The bill claiming, not against his assets, but merely an account since his death against his devisee for life; whose possession commenced long since the fall of the surviving life in the original leases.—*MILNER v. HAREWOOD* (LORD) (1810), 18 Ves. 259; 34 E. R. 215, L. C.

Annotations:—*Consd.* *Fitzroy v. Howard* (1828), 3 Russ. 225. *Refd.* *Field v. Moore*, *Field v. Brown* (1855), 7 De G. M. & G. 691; *Helps v. Clayton* (1864), 17 C. B. N. S. 553; *Davies v. Davies* (1870), L. R. 9 Eq. 468. *Mentd.* *Jarratt v. Aldam* (1870), L. R. 9 Eq. 463.

655. ——— Made with approbation of court.]—On the marriage of a female infant who was a ward of ct., & entitled to a leasehold estate to her separate use, a settlement was made under the order of the ct., giving to the trustees a power of sale over the leasehold estate. A sale made by the trustees under the power, during the minority of the female infant, is not valid.

I take it to be clear that the real estate of a female

infant would not be bound by a settlement made with the approbation of the ct. (LEACH, M.R.).

Where an infant is bound to elect the ct. will decide for the infant what election ought to be made, but this ct. has no power to give an infant a form of alienation even for her own benefit (LEACH, M.R.).—*SIMSON v. JONES* (1831), 2 Russ. & M. 365; 9 L. J. O. S. Ch. 106; 39 E. R. 433.

Annotations:—*Distd.* *Tullett v. Armstrong* (1840), 4 My. & Cr. 390. *Refd.* *Johnson v. Johnson* (1837), 1 Keen, 648; *Scarborough v. Borman* (1840), 4 Jur. 38; *Pimm v. Insall* (1849), 1 Mac. & G. 449; *Field v. Moore*, *Field v. Brown* (1855), 7 De G. M. & G. 691; *Cooper v. Cooper* (1888), 13 App. Cas. 88. *Mentd.* *Davies v. Thornycroft* (1836), 6 Sim. 420.

656. ———.]—A covenant by an infant heiress & her intended husband, in marriage articles, to settle the descended estate on the issue of the marriage, though effectual to defeat any alienation by the husband & wife during the coverture, inconsistent with the articles, is not in itself an alienation of the estate, & therefore, has not the effect of withdrawing it from the claims of the ancestor's creditors in a suit subsequently instituted by them for payment of his debts.

Qu.: whether a settlement executed pursuant to such articles after the institution of such suit, would have that effect.

Upon these articles the present rights of the parties must depend & the case upon these arts. is simply that of an agreement by an infant heir upon marriage never carried into effect. It is too late to contend that such a contract is binding on the wife (LORD COTTENHAM, C.).—*PIMM v. INSALL* (1849), 1 Mac. & G. 449; 1 H. & Tw. 487; 19 L. J. Ch. 1; 15 L. T. O. S. 177; 14 Jur. 357; 41 E. R. 1338, L. C.

Annotations:—*Refd.* *Dilkes v. Broadmead* (1860), 2 Giff. 113. *Mentd.* *Morley v. Morley* (1855), 5 De G. M. & G. 610; *Re Mouat, Kingston Cotton Mills Co. v. Mouat*, [1899] 1 Ch. 831.

657. ———.]—Wife, an infant, being entitled to a present interest in certain personal property, & also to certain other contingent interests, a deed of separation was entered into between herself, her father, & her husband, by which she was to retain her present interest in the property; & it was agreed that the husband should have a certain share in the contingent property, if it should fall into possession. The husband died before the wife:—*Held:* the deed was a nullity as to the wife, & the contingent interest falling into possession, she was entitled by survivorship.

At the time of this deed this lady as an infant was incapable of contract, she was also incapable of contract as a *feme covert*, especially of contract with her husband. As far, therefore, as this deed is to be considered as the act of this lady, it must be a mere nullity (LEACH, V.-C.).—*STAMPER v. BARKER* (1820), 5 Madd. 157; 56 E. R. 855.

Annotations:—*Consd.* *Field v. Moore*, *Field v. Brown* (1855), 7 De G. M. & G. 691. *Refd.* *Harle v. Jarman*, [1895] 2 Ch. 419.

658. Wife's after-acquired property Covenant for wife's benefit.]—On the marriage of a female infant, her reversionary interest in choses in action was settled under the ct. for her separate use for life, with remainder to her children. She afterwards contracted two subsequent marriages, but no further settlement was executed on those occasions. Part of the reversionary interests fell into possession during the first coverture, & part during the second, & were transferred to the trustees:—*Held:* (1) although the deed made during infancy was not binding in respect of the reversionary interests, as against the wife surviving, still she might, while discover, adopt it if for her benefit; (2) the wife having survived & not having

called for a transfer of the fund, must be deemed to have acquiesced in & adopted it, as it was for her interest to do so.—*ASHTON v. M'DOUGALL* (1842), 5 Beav. 56; 11 L. J. Ch. 344; 6 Jur. 447; 49 E. R. 497.

Annotations:—As to (1) *Reid. Brownrigg v. Pike* (1882), 7 P. D. 61. As to (2) *Consd. White v. Cox* (1876), 2 Ch. D. 387. *Generally, Mentd. Spicer v. Dawson, Spicer v. Spicer, Lawford v. Spicer* (1857), 26 L. J. Ch. 704.

659. ———.]—An agreement by husband & wife, in an ante-nuptial settlement for the settlement by the husband & wife of the wife's after-acquired property, is a covenant by the wife as well as by the husband, whether the wife is a minor or of full age. If the wife is a minor, & the covenant is for her benefit, it is voidable only & not void, & is binding upon all property coming to her during the coverture for her separate use, without a restraint on anticipation, until she avoids or disaffirms the covenant as to such property; for she may, after attaining twenty-one, & during the coverture, elect whether the covenant shall be binding on her separate estate or not, such right of election being a necessary consequence of a married woman's power to dispose of, without her husband's consent, property settled to her separate use.—*SMITH v. LUCAS* (1881), 18 Ch. D. 531; 45 L. T. 460; 30 W. R. 451.

Annotations:—*Consd. Re Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606; *Burnaby v. Equitable Reversionary Interest Soc.* (1885), 28 Ch. D. 416; *Duncan v. Dixon* (1890), 44 Ch. D. 211. *Reid. Wilder v. Piggott* (1882), 22 Ch. D. 263; *Cahill v. Cahill* (1883), 8 App. Cas. 420; *Re Queade's Trusts* (1885), 54 L. J. Ch. 786; *Re Vardon's Trusts* (1885), 31 Ch. D. 275; *Cooke v. Cooke* (1887), 38 Ch. D. 202; *Carter v. Silber, Carter v. Hasluck*, [1892] 2 Ch. 278; *Greenhill v. North British & Mercantile Insee.*, [1893] 3 Ch. 474; *Clements v. L. & N. W. Ry.*, [1894] 2 Q. B. 482; *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421; *Harle v. Jarman*, [1895] 2 Ch. 419; *Viditz v. O'Hagan*, [1899] 2 Ch. 569; *Pullan v. Koe*, [1913] 1 Ch. 9. *Mentd. Haywood v. Tidy* (1890), 63 L. T. 679; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345.

660. Dissolution of marriage.]

Re SHELTON, BILLINGHURST v. CHANCELLOR (1892), 37 Sol. Jo. 47.

661. ——— Settlement of realty by infant husband.]—*FRYER v. COOKE* (1843), 12 L. J. Ch. 487; 1 L. T. O. S. 408.

662. ———.]—*HONYWOOD v. HONYWOOD*, No. 2097, *post*.

663. ——— Misrepresentation of husband's age.]—*NELSON v. STOCKER*, No. 369, *ante*.

664. ———.]—The next point is the agreement of the husband, who at that time was an infant of the age of seventeen years, or thereabouts, in consideration of the marriage to convey & assign all the then present & future property of the wife for her separate use. I regret that I cannot see the means of giving effect to that agreement, but I find the law on this subject to be, according to authorities with which we are familiar, that generally the promise of an infant is void absolutely as against himself. Of course it follows that no one but himself can take advantage of that law. But to make this agreement effectual as constituting this property the separate estate of the wife, it would, *primâ facie*, have an effect to the prejudice of the infant husband, & necessarily be an agreement impossible as against him. He remained an infant up to & at the time of this action, & he could not be presumed to have done, nor was it possible for him to have done, anything in the interval to affirm this agreement. Under these circumstances, I apprehend he cannot therefore be treated to have done anything constituting this property in equity, any more than at law, the separate estate of the wife. Consequently the legal effect of the marriage must prevail, which is

to vest in the husband the legal right to assign or deal with the wife's leaseholds, & in the meantime to receive the rents (*LORD SELBORNE, C.*).—*KINGSMAN v. KINGSMAN* (1880), 6 Q. B. D. 122; 50 L. J. Q. B. 81; 44 L. T. 124; 45 J. P. 357; 29 W. R. 207, C. A.

Annotations:—*Mentd. Abouloff v. Oppenheimer* (1882), 47 L. T. 702; *James v. Barraud* (1883), 49 L. T. 300.

665. ———.]—They were dealing with property which at that time did belong to the lady who was an infant but was under no incapacity except infancy. It is said that the settlement of freeholds was absolutely void. I know of no ground for saying so; to hold that it was would be to go directly against *Smith v. Lucas*, No. 659, *ante*. That instrument was therefore voidable, but it was never avoided, it remained binding in 1836. . . . In my opinion the estate was bound already by the agreement which was voidable & not void (*NORTH, J.*).—*COOKE v. COOKE* (1887), 38 Ch. D. 202; 59 L. T. 693; 36 W. R. 756.

Annotation:—*Mentd. Re Hancock, Watson v. Watson*, [1901] 1 Ch. 482.

666. ———.]—Applt., the widow of a domiciled Scotsman, brought an action in the Ct. of Session for the reduction of an ante-nuptial contract, by which, in consideration of a provision made by her husband, she purported to discharge her legal rights of *terce* & *jus relictæ*. The contract was executed in Ireland by applt., who was then an infant domiciled in Ireland, but it was contemplated that she & her husband should reside, & they actually resided, during their married life, in Scotland. The grounds upon which applt. sought to obtain reduction of the contract were, that being an infant she was incapable of contracting by the law of Ireland, & minority & lesion according to the law of Scotland, but no evidence was adduced before the Ct. of Session as to the Irish or English law with regard to the capacity of an infant to enter into contracts:—*Held*: the capacity of applt. to bind herself by the marriage contract must be determined by the law of her domicile, i.e. the Irish or English law, & under such law she could not as an infant incur an obligation which was not shown to be for her benefit, & she was therefore at liberty to avoid the contract & claim her legal rights as a Scottish widow.

As regards the contract of infants the law of Ireland, which does not differ from that of England, is well settled. Infants are incapable, generally speaking, of binding themselves absolutely by contract.

A settlement on marriage not being a settlement under the Infants Settlement Act, 1855 (c. 43), forms no exception to the rule. *Primâ facie*, therefore, this ct. was not bound by the settlement in question. *Primâ facie* it was voidable by her, & she has elected to avoid it (*LORD MACNAGHTEN*).—*COOPER v. COOPER* (1888), 13 App. Cas. 88; 59 L. T. 1, H. L.

Annotations:—*Consd. Viditz v. O'Hagan*, [1900] 2 Ch. 87. *Mentd. Dreyfus v. Peruvian Guano Co.* (1889), 43 Ch. D. 316; *North-Western Bank v. Poynter, Son & Macdonalds* (1894), 11 R. 125; *Banque Internationale de Commerce de Petrograd v. Goukassow*, [1923] 2 K. B. 682.

667. ——— Not within Infants Relief Act, 1874, c. 62.]—*DUNCAN v. DIXON*, No. 161, *ante*.

668. ———.]—*EDWARDS v. CARTER*, No. 181, *ante*.

669. Settlement must be fair & reasonable.]—*WILLIAMS v. WILLIAMS*, No. 730, *post*.

670. Letter expressing desire to make settlement—No binding effect.]—On Tuesday, an intended husband, who was an infant, wrote to the trustee of the intended wife, "that he especially wished his wife's property entirely settled on

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herself" & that the wedding was to take place on Saturday. They married, unknown to the trustee, on Wednesday, without any settlement:—*Held*: this letter contained no settlement or agreement for a settlement binding on the husband or wife.—**BEAUMONT v. CARTER, CARTER v. BEAUMONT** (1863), 32 Beav. 586; 8 L. T. 685; 55 E. R. 230.

Confirmation of settlement.]—See Sub-sect. 1, A. (b) (ii.), post.

Repudiation of settlement.]—See Sub-sect. 1, A. (b) (iii.), post.

Covenants by husband to settle infant wife's property.]—See Sub-sect. 1, B., post.

(b) *Confirmation and Repudiation.*

i. *Election to Confirm or Repudiate.*

Election generally.]—See EQUITY, Vol. XX., pp. 403 et seq.

671. Wife's right to elect.]—GLOVER v. BATES, No. 681, post.

672. —.]—By the settlement made on the marriage of a female infant, an estate was settled on the husband's mother for life, remainder to the husband for life, remainder to the wife for life, with remainders over, in bar of dower. This settlement will not bind the wife in regard the mother might, which she did survive the husband; the wife may therefore elect to take the provision under the settlement, or her dower & free-bench.

It is said that great judges have laid it down, that by such a settlement made during the infancy of a female infant, her own estate would be bound & for this *Cannel v. Buckle, Harvey v. Ashly*, Nos. 714, 715, *post*, have been cited, but in those cases this was not the point decided, although something like the principle is laid down & it appears to have been the opinion of those judges that such was the power of guardians & that having the power of marrying their wards, they must have that of making the collateral contracts. But I hardly think that LORD HARDWICKE laid it down so broadly (*ARDEN, M.R.*).—**CARUTHERS v. CARUTHERS** (1794), 4 Bro. C. C. 500; 29 E. R. 1010.

Annotations:—*Distd.* Corbet v. Corbet (1828), 5 Russ. 254. *Refd.* Field v. Moore, Field v. Brown (1855), 7 De G. M. & G. 691. *Mentd.* Simpson v. Gutteridge (1816), 1 Madd. 609; Dyke v. Rendall (1852), 2 De G. M. & G. 209.

673. —.]—BARROW v. BARROW, No. 683, post.

674. — Separate property restrained from anticipation.]—SMITH v. LUCAS, No. 659, ante.

675. —.]—WILDER v. PIGOTT, No. 689, post.

676. —.]—HAMILTON v. HAMILTON, No. 711, post.

677. —.]—GREENHILL v. NORTH BRITISH & MERCANTILE INSURANCE CO., No. 685, post.

678. Wife's duty to elect—Property to wife's separate use.]—WILLOUGHBY v. MIDDLETON, No. 710, post.

679. — Covenant to settle after-acquired property.]—The doctrine of election is founded on the presumption of a general intention that every part of an instrument shall take effect, & the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument. Therefore, where a marriage settlement settled a fund for the separate use of the wife for life with restraint on anticipation, & contained a covenant by the wife, then an infant, to settle future property:—*Held*: the wife could not be compelled to elect between after-acquired property & her interest in the settled fund, but was entitled to retain both.—*Re VARDON'S*

TRUSTS (1885), 31 Ch. D. 275; 55 L. J. Ch. 259; 53 L. T. 895; 34 W. R. 185; 2 T. L. R. 204, C. A.

Annotations:—*Consd.* *Re Queade's Trusts* (1885), 54 L. J. Ch. 786; *Hamilton v. Hamilton*, [1892] 1 Ch. 396; *Haynes v. Foster*, [1901] 1 Ch. 361. *Refd.* *Carter v. Silber, Carter v. Hasluck*, [1891] 3 Ch. 553; *Re Tancred's Settlement, Somerville v. Tancred, Re Selby, Church v. Tancred*, [1903] 1 Ch. 715; *Re Hargrove, Hargrove v. Pain*, [1915] 1 Ch. 398. *Mentd.* *Re Brooksbank, Beauclerk v. James* (1886), 34 Ch. D. 160; *Re Wells Trusts, Hardisty v. Wells* (1889), 42 Ch. D. 646.

680. —.]—Re SHELTON, BILLINGHURST v. CHANCELLOR (1892), 37 Sol. Jo. 47.

See, generally, EQUITY, Vol. XX., pp. 447–448, Nos. 1725–1740.

ii. *Confirmation.*

681. What amounts to confirmation—Benefit taken under settlement.]—In arts. before marriage it was declared that the provision thereby made should be in full satisfaction & recompense of & for all dower, or thirds, parts, or shares, & right, title, or claim of dower, which the wife might have to any of the real or personal estate of the husband by the common law custom of the city of London or any other law custom or usage whatsoever; the wife being an infant when she signed the arts. had her election at her husband's death, which she made by accepting since his death the provision secured to her by the arts.—**GLOVER v. BATES** (1739), 1 Atk. 439; *West temp. Hard.* 667; 26 E. R. 280, L. C.

682. —.]—DURNFORD v. LANE, No. 652, ante.

683. —.]—A married woman can elect so as to affect her interest in real property, without deed acknowledged under Fines & Recoveries Act, 1833 (c. 74) &, where she has so elected, the ct. can order a conveyance accordingly, the ground of such order being that no married woman shall avail herself of fraud.

By ante-nuptial settlement the intended husband covenanted to settle lands, of which the intended wife, then an infant, was tenant in tail, upon trusts for her separate use for life, remainder for himself for life, remainder for the children of the marriage. The wife, having attained twenty-one, filed a bill by her next friend against her husband, & obtained a decree for specific performance of the covenant, with directions for raising the costs out of the estate; &, by virtue of the decree, she received, during the husband's lifetime, £50 on account of rents, to her separate use. The husband dying a month after the decree. Upon petition by the children:—*Held*: these acts on the part of the wife amounted to an election, & she was bound by the decree; & she was ordered to settle the premises accordingly.—**BARROW v. BARROW** (1858), 4 K. & J. 409; 27 L. J. Ch. 678; 33 L. T. O. S. 42; 4 Jur. N. S. 1049; 6 W. R. 714; 70 E. R. 171.

Annotations:—*Consd.* *Cahill v. Cahill* (1883), 8 App. Cas. 420. *Apld.* *Greenhill v. North British & Mercantile Insce.*, [1893] 3 Ch. 474. *Foll'd.* *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421. *Refd.* *Williams v. Bailly* (1866), L. R. 2 Eq. 731; *Smith v. Lucas* (1881), 18 Ch. D. 531; *Wilder v. Pigott* (1882), 22 Ch. D. 263; *Harle v. Jarman*, [1895] 2 Ch. 419. *Mentd.* *Willoughby v. Middleton* (1862), 2 John. & H. 344.

684. — Receipt of annuity.]—In a marriage settlement, the intended wife being a minor, the lady's father covenanted to pay an annuity of £100 to his daughter during her life, & after her death to her husband, she covenanting that the share to which she then was or at any time subsequently should become entitled under the will of her grandfather should be settled upon the trusts of the settlement. She never formally ratified the settlement, but regularly received the

annuity. But when her share of the fund became payable, she petitioned that it might be paid to her free from the trusts of the settlement:—*Held*: there was good consideration for the annuity; she had ratified the settlement by her acts, & the fund was bound by the trusts of the settlement.—*Re SMITH'S WILL* (1878), 38 L. T. 466.

685. ——— Mortgage of her interest.]—A husband & wife had, previously to their marriage, entered into an agreement for the settlement of all the wife's property, including a policy of insurance on the life of another to which she was entitled under an instrument made before 20 & 21 Vict. c. 57. A memorandum in writing of this agreement was signed before the marriage by the husband alone, & the settlement therein referred to was, after the marriage, also executed by the husband, but not by the wife. By it the husband & wife covenanted to assign to trustees all her property upon trust for the wife for life, & after her death as she should appoint, & in default of appointment for the children of the marriage, & if there should be none for the husband. By a subsequent deed acknowledged by the wife under the Fines & Recoveries Act, 1833 (c. 74), the policy was assigned & certain real estate of the wife's was conveyed to the trustees of the settlement. The wife subsequently, in exercise of her power under the settlement, mortgaged the policy:—*Held*: the wife by acting on the contract & taking benefit of it had elected to confirm the settlement, & was bound in equity to perform it fully, & that consequently the mtge. was valid.—*GREENHILL v. NORTH BRITISH & MERCANTILE INSURANCE CO.*, [1893] 3 Ch. 474; 62 L. J. Ch. 918; 69 L. T. 526; 42 W. R. 91; 37 Sol. Jo. 632; 3 R. 674.

Annotations:—*Consd.* *Harle v. Jarman*, [1895] 2 Ch. 419. *Reid.* *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421.

Transfer of property to trustees of settlement.]—ASHTON v. M'DOUGALL, No. 658, *ante*.

687. ———.]—A. was entitled in remainder, under the marriage settlement of her father & mother in 1767, to a share of certain real estates as tenant in common in tail. A settlement was executed upon her first marriage in 1790, she being then an infant. A second marriage was contracted by her while still an infant. A fine was levied in 1808, & the settled property conveyed to a purchaser. A deed was executed declaring the trusts of the purchase-money, which as to A.'s share was to be held upon the trusts of the settlement of 1790. A. & her husband, though named as parties, did not execute this deed, nor was there any evidence of their assent to it:—*Held*: A.'s interest was unaffected by this deed of 1808, & remained upon the trusts of the original settlement of 1767, so that she was entitled absolutely to her share of the purchase-money.—*Re FOZARD'S TRUST* (1855), 1 K. & J. 233; 24 L. T. O. S. 267; 3 W. R. 219; 69 E. R. 443; *on appeal*, 3 Eq. Rep. 759, L. JJ.

688. ——— Instructions to pay profits.]—Pltf. in 1841, being then an infant, in contemplation of marriage executed a settlement of two reversionary funds on herself for life, with remainders over. She attained twenty-one in 1842, & her husband died in 1846. In 1859 one of the funds having come into possession, she

directed that it should be paid to the trustees of the settlement, & that the dividends should be paid to her for life. She never did any act to repudiate the settlement:—*Held*: she had confirmed the settlement generally, so that both funds were bound by it.—*DAVIES v. DAVIES* (1869), L. R. 9 Eq. 468; 39 L. J. Ch. 343; 22 L. T. 505; 18 W. R. 634.

Annotation:—*Reid.* *White v. Cox* (1876), 45 L. J. Ch. 685.

689. ———.]—By a marriage settlement made in Jan. 1874, the wife being an infant, personal property derived under her father's marriage settlement was assigned by the husband & wife to trustees upon the usual trusts. There was a covenant by the husband that he & his wife would so soon as she should attain the age of twenty-one years convey & assign real & personal property to which she was entitled under the will of her father; & it was provided that if the wife should refuse or neglect to do so it should be lawful for the trustees to accumulate any part of the income payable to her for the other persons interested under the settlement. There was an agreement to settle the wife's after-acquired personal property. The wife, on Apr. 13, 1874, a week after she attained the age of twenty-one, & her husband executed a deed, which she acknowledged, by which she assigned all her personal property expressed to be assigned by the settlement which had not become vested in possession, & conveyed property purported to be conveyed by the settlement upon the trusts thereof. At the date of the settlement she was contingently entitled to a reversionary interest in personal estate, but it was not actually assigned by the deed of confirmation because it did not come within 20 & 21 Vict. c. 57. It fell into possession, & it was by the direction of the wife & her husband invested in the names of the trustees. The husband had died, & the wife had become of unsound mind, but not so found by inquisition. On summons by the infant children, by their next friend:—*Held*: the wife could during her coverture elect to confirm the settlement, & she had by her acts elected.—*WILDER v. PIGOTT* (1882), 22 Ch. D. 263; 52 L. J. Ch. 141; 48 L. T. 112; 31 W. R. 377.

Annotations:—*Apld.* *Greenhill v. North British & Mercantile Insce.*, [1893] 3 Ch. 474. *Consd.* *Re Hodson, Williams v. Knight*, [1894] 2 Ch. 421; *Harle v. Jarman*, [1895] 2 Ch. 419. *Reid.* *Re Vardon's Trusts* (1884), 51 L. T. 884.

690. Appointment of new trustees.]—Where pltf., a married woman, when a minor, executed a post-nuptial settlement for the benefit of herself, her husband & the issue of the marriage, of property devised to her separate use, & on coming of age executed a subsequent deed for the appointment of new trustees to the same, & afterwards, on the petition of her husband, by whom she had one child, living, became divorced & married a second time. On a bill filed by pltf. by her next friend seeking to set aside the settlement, on the ground (*inter alia*) that it contained a proviso defeating her interest under it in the event of her separating from her husband, & calling upon him to allow her alimony:—*Held*: the proviso was bad, & must be declared void; but there was no pretence for setting aside the settlement, & the bill was ordered to be dismissed

PART VIII. SECT. 11, SUB-SECT. 1.—
A. (b) ii.

690 i. What amounts to confirmation—Appointment of new trustees.]—In 1836, N., then a minor, entered into marriage articles, by which he covenanted that, on attaining his full age

in the following year, he would bar the entail in the lands in this matter, & convey to trustees to secure a jointure to his wife. The articles were duly registered. In 1836, being then of full age, N. appointed a new trustee of the marriage articles, & in 1841, executed a settlement in pursuance of the mar-

riage articles. The settlement was duly registered:—*Held*: the appointment of a new trustee in 1836 was a confirmation of the marriage articles.—*Re TOTTENHAM'S ESTATE, INGRAM & HARRISON PETITIONERS* (1886), 17 L. R. Ir. 174.—*IR.*

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with costs, to be paid by the next friend, excepting so much related to the proviso.—*MERRYWEATHER v. JONES* (1864), 4 Giff. 509; 10 L. T. 62; 10 Jur. N. S. 290; 12 W. R. 524; 66 E. R. 807.

691. — — —.]—By an ante-nuptial settlement, dated in 1872, the wife being then a minor, after reciting that she would be entitled, on attaining twenty-one, to a legacy under her deceased father's will, & the intention to settle the same, the wife, with the sanction of her guardian, purported to agree, & the husband covenanted with the trustees, that as soon as the wife attained twenty-one she & the husband & all other necessary parties would assign the legacy to the trustees upon the trusts declared by the settlement; & it was agreed that, if the wife then was, or if during the coverture she or her husband in her right should become seized, possessed of, or entitled to any real or personal property of the value of £100 or upwards for any estate or interest whatsoever, except jewels, etc., then & in every such case the husband & wife & all other necessary parties should assure the same to the trustees upon the trusts declared by the settlement. The wife attained twenty-one in 1874, & thereupon she & her husband by deed purported to be acknowledged, purported to assign the legacy to the trustees. The deed was, however, only executed by the wife, & was therefore of no effect. In 1883 the husband & wife by deed appointed a new trustee of the settlement under the power thereby vested in them. In 1885, upon the death of testator, the wife became entitled, under his will, to a reversionary interest in certain property. The wife contended that she had done no act to confirm the marriage settlement, & that the same was voidable & she repudiated the same, & elected not to be bound by the covenant to settle after-acquired property therein contained. The question, however, was, whether the appointment of a new trustee could not be regarded as an election by the wife to confirm the marriage settlement:—*Held*: when there was, as here, an appointment of a new trustee, in accordance with the usual power, by a married woman, it could not, standing alone, be accepted as expressing her intention to confirm the settlement.—*HAYWOOD v. TIDY* (1890), 63 L. T. 679.

692. — — — No act of repudiation.]—*DAVIES v. DAVIES*, No. 688, *ante*.

693. — — — Consent to order relating to settlement.]—A female infant on her marriage in 1843 executed a settlement of her reversionary interest in personalty; & the husband covenanted to insure his life, & assign the policy, which he did, to the trustees of the settlement to be held by them upon the usual trusts.

In 1846 the husband died, having had two children by his wife. In 1848 a decree was made in an interpleader suit respecting the policy moneys, to which she, as the legal personal representative of her husband, & trustees of the settlement were made defts., by which the policy moneys were by consent of all parties paid to the trustees of the settlement. In 1853 she married again, & had issue several children. In 1871 the reversionary interest fell into possession. On a bill filed by her & her second husband to set aside the settlement:—*Held*: by being a party & consenting to the decree made in the interpleader suit, she had formally adopted & confirmed the settlement.—*D. 387*;

694. — — — Post-nuptial settlement—No reference to ante-nuptial agreement.]—*TROWELL v. SHENTON*, No. 701, *post*.

695. — — — Deed expressly confirming.]—*Re HODSON, WILLIAMS v. KNIGHT*, No. 182, *ante*.

696. Transfer of funds to trustees on confirmation—Separate examination of wife.]—A ward of the ct. married under twenty-one, with the consent of her father, but without the consent of the ct., & prior to her marriage, a settlement was made of her property. On her attaining twenty-one, she & her husband applied to have her property transferred to the trustees; which was ordered upon her being examined separately & consenting.—*LEEDS v. BARNARDISTON* (1831), 4 Sim. 538; 58 E. R. 201.

Annotations:—*Dbtd. Re Cooke* (1851), 21 L. J. Ch. 145. *Consd. Gynn v. Gilbard* (1860), 1 Drew. & Sm. 356. *Refd. Russell v. Nicholls* (1846), 16 L. J. Ch. 47.

697. — — — Consent of wife necessary.]—*LEEDS v. BARNARDISTON*, No. 696, *ante*.

698. — — —.]—On the marriage of an infant *feme*, a settlement was made of funds in ct. to which she was entitled. On her attaining twenty-one, a petition was presented for payment to the trustees:—*Held*: the consent of the lady in ct. or by commission was necessary.—*DAY v. DAY* (1848), 11 Beav. 35; 50 E. R. 729.

iii. *Repudiation.*

699. Evidence of repudiation — Statements in letters—Recital in will.]—*VERNON v. VAUDREY* (1740), Barn. Ch. 280; 2 Atk. 119; 27 E. R. 646, L. C.

Annotations:—*Refd. Holland v. Holland* (1869), 17 W. R. 565. *Mentd. Allfrey v. Allfrey* (1849), 1 H. & Tw. 179; *Adey v. Arnold* (1852), 2 De G. M. & G. 432.

700. What amounts to—No act of confirmation—Negligence.]—By marriage arts., reversionary real estate of the intended wife was agreed to be settled upon the intended husband for life, & the former had a testamentary power conferred upon her over part of her personal property. The lady was under age. The marriage took place. No settlement was ever executed. The reversion fell into possession. The wife lived thirty years, and then died, leaving her husband surviving. By her will, she executed the power reserved to her by the arts., & appointed a sum of stock among her nieces. The husband filed his bill against the heir-at-law of his wife & the appointees under her will, seeking to have the marriage arts. carried into execution, & a life estate in the real estate secured to him, or that he might be declared entitled to be compensated for the value of such life estate out of the personalty appointed by his wife, & that the appointment by the wife so far as it interfered with such compensation, might be declared void:—*Held*: as it appeared in evidence that the husband knew at the time of the marriage that his wife was an infant, & as there was no settlement executed, nor were the arts. proved to have been recognised by her after she attained twenty-one, & as there was no evidence or allegation that she had ever refused to concur in carrying the arts. into effect, the real estate was not bound by them, but must pass to the heir-at-law of the wife; & the husband could not be entitled to any compensation out of the appointed personalty, the real & personal estate not having been conveyed & assigned upon the trusts of the arts., being solely attributable to the negligence or indifference of the husband.—*CAMPBELL v. INGILBY* (1857), 1 De G. & J. 393; 26 L. J. Ch. 654; 29

L. T. O. S. 287; 5 W. R. 837; 44 E. R. 775, L. JJ.; *affg.* (1856), 21 Beav. 567.

Annotations:—*Distd.* *Anderson v. Abbott* (1857), 23 Beav. 457. *Consd.* *Willoughby v. Middleton* (1862), 2 John. & H. 844. *Expld. & Distd.* *Brown v. Brown* (1866), L. R. 2 Eq. 481. *Consd.* *Codrington v. Lindsay* (1873), 8 Ch. App. 578. *Mentd.* *Ingilby v. Amcotts* (1856), 21 Beav. 585.

701. — Post-nuptial settlement of property—In manner different from ante-nuptial agreement—Rights of purchaser for value.]—An ante-nuptial agreement by an infant is not sufficient to take a post-nuptial settlement, in which no reference is made to the ante-nuptial agreement out of operation of 27 Eliz. c. 4, & such post-nuptial settlement is void against a subsequent purchaser for value. In 1857 an infant engaged to be married, wrote to his intended wife, promising that on coming of age he would give her seven specified houses. The marriage took place in 1859, after he came of age. In 1872 he executed a deed, not referring to any previous agreement, by which he conveyed the above & two other houses to trustees upon trust for his wife for life, for her separate use, & after her death upon trust for himself for life, & after the death of the survivor, upon such trusts as the wife should by deed or will appoint, & in default of appointment, in trust for her in fee. He subsequently agreed to sell three of the houses, & the purchaser sued for specific performance:—*Held*: the purchaser was entitled to specific performance, for as the settlement did not refer to any previous agreement, dealt with other property than that mentioned in the letter of 1857, & settled the property in a different way, there was no ratification in writing of the promise contained in that letter, & the settlement therefore was voluntary, & void as against a purchaser for value.—*TROWELL v. SHENTON* (1878), 8 Ch. D. 318; 47 L. J. Ch. 738; 38 L. T. 369; 26 W. R. 837, C. A.

Annotations:—*Consd.* *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360. *Mentd.* *Re Croasdel & Cammell, Laird* (1906), 75 L. J. K. B. 769.

702. Must be within reasonable time.]—*EDWARDS v. CARTER*, No. 181, *ante*.

703. — Unless infant afterwards acquires foreign domicile—Infant incapable of ratifying by foreign law.]—The rule that an infant's contract is voidable, but binding upon the infant unless repudiated within a reasonable time after attaining majority, does not apply where the infant after entering into the contract acquires a foreign domicile & becomes under the law of the country of domicile incapable of validly ratifying the contract made by her.

An infant executed marriage articles in 1864, & married an Austrian & became a domiciled Austrian. Under the law of Austria she had power to revoke but no power of irrevocably affirming any marriage contract made by her:—*Held*: the marriage articles were rendered void by a repudiation by her which took place in 1893.

Now what is the effect of the English law as expounded by the House of Lords in *Edwards v. Carter*, No. 181, *ante*. What is the theory of it? The theory is, I apprehend, this: that there are some contracts of infants which by English law

are absolutely void. There are a few, not a great many, contracts which in the view of the English law cannot possibly be for the benefit of the infant, take a bond with penalties as an illustration, & they are void. . . . The great bulk of infant's contracts are only voidable. What does that mean? It means that when the infant comes of age he can elect either to affirm or to disaffirm the contract. If he does nothing within a reasonable time after he attains twenty-one, the presumption is that he has affirmed the contract. The contract is binding & has been binding on him since he attained twenty-one, unless he proves the contrary by repudiating within a reasonable time. . . . Now by alteration of the wife's domicile in this case, her ability to ratify her contract was lost. . . . In my opinion, the effect of the change of domicile was that the English doctrine of reasonable time became inapplicable by reason of the impossibility after that change of the wife's effectually ratifying her contract (*LINDLEY, M.R.*).—*VIDITZ v. O'HAGAN*, [1900] 2 Ch. 87; 69 L. J. Ch. 507; 82 L. T. 480; 48 W. R. 516; 16 T. L. R. 357; 44 Sol. Jo. 427, C. A.

Annotations:—*Consd.* *Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333. *Mentd.* *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573.

704. What is reasonable time—Four years.]

—*EDWARDS v. CARTER*, No. 181, *ante*.

705. — — No absolute rule.]—There is no absolute rule as to what is a reasonable time within which an infant after coming of age may repudiate a marriage settlement executed during infancy. The option was held to be exercised within a reasonable time, being exercised when the question first arose whether some property should be dealt with under or against the settlement, although that was thirty-six years after the date of the settlement.—*Re JONES, FARRINGTON v. FORRESTER*, [1893] 2 Ch. 461; 62 L. J. Ch. 996; 69 L. T. 45; 3 R. 498.

Annotations:—*Dtd.* & *N.F.* *Carnell v. Harrison*, [1916] 1 Ch. 328. *Mentd.* *Re Cook's Mortgage, Lawledge v. Tyndall*, [1896] 1 Ch. 923; *Hill v. Hickin*, [1897] 2 Ch. 579; *Kenrick v. Mountstevens* (1899), 48 W. R. 141; *Re Repington, Wodehouse v. Scobell* (1904), 73 L. J. Ch. 533; *Re Coulson's Trusts, Prichard v. Coulson* (1907), 97 L. T. 754; *Re Darby's Estate, Rendall v. Darby*, [1907] 2 Ch. 465.

706. — — Thirty years—Contents made known to infant shortly before repudiation.]—An infant who has executed a marriage settlement will not be allowed to repudiate it thirty years later upon the ground that she only became aware of its contents shortly before repudiation.—*DAVENPORT v. MARSHALL*, [1902] 1 Ch. 82; 71 L. J. Ch. 29; 85 L. T. 340; 50 W. R. 39; 46 Sol. Jo. 30.

Annotation:—*Mentd.* *Re Bankes, Reynolds v. Ellis*, [1902] 2 Ch. 333.

707. From when time runs—On infant attaining age.]—The "reasonable time" within which an infant must exercise her right to repudiate a settlement of reversionary property made by her on her marriage must be calculated from the time when she attains twenty-one, & not from the time when the reversionary property falls into possession & becomes payable to her or her trustees.

PART VIII. SECT. 11, SUB-SECT. 1.— A. (b) iii.

702 i. Must be within reasonable time.]—*Deft. F.*, an infant domiciled in New Zealand, while on a visit to Scotland in 1901, executed an ante-nuptial settlement, which purported to bind her after-acquired property. She married, & through her husband

acquired a Scotch domicile. At the time of her marriage she was possessed of no property, but in 1904, she being then of full age, her father transferred to her certain lands in New Zealand. In the same year, forgetting the settlement, which she had never properly understood, she executed a power of attorney to her brothers in New Zealand to manage this estate for

her. In 1907, while on a visit to New Zealand, her solicitors there inquired about a settlement, & on their advice she formally repudiated the settlement:—*Held*: as her repudiation had been made within a reasonable time after attaining majority it was valid.—*BAIRD v. BERGUSSON* (1911), 31 N. Z. L. R. 33.—N.Z.

Sect. 11.—Settlements and covenants to settle on marriage: Sub-sect. 1, A. (b) iii. & (c), B. & C.]

An infant cannot plead ignorance of her right to repudiate as an answer to her obligation to exercise that right within a reasonable time.—

CARNELL v. HARRISON, [1916] 1 Ch. 328; 85 L. J. Ch. 321; 114 L. T. 478; 60 Sol. Jo. 290, C. A.

708. Delay in repudiation—Defences to—Ignorance of particular provisions.]—EDWARDS v. CARTER, No. 181, ante.

709. ——— Ignorance of right to repudiate.]—CARNELL v. HARRISON, No. 707, ante.

710. Effect of repudiation—Interest of infant impounded—To compensate disappointed parties.]

—A married woman having by her marriage settlement executed when a minor, covenanted to confirm the settlement & also to settle future property, & having acquired by bequest personal property to her separate use:—*Held*: bound to elect either to bring the bequest into settlement, or to make compensation out of certain reversionary personalty & other property to which she would be entitled under the settlement for her separate use with a restraint on anticipation.—WILLOUGHBY v. MIDDLETON (1862), 2 John. & H. 344; 31 L. J. Ch. 683; 6 L. T. 814; 8 Jur. N. S. 1055; 10 W. R. 460; 70 E. R. 1089.

Annotations:—*Consd.* Codrington v. Lindsay (1873), 8 Ch. App. 578; Smith v. Lucas (1881), 18 Ch. D. 531; *Re* D'Estampes' Settlement, D'Estampes v. Crowe (1884), 53 L. J. Ch. 1117; *Re* Wheatley, Smith v. Spence (1884), 27 Ch. D. 606; *Re* Queade's Trusts (1885), 54 L. J. Ch. 786. *Refd.* Coventry v. Coventry (1863), 8 L. T. 819; Brown v. Brown (1866), L. R. 2 Eq. 481; *Re* Vardon's Trusts (1885), 31 Ch. D. 275. *Mentd.* De Serre v. Clarke (1874), L. R. 18 Eq. 587; Codrington v. Codrington (1875), 45 L. J. Ch. 660; Bateman v. Faber, [1898] 1 Ch. 144.

711. ——— Income restrained on anticipation.]—An ante-nuptial settlement was made in 1879, the wife being under age. The settlement contained a covenant by the husband & wife to settle her after-acquired property. She was, among other benefits, given certain life interests without power of anticipation. She was divorced. She brought an action to avoid the covenant. Before trial, she married again. Declared, if she elected to avoid the covenant, her interests in other property under the settlement & also in a house settled by a deed of even date recited in the settlement, ought to be impounded to compensate those who lost by her election; but the declaration was not to apply during the existing coverture to the income she was restrained from anticipating.—HAMILTON v. HAMILTON, [1892] 1 Ch. 396; 61 L. J. Ch. 220; 66 L. T. 112; 40 W. R. 312; 36 Sol. Jo. 216.

Annotations:—*Consd.* Haynes v. Foster, [1901] 1 Ch. 361; *Re* Hargrove, Hargrove v. Pain, [1915] 1 Ch. 398. *Refd.* *Re* Shelton, Billingham v. Chancellor (1892), 37 Sol. Jo. 47.

(c) Consent of Parent or Guardian.

712. Whether consent gives validity.]—Guardian of an infant bound in his own estate by covenant of the infant; the guardian being party to the indenture.—STRICKLAND v. COKER (1675), 2 Cas. in Ch. 211; 22 E. R. 915.

Annotation:—*Refd.* Harvey v. Ashley (1748), 3 Atk. 607.

713. ———.]—I agree there are cases where a father contracting for an infant child shall bind the child, especially if the child claim anything under the settlement; but then it must be before marriage & in consideration of the marriage; for the ct. will not suffer her to claim benefit one way, & not to be bound the other. But this being after marriage is voluntary, and being the next day after the marriage does not differ the case,

for whether two days or six, or six years, it is the same thing. No recital of the father will bind the property of the daughter, but there must be some proof of the father's intention to do it (LORD HARDWICKE, C.).—SEAMER v. BINGHAM (1743), 3 Atk. 54; 26 E. R. 834, L. C.

Annotation:—*Refd.* Exel v. Wallace (1751), 2 Ves. Sen. 117.

714. ———.]—An infant is bound by a settlement made on her marriage, where it was made with the approbation of parents & guardians.—HARVEY v. ASHLEY (1748), 3 Atk. 607; Wilm. 219, n.; cited in 2 Ves. Sen. at p. 671; 26 E. R. 1150, L. C.

Annotations:—*Consd.* Field v. Moore, Field v. Brown (1855), 25 L. J. Ch. 66. *Refd.* Buckinghamshire v. Drury (1762), Wilm. 177; Durnford v. Lane (1781), 1 Bro. C. C. 106; Clinton v. Hooper (1790), 1 Ves. 173; Caruthers v. Caruthers (1794), 4 Bro. C. C. 500; Campbell v. Ingilby (1856), 21 Beav. 567.

715. ———.]—Suppose a *feme* infant, seised in fee, on marriage, with the consent of her guardians, should covenant in consideration of a settlement to convey her inheritance to her husband. If this were done in consideration of a competent settlement, equity would execute the agreement (LORD MACCLESFIELD, C.).—CANNEL v. BUCKLE (1724), 2 P. Wms. 243; 2 Eq. Cas. Abr. 23; 24 E. R. 715, L. C.

Annotations:—*Consd.* Harvey v. Ashley (1748), 3 Atk. 607. *Dbtd.* Drury v. Drury (1761), 2 Eden, 39 (*see* (1762), 2 Eden, 60). *Consd.* Wright v. Cadogan (1764), 2 Eden, 239. *Dbtd.* Caruthers v. Caruthers (1794), 4 Bro. C. C. 500. *Consd.* Field v. Moore, Field v. Brown (1855), 7 De G. M. & G. 691. *Refd.* Durnford v. Lane (1781), 1 Bro. C. C. 106.

716. ———.]—DURNFORD v. LANE, No. 652, ante.

717. ———.]—CARUTHERS v. CARUTHERS, No. 672, ante.

718. ———.]—Agreements before marriage on behalf of infants by parents & guardians binding on the infants.—AINSLIE v. MEDLYCOTT (1803), 9 Ves. 13; 32 E. R. 504.

Annotations:—*Refd.* Helps v. Clayton (1864), 17 C. B. N. S. 553. *Mentd.* Evans v. Wyatt (1862), 31 Beav. 217.

719. ———.]—FIELD v. MOORE, FIELD v. BROWN, No. 437, ante.

B. Settlements by Adult Husband of Property of Infant Wife.

720. Prior to Married Women's Property Act, 1882 (c. 75)—What property bound—Only property of husband *jure mariti*—Not property to wife's separate use.]—Upon a marriage of an infant the husband by an ante-nuptial settlement covenanted that upon his wife attaining the age of twenty-one he would join & concur with her, if she would consent thereto, in settling upon her & the children of the marriage certain property to which she would become entitled for her separate use. The wife attained her age of twenty-one, & refused to join in settling the property:—*Held*: the settlement was inoperative.

The question, therefore, is, whether the fact of a settlement having been made when she was an infant alters the case. I must say I think it is more than mere waste paper as against her. I cannot treat it otherwise without overruling every principle which has been laid down with regard to infants. The only reason which could ever make such a settlement binding would be that inasmuch as the husband binds himself he binds the fund, because it would be his if he did not, but that applies only to a case where the husband would be entitled *jure mariti*, but not so under a case where the property was given to the wife so as to exclude the *jus mariti* (KINDERSLEY, V.-C.).—*Re* WARING (1852), 21 L. J. Ch. 784; 16 Jur. 652.

Annotation:—*Mentd.* *Ex p.* Hemming (1856), 2 Jur. N. S. 1186.

721. — — — — — Personalty.]—Arts., made on the marriage of a female infant, recited, that it had been agreed, that all the real & personal estate to which she was then or thereafter might be entitled should be settled, & the husband covenanted "in case she would voluntarily consent thereto, but not otherwise," that he & she would settle the same:—Held: the consent applied only to real estate, & the personal estate must be settled, though the wife refused to consent thereto.

But to say with reference to the personal estate, she should consent to the husband's settling that which would become his property in her right, *jure mariti* & over which she could have no control, would be to use words without any sensible meaning (ROMILLY, M.R.).—*Re DANIEL'S TRUST* (1853), 18 Beav. 309; 52 E. R. 122.

722. — — — — — Concurrence of husband in defeating settlement.]—A covenant in a marriage settlement, that in case, at any time "thereafter" during the coverture, any real or personal estate should "descend, come to or vest in" the wife, who was then an infant, it should be settled, held to include the proceeds of real estate taken by a public co., to which the wife, at the execution of the settlement, was entitled in remainder.

Effect of an agreement, on the marriage of a female infant, to settle her real estate. It would be a fraud upon the husband's contract, if he were to consent to a disposition of the estate by his wife, calculated to defeat the settlement.—*Re LONDON DOCK CO., Ex p. BLAKE* (1853), 16 Beav. 463; 21 L. T. O. S. 16; 51 E. R. 857.

Annotations:—Consd. Field v. Moore, Field v. Brown (1855), 7 De G. M. & G. 691; *Wilton v. Colvin* (1856), 3 Drew. 617; *Re Hill* (1863), 11 W. R. 930; *Spring v. Pride* (1864), 12 W. R. 510. *Reid. Re Clinton's Trusts, Ex p. Hollway, Ex p. Weare* (1871), 41 L. J. Ch. 191.

723. — — — — — Rights of mortgagee.]—In a settlement made on the marriage of a female infant, the husband covenanted that in case his wife attained twenty-one he would concur with her, if she would consent, & would use his utmost endeavours to induce her to concur with him, in settling her real estate. This was never done. In 1862, after the wife had attained her majority, the husband & wife mortgaged the wife's real estate to secure money advanced to the husband. The mtgee. was informed by the husband & wife that there was no settlement, & although the person who acted as solr. for both parties was aware of its existence he concealed it with the acquiescence of the husband & wife from the mtgee. In 1865 the mtgee. discovered the existence of the settlement. The mtge. deed, by mistake, was not effectually acknowledged by the wife till after the mtgee. had received notice of the settlement:—Held: in the face of the evidence of concealment the mtgee. was not affected by notice to the person who acted as his solr. although the wife's estate did not pass to the mtgee. till after he had received notice of the settlement, yet the misrepresentations of the wife constituted a fraud, which bound her estate, & prevented her from disappointing the mtgee., & consequently, the mtgee. had priority over the persons interested under the settlement.—SHARPE v. FOY (1868), 4 Ch. App. 35; 19 L. T. 541; 17 W. R. 65, L. JJ.

Annotations:—Reid. Cave v. Cave, Chaplin v. Cave (1880), 42 L. T. 730. *Mentd. Rolland v. Hart* (1871), 40 L. J. Ch. 701; *Bateman v. Faber* (1897), 77 L. T. 576.

724. — — — — — Failure of trusts declared by settlement—Resulting trust for wife.]—On the marriage of a lady, then an infant, her husband covenanted that her fortune should be settled in trust for

herself & her husband for their lives, with remainder to their children, with remainder in default of children to her next of kin. The husband having died without issue:—*Held: the trust for the next of kin was inoperative & did not bind the wife.—GIBBS v. GRADY* (1871), 41 L. J. Ch. 163; 20 W. R. 257.

725. Effect of Married Women's Property Act, 1882 (c. 75)—Settlement unaffected—Repudiation by wife on attaining age.]—By a settlement made in 1891 in contemplation of the marriage of Mr. & Mrs. T. G., then an infant, it was agreed by both parties that a sum of £1,000 to which Mrs. T. G., would become entitled on attaining twenty-one years or marriage, should be assigned upon the trusts of the settlement. Mrs. T. G., on attaining twenty-one, disaffirmed the settlement:—*Held: the fund was, notwithstanding above Act, sect. 2, bound by the settlement by virtue of the operation of sect. 19 of the Act.—STEVENS v. TREVOR-GARRICK*, [1893] 2 Ch. 307; 62 L. J. Ch. 660; 69 L. T. 11; 41 W. R. 412; 3 R. 468.

Annotations:—Folld. Buckland v. Buckland, [1900] 2 Ch. 534. *Apld. Re Crook's Settlement, Re Glasier's Settlement, Crook v. Preston*, [1923] 2 Ch. 339.

726. — — — — —.]—By a marriage settlement made in 1891, when the intended wife was an infant, after reciting that it was agreed that a sum of £1,000 to which the wife was then entitled under the will of her father, who died in 1875, should be settled, it was witnessed that the wife, with the privity & approbation of the husband, declared that the trustees of the will, in whom the fund was then vested, should hold it on the trusts declared by the settlement. The legacy was not expressed by the will to be given to the wife for her separate use. The wife on attaining twenty-one repudiated the settlement:—*Held: the fund was, notwithstanding the repudiation & sect. 2 of above Act, bound by the settlement, by virtue of sect. 19 of the Act.—BUCKLAND v. BUCKLAND*, [1900] 2 Ch. 534; 69 L. J. Ch. 648; 82 L. T. 759; 48 W. R. 637; 16 T. L. R. 487; 44 Sol. Jo. 593.

Annotation:—Apld. Re Crook's Settlement, Re Glasier's Settlement, Crook v. Preston, [1923] 2 Ch. 339.

See, now, Married Women's Property Act, 1907 (c. 18), s. 2 (1), (2).

C. Other Cases.

727. Power of infant wife to bar her future rights—Right to share of husband's personalty—On his death intestate.]—BUCKINGHAMSHIRE (EARL) v. DRURY, No. 367, ante.

728. Settlement of property held in joint tenancy—Whether joint tenancy severed—Settlement fraudulent towards infant.]—MAY v. HOOK (1773), 2 Co. Litt. 246 a, L. C.; subsequent proceedings, 1 Jac. & W. 663, n.

Annotation:—Consd. & Expld. Burnaby v. Equitable Reversionary Interest Soc. (1885), 28 Ch. D. 416.

729. — — — — —.]—BURNABY v. EQUITABLE REVERSIONARY INTEREST SOCIETY, No. 457, ante.

730. Settlement of after-acquired property—From specific source "or otherwise"—Limited to specific source.]—(1) Covenant, in an infant's marriage settlement, that whatever should come to the wife from the mother or otherwise, shall be bound by the settlement, restrained to what shall come from the mother, not to property coming unexpectedly from other quarters.

(2) To bind an infant, the marriage settlement must be fair & reasonable, & not tend to deprive her of every thing.—*WILLIAMS v. WILLIAMS* (1782), 1 Bro. C. C. 152; 28 E. R. 1048, L. C.

Annotation:—As to (2) Consd. Caruthers v. Caruthers (1794), 4 Bro. C. C. 500 c.

Sect. 11.—Settlements and covenants to settle on marriage: Sub-sect. 1, C.; sub-sect. 2. Sect. 12.]

731. Interest in fund given to issue—If husband survived wife—No interest given in contrary events—Interest on such contingency not implied.]—

On the marriage of a female infant, a settlement of her personal estate was executed, giving an interest to the issue in the event of the husband surviving his wife, but none in the contrary event:—*Held*: (1) the issue could not, on the latter event, take by implication or construction; (2) the husband had not, by the settlement, reduced the fund into possession.—*PRINGLE v. PRINGLE* (1856), 22 Beav. 631; 52 E. R. 1251.

Annotation:—*As to* (2) *Distd. Hamilton v. Mills* (1861), 29 Beav. 193.

SUB-SECT. 2.—UNDER STATUTE.

See Infant Settlements Act, 1855 (c. 43), ss. 1-4; Settled Land Act, 1925 (c. 18), s. 27 (3); R. S. C., Ord. 55, rr. 2 (10), 26.

732. Under Infant Settlements Act, 1855 (c. 43)—Infant not compellable to make settlement.]—

Above Act gives the ct. no power to compel an infant married woman, to execute a settlement on her children, against her will, although circumstances may seem to render it desirable, the statute being simply enabling.—*Re POTTER* (1869), L. R. 7 Eq. 484; 20 L. T. 355; 17 W. R. 347.

733. ———.]—*Re LEIGH, LEIGH v. LEIGH*, No. 2153, *post*.

734. Removes disability of infancy.]—*SEATON v. SEATON*, No. 2152, *post*.

735. ——— Effect of settlement—Whether infant becomes ward of court.]—On a petition by a female infant under above Act praying a reference to approve of a proper settlement & stating that the intended marriage had the sanction & approbation of the infant's father, the Lord Chancellor made the order without directing any inquiry as to the propriety of the marriage.

The provisions of the Act do not impose on the ct. any other duty than that of looking to the propriety of the settlement, though this may sometimes lead to an inquiry as to all the circumstances connected with the marriage. *Qu.*: how far an infant applying under above Act becomes by such application a ward of ct.—*Re DALTON* (1856), 6 De G. M. & G. 201; 25 L. J. Ch. 751; 2 Jur. N. S. 1077; 4 W. R. 793; 43 E. R. 1209, L. C.

Annotation:—*Distd. Re Strong* (1856), 28 L. T. O. S. 226.

736. ———.]—decided what the rule of the ct. is, where a female infant petitions under above Act, praying a reference to approve of a proper settlement, there being no evidence to show that the proposed marriage is a proper one. Where there is satisfactory evidence to that effect the ct. will make the order.

Qu.: whether an application by a female infant under above Act makes her a ward of ct.—*Re STRONG* (1856), 26 L. J. Ch. 64; 28 L. T. O. S. 226; 2 Jur. N. S. 1241; 5 W. R. 107, L. C. & L. JJ.

737. ——— As against judgment creditor—Settlement after debt contracted.]—A woman at

the time of her marriage in Dec. 1882, being then an infant, was entitled to a sum of money absolutely to a sum for her separate use, & to certain freeholds. After her marriage, & while still an infant, she contracted a debt for which judgment was recovered against her separate estate. After this debt was contracted, & before the woman attained her majority, a post-nuptial settlement of all the property was made in 1884, under the above Act, to the wife for her life for her sole & separate use with a restraint on anticipation, & after her death to her husband & children. This settlement was approved by the Ch. Div. of the High Ct. The judgment creditor applied to have a receiver appointed of the property, upon the ground that such settlement was void as against creditors under the last clause of sect. 19 of Married Women's Property Act, 1882 (c. 75):—*Held*: the settlement, though made after the debt was contracted, was valid as against creditors by virtue of the first part of sect. 19 of the Act, & the judgment creditor was not entitled to have a receiver appointed.—*HEMINGWAY v. BRAITHWAITE* (1889), 61 L. T. 224.

738. ——— To what settlements applicable—Post-nuptial.]—*POWELL v. OAKLEY* (1865), 34 Beav. 575; 6 New Rep. 375; 55 E. R. 757.

Annotations:—*Distd. Re Potter* (1869), L. R. 7 Eq. 484. *Fold. Re Sampson & Wall* (1884), 25 Ch. D. 482.

739. ———.]—A gentleman having, in wilful defiance of an order of the ct., married an infant ward of ct., the usual directions were given for a settlement of her property, & a settlement was prepared which provided that the power of testamentary appointment given to her in default of issue should not be exercised in favour of the husband. The wife objected to this exclusion of the husband, & to the proposed trustees, with whom she was not on friendly terms, & she refused to execute the settlement unless it was altered in these particulars. There was no objection to the trustees except her personal dislike to them. On an application in the matter of the infant & under above Act the judge made an order for the husband & wife to execute the settlement as it stood. The wife appealed:—*Held*: (1) under the above Act a settlement of an infant's property may be made on the occasion of his or her marriage after the marriage has taken place; (2) the wife ought not to be prevented from exercising in favour of her husband the power of testamentary appointment in default of issue, & it was desirable not to appoint trustees with whom she was on unpleasant terms, & the settlement ought to be modified in these respects; & the wife being willing to execute the settlement so modified, the ct. declined to decide whether she could be compelled to execute it.

Qu.: whether the marriage of an infant terminates the authority of a guardian.—*Re SAMPSON & WALL* (1884), 25 Ch. D. 482; 53 L. J. Ch. 457; 32 W. R. 617; *sub nom. Re WALL*, 50 L. T. 435, C. A.

Annotations:—*As to* (1) *Appl. Re Phillips* (1887), 34 Ch. D. 467. *Consd. Re Leigh, Leigh v. Leigh* (1888), 40 Ch. D. 290; *Seaton v. Seaton* (1888), 13 App. Cas. 61. *Generally, Mentd. Scott v. Scott*, [1921] P. 107.

740. ———.]—*Re LEIGH, LEIGH v. LEIGH*, No. 2153, *post*.

741. ———.]—*Re A. B. (AN INFANT)*, [1914] W. N. 140, C. A.

PART VIII. SECT. 11, SUB-SECT. 2.

734 i. Under Infant Settlements Act, 1855 (c. 43)—Removes disability of infancy.]—Although above Act authorises an infant with the sanction of the Ct.

of Ch. to make a binding settlement of his or her property with full power to do any act for bringing all the infant's property into settlement yet it does not alter the legal status of the infant

in respect of the alienation of the property or the exercise of a power under the trusts of the settlement.—*Re ARMIT'S TRUSTS* (1871), 5 I. R. Eq. 352.—*IR.*

742. To what property applicable—After-acquired property.]—*Re HOARE'S TRUSTS*, No. 2166, *post*.

743. ——— Interest ambulatory at date of settlement.]—By above Act, sect. 1, an infant is enabled, with the sanction of the ct. to enter into a covenant to settle after-acquired property; & such a covenant will apply to & bring within the settlement an interest acquired by the settlor under the will of a person who dies after the execution of the settlement, such an interest being property "in expectancy" within the meaning of sect. 1 of the Act.—*Re JOHNSON, MOORE v. JOHNSON*, [1891] 3 Ch. 48; 60 L. J. Ch. 499; 64 L. T. 696; 39 W. R. 509.

744. ——— Reversionary interest.] —*SEATON v. SEATON*, No. 2152, *post*.

745. ——— Effect of marriage under statutory age—Whether settlement directed after attaining that age—Female marrying under seventeen.]—The ct. has jurisdiction in a case where a female infant has married under the age of seventeen. after she has attained that age, to direct a proper settlement of her property to be executed.—*Re PHILLIPS* (1887), 34 Ch. D. 467; 56 L. J. Ch. 337; 56 L. T. 144; 35 W. R. 285.

*Annotation:—*Dttd. *Re Leigh, Leigh v. Leigh* (1888), 37 W. R. 241.

746. ——— Male marrying under twenty.]—*Re LEIGH, LEIGH v. LEIGH*, No. 2153, *post*.

747. ——— Effect of infant's death under twenty-one—Infant tenant in tail—Exercise of power of appointment.]—(1) An infant had a life interest & a general power of appointment under her mother's will. She made a settlement in exercise of the power, with the sanction of the ct. under Infants' Settlement Act, 1855 (c. 43). She died while still an infant & the ultimate limitation in the settlement, which was in favour of the infant's next of kin according to the Statutes of Distribution failed by reason of the infant's illegitimacy:—*Held*: there was a resulting trust in favour of the infant herself & the property appointed passed to her surviving husband, who was her administrator & not to the person entitled under the mother's will in default of exercise of the power of appointment.

(2) The provisions of Infants' Settlement Act, 1855 (c. 43), s. 2, are only applicable in cases in which the infant is a tenant in tail.—*Re SCOTT, SCOTT v. HANBURY*, [1891] 1 Ch. 298; 60 L. J. Ch. 461; 63 L. T. 800; 39 W. R. 264.

748. ——— Disentailing assurance.]—*Re SCOTT, SCOTT v. HANBURY*, No. 747, *ante*.

749. ——— Infant not tenant in tail—Exercise of power of appointment.]—*Re SCOTT, SCOTT v. HANBURY*, No. 747, *ante*.

750. ——— Propriety of proposed marriage—Whether court will inquire into.]—*Re DALTON*, No. 735, *ante*.

751. ——— ———.] —*Re STRONG*, No. 736, *ante*.

752. ——— Proper clauses—Forfeiture of interest on becoming Roman Catholic—Name & arms clause.]—On a petition presented under above Act to obtain the sanction of the ct. to a certain

disentailing assurance, & a settlement proposed to be made by a female infant tenant in tail in remainder on her marriage, the ct. refused to sanction the insertion of a clause providing that no person professing the Roman Catholic religion should take any interest under the settlement.

The ct., however, permitted the insertion of a clause making it compulsory on succession owners or their husbands to assume the name & arms of testator, from whom the settlor derived her estates.—*Re WILLIAMS* (1860), 3 L. T. 76; 6 Jur. N. S. 1064; 8 W. R. 678.

753. ——— Provision for children of future marriage.]—*Re HOARE'S TRUSTS*, No. 2166, *post*.

754. ——— Misrepresentation of property to be settled—Property sold at date of settlement—Infant estopped from denying settlement.]—On the marriage of a female infant & ward of ct. proposals from a settlement were brought into chambers. In these proposals, & in an affidavit read in support, it was stated that she was tenant in tail of certain property. With the sanction of the ct. she executed a disentailing assurance of this property, & conveyed it to the trustees of her settlement. As a fact, part of the property had, prior to the date of the proposals, been taken by the London School Board under its compulsory powers, & the money paid into ct., but, by inadvertence, this had been overlooked, & no mention of the fund in ct. was made in the proposals or the subsequent deeds. The lady, after she had married, & had attained twenty-one, disentailed her interest in the fund, & claimed that she was entitled to have it transferred to her for her own use:—*Held*: a representation of fact had been made on behalf of the infant that she was tenant in tail of the property, & could convey it by means of a disentailing assurance, & on the faith of that, & on the terms of the property being settled, the ct. had sanctioned the marriage, & she was precluded from denying the truth of the representation, & consequently, from denying that the land taken by the board was disentailed & vested in the trustees, & they were entitled to the purchase money arising from the sale of it.—*MILLS v. FOX* (1887), 37 Ch. D. 153; 57 L. J. Ch. 56; 57 L. T. 792; 36 W. R. 219.

*Annotations:—*Mentd. *Re Monckton's Settltmt.*, *Monckton v. Monckton*, [1913] 2 Ch. 636; *Re E. D. S.*, [1914] 1 Ch. 618.

755. ——— Costs of settlement—Payable out of corpus of settled property.]—Ordered that the costs of a settlement of the property of a female ward of ct. made upon her marriage with the sanction of the ct. should be paid out of the corpus of the settled property.—*DE STACPOOLE v. DE STACPOOLE, DE STACPOOLE v. STAPLETON, Re DE STACPOOLE, DE STACPOOLE v. SEYMOUR* (1887), 37 Ch. D. 139; 57 L. J. Ch. 463; 58 L. T. 382; 36 W. R. 320.

SECT. 12. — FORFEITURE OF INTEREST ON MARRIAGE WITHOUT REQUISITE CONSENT.

See HUSBAND & WIFE, Vol. XXVII., p. 58, Nos. 388–398.

Part IX.—Rights and Duties of Parent.

Care & custody.]—See Part XI., post.
Guardianship.]—See Part XIII., post.
Illegitimate children.]—See Part XIX., post.
Liability for infant's torts.]—See Part VII., Sect. 1, ante.
Maintenance.]—See Part X., post.
Marriage.]—See Part IV., ante.

Persons in loco parentis.]—See EQUITY, Vol. XX., pp. 461–463, Nos. 1871–1887.
Protection of property.]—See Part VIII., Sect. 4, ante.
Religion & education.]—See Part XII., post.
Right to chastise child.]—See Part XI., Sect. 6, post.
Services of child.]—See MASTER & SERVANT.

Part X.—Maintenance and Advancement.

SECT. 1.—MAINTENANCE.

SUB-SECT. 1.—DUTY TO MAINTAIN.

A. In General.

Jurisdiction of court—Application of child's property to maintenance.]—See Sub-sect. 2, B., post.

756. Nature of duty—Imperfect obligation—Apart from poor law.]—It is now well established that, except under the operation of the poor law, there is no legal obligation on the part of the father to maintain his child, unless, indeed the neglect to do so should bring the case within the criminal law (COCKBURN, C.J.).—BASELEY v. FORDER (1868), L. R. 3 Q. B. 559; 9 B. & S. 599; sub nom. BASELEY v. FORDER, 37 L. J. Q. B. 237; 18 L. T. 756; 32 J. P. 550.

Annotation:—Reid. Coldingham Parish Council v. Smith, [1918] 2 K. B. 90.

757. ———.]—The obligation which rests on a parent to provide for his children, not of tender years, is a moral & not a legal one & there is no liability on him to pay for debts incurred by the child unless he has given the child authority

them or has contracted to pay them J.).—HEALING v. HEALING (1902), 51

. 221; 19 T. L. R. 90; 47 Sol. Jo. 110.

758. ———.]—The duty of a father towards his son does not come to an end when, by reason of his attaining his majority or a riper age, he might be properly called upon to provide for himself. Even when a child is an infant the parent's duty to provide maintenance & education is of imperfect obligation, & whether in a ct. of law or of equity its direct enforcement may be difficult or impossible. But the duty arising from the relation existing between parent & child, whether directly enforceable or not, is a duty of which the parent can in no circumstances divest himself—the duty is not confined to providing maintenance in infancy or any other time. It is a duty so to conduct himself in all respects towards his child as is right in him, he being his father. The ct., for many purposes, deals with questions between parent & child in a manner different from that

which would be applied as between strangers in blood. As between father & son, the ct. regards not only obligations which were merely enforceable, but those which were not merely legal, but might be called moral. A son might by his misconduct, render it very difficult for a father to discharge his parental duties. But the duty remains. The son also has his duties, & the father is entitled to use every legitimate means to ensure the performance of those duties by the son. But no misconduct on the son's part will abrogate the duty of the father (BUCKLEY, J.).—WATERHOUSE v. WATERHOUSE (1905), 94 L. T. 133; 22 T. L. R. 195; 50 Sol. Jo. 169.

Annotation:—Consd. Stevens v. Stevens (1907), 24 T. L. R. 20.

759. Extent of duty—Circumstances on which dependent—Poverty & size of family.]—(1) B. gives all the rest & residue of his personal estate to his grandson at twenty-one, & if he die before that age, then to F., whom he makes his exor.; the grandson is not entitled to the interest arising from this residue, but must accumulate till he arrives at twenty-one.

(2) The law of nature obliges fathers only to maintain their children, & unless the child from the mean circumstances of the parent is in danger of perishing for want, the ct. will not direct the interest that shall be made of a contingent legacy to be applied for that purpose; so that unless the parent is totally incapable, or under particular circumstances, as having a numerous family or children, & is bordering upon necessity, the law of the land, & of nature, make it incumbent upon the parent to maintain his child (LORD HARDWICKE, C.).—BUTLER v. FREEMAN & BUTLER (1743), 3 Atk. 58; 26 E. R. 836, L. C.

Annotations:—As to (1) Reid. Trevanion v. Vivian (1752), 2 Ves. Sen. 430. As to (2) Reid. Re Bowlby, Bowlby v. Bowlby, [1904] 2 Ch. 685.

760. ——— Where child has property.]—As on the one hand, parents are bound to maintain their children, where the children have no subsistence of their own, so, on the other hand, where the child has an annual income, the parent is not

Nature of

m. Extent of duty—Child in another's custody.]—A father cannot, except under C. S. M., c. 39, s. 11, be ordered to pay a sum for maintenance of his child in another's custody.—WOOD v. WOOD (1885), 2 Man. L. R. 198.—CAN.

n. ——— Includes teaching.]—Maintenance within Destitute Persons Act, 1894, includes teaching, & an order may be made which will enable a destitute son to be taught a trade.—SMILEY v. MURRAY (1897), 16 N. Z. L. R. 327.—N.Z.

o. Duration of duty—Terminated on marriage or forisfamiliation.]—When a testator has himself specified the time for the duration of maintenance, that will be observed; but the right to maintenance & support, when given in general terms, will cease with the

marriage or forisfamiliation of a child.—COOK v. NOBLE (1886), 12 O. R. 81.—CAN.

p. Transfer of right.]—A father, after the death of his wife, agreed in writing with her mother that she should, at her sole expense, have the custody, maintenance, & education of his children, in consideration of his renouncing his rights thereto & of other considerations.—Held: he could transfer his rights as a parent; & in the absence of fraud, evidence of an oral promise by him before the execution

bound, if that income be in his management to let it accumulate, & maintain the child out of his own pocket, but may apply that income to the child's maintenance. But if the father has waived their right he cannot afterwards revive it; though by his will he may put his son to election whether to take under the will & waive the interest, or to have their interest & waive all advantage of a bequest (LORD TALBOT, C.).—JENKINS v. JENKINS (1736), Belt's Supp. 250; 1 Hov. Supp. 276; 28 E. R. 517, L. C.

*Annotations:—*Mentd. Boughton v. Boughton (1750), 2 Ves. Sen. 12; Clark v. Guise (1755), 2 Ves. Sen. 617; Forrester v. Cotton (1760), 1 Eden, 531; Cull & Hay v. Showell (1773), Amb. 727; Tibbits v. Tibbits (1816), 19 Ves. 656; Boyle v. Boyle (1839), West temp. Hard. 662.

761. —.—.]—WELLESLEY v. BEAUFORT (DUKE), No. 2098, *post*.

762. —.—.]—THOMASSET v. THOMASSET, No. 26, *ante*.

763. —.— Parent not having means—Application to poor law guardians.]—If parents have not the means of providing proper food & nourishment for their infant children who are incapable of taking care of themselves, it is their duty to apply for the assistance provided by means of the poor laws.—R. v. MABBETT (1851), 5 Cox, C. C. 339.

*Annotation:—*Mentd. R. v. Shepherd (1862), 5 L. T. 687.

764. —.— Effect of child's misconduct.]—WATERHOUSE v. WATERHOUSE, No. 758, *ante*.

765. Duration of duty—Not terminated on majority.]—WATERHOUSE v. WATERHOUSE, No. 758, *ante*.

Means of parent—Effect on allowance for maintenance—Out of child's own property.]—See Subsect. 2, *post*.

Criminal liability for neglect.]—See CRIMINAL LAW, Vol. XV., pp. 854–857, Nos. 9372–9410.

— Neglect causing death.]—See CRIMINAL LAW, Vol. XV., pp. 792–794, Nos. 8559–8588.

Liability under Poor Law & Vagrancy Acts.]—See, generally, POOR LAW.

Liability of married woman—Having separate estate.]—See Married Women's Property Act, 1882 (c. 75), ss. 20, 21, & generally, POOR LAW.

Right of wife to pledge husband's credit—For children's maintenance.]—See HUSBAND & WIFE, Vol. XXVII., pp. 193, 195, 205, Nos. 1609, 1610, 1614, 1641, 1779–1785.

B. On Whom Duty Falls.

766. Parent having custody—Presumption under Children's Act, 1908 (c. 67), s. 38 (2)—Effect of separation agreement.]—A parent of a child cannot by a voluntary agreement, whether oral or in writing, get rid of the legal presumption created by above sub-sect., that for the purposes of that Act he has the custody of the child so as to render him liable under sect. 12 (1) of that Act for wilfully neglecting the child.—BROOKS v. BLOUNT. [1923] 1 K. B. 257; 92 L. J. K. B. 302; 128 L. T. 607; 87 J. P. 64; 39 T. L. R. 168;

of the agreement that he would pay for the maintenance of the children, was inadmissible.—WRIGHT v. MCCABE (1899), 30 O. R. 390.—CAN.

q. Right to compromise.]—A mother cannot compromise the right conferred by Deserted Wives' & Children's Act, 1895, upon her child & upon the public to compel a father to provide maintenance for his destitute children.—DU WET v. SILBERBAUER, [1923] C. P. D. 1.—S. AF.

PART X. SECT. 1, SUB-SECT. 1.—B.

769 i. Mother.]—A husband peti-

tioned the ct. for maintenance for the children out of the property of his wife, who had eloped, stating that his own means were not sufficient:—Held: the children had no right in law or equity, during the life of their mother, to be maintained out of her separate estate, while their father was living.—HODGENS v. HODGENS (1837), 4 Cl. & Fin. 323; 7 E. R. 124.—IR.

769 ii. —.—.]—A mother domiciled in England, but against whom jurisdiction is founded by arrestment, is liable in aliment to her child, not according to the law of Scotland, but

67 Sol. Jo. 299; 21 L. G. R. 150; 27 Cox, C. C. 399, D. C.

See, further, CRIMINAL LAW, Vol. XV., pp. 855, 856, Nos. 9397–9401.

767. Father.]—Legacies given by an uncle to children were paid to the father upon his entering with S. into security for payment to the children respectively at twenty-one. The father died insolvent, without having paid the legacies:—Held: S. could not set off against the legacies maintenance paid by the father, since the father was bound to maintain the children.—STRICKLAND v. HUDSON (1708), 3 Rep. Ch. 165; 21 E. R. 757.

768. —.— Rights acquired by child—As creditor.]—S. having several young children & being much in debt, conveyed part of his lands in trust for payment of his debts, & by another deed conveyed other part to trustees for maintenance of his children. This last conveyance being voluntary, was declared void as to creditors, but good against S. himself, & therefore if his creditors should fall upon those lands for a satisfaction of their debts & thereby strip the children of their maintenance, the children should have a recompense out of the residue of the estate which S. had reserved to himself for his own maintenance; & compared it to the case where creditors that have a lien upon the land take their satisfaction out of the personal estate, which was liable to other creditors of an inferior nature, who have no lien upon the land; these creditors in equity shall stand in the place of the other creditors who had a lien upon the land & have a satisfaction out of that in their stead; this case is the same, for though the conveyance was voluntary in the father, yet he is bound by nature to provide for his children, & it is a sort of a debt.—SNEED v. CULPEPPER (LORD & LADY) (1717), 2 Eq. Cas. Abr. 255; 22 E. R. 216, L. C.

— Liability for debts contracted by wife—In support of children.]—See HUSBAND & WIFE, Vol. XXVII., p. 205, Nos. 1779–1785.

769. Mother.]—There is no distinction between the settlement of children with the father or mother, for they are as much hers as the father's, & nature obliges her as much as the father, to provide for them; so does the law & every argument that holds for their settlement with the father, holds as to their settlement with the mother. The reason why children shall not gain a settlement where the wife gains a settlement only by intermarriage, is because it is not her family, but her husband's, & she cannot give the children any sustenance without the husband's leave. Since she is equally punishable with her husband for deserting her children, & therefore could not leave them behind her, they must gain a settlement with her (PARKER, C.J.).—ST. GEORGE'S PARISH v. ST. KATHERINE'S, SOUTH-WARK (1714), Sess. Cas. K. B. 22; 93 E. R. 22.

*Annotations:—*Reid. R. v. Paulsperry (1727), 1 Barn. K. B. 11; R. v. Woodend, Northampton (1728), Fortes. Rep. 328; R. v. St. Mary Newington (1843), 12 L. J. M. C. 68.

according to the law of England, though she was domiciled in Scotland at the date of her marriage, & of the child's birth.—MACDONALD v. MACDONALD (1846), 8 Dunl. (Ct. of Sess.) 830; 1 Sc. Jur. 452.—SCOT.

r. —.— Father dead.]—The widow of an intestate, having obtained letter of administration, received & got in his personal estate, went into occupation of the real estate, received the rents & profits thereof, & spent a considerable sum in improving it. She also maintained the infant heirs of the intestate, to whom no guardian had been

Sect. 1.—Maintenance: Sub-sect. 1, B. & C. (a).]

770. — Father dead—Testamentary provision for maintenance.]—Testator gave his wife £400 a year in addition to £500 a year under her settlement, in consideration of the expense & care she would incur in the maintenance of their children; she must maintain them when at home; but is not to be charged with education, or maintenance at school.—*COLLIER v. COLLIER* (1796), 3 Ves. 33; 30 E. R. 878, L. C.

771. —.]—A mother is not bound to maintain her son, & if she does, & seeks to recover from him or his estate advances made for his maintenance after his majority, she must prove a contract in order to establish a debt. Testator by his will bequeathed to his son certain legacies, & gave him a share in the residuary estate payable at the age of twenty-eight years, with a trust to apply the income in maintenance, & appointed his wife & another son guardians & exors. The legatee was an infant at testator's death. He attained the age of twenty-one years when the legacies were paid to him with the widow's assent. After the death of the legatee, the widow made a claim for past maintenance, both during his infancy & after his majority:—*Held*: any claim during minority had been clearly waived by payment of the legacies, & in the absence of contract the claim of the majority could not be allowed.—*Re COTTRELL'S ESTATE, JOYCE v. COTTRELL* (1871), L. R. 12 Eq. 566; 41 L. J. Ch. 70; 25 L. T. 405; 19 W. R. 1076.

Annotation:—*Consd. Re Moulton, Grahame v. Moulton* (1906), 94 L. T. 454.

772. — Under Married Women's Property Act, 1882, (c. 75), s. 21—Separate property.]—A married woman, even though possessed of separate estate, cannot be required to contribute to the maintenance of her father under Poor Relief Act, 1601 (c. 2), s. 7, & the amending enactments. The only liability of a married woman for the maintenance of her relations is the liability expressly imposed on her by Married Women's Property Act, 1870 (c. 93), s. 14, & Married Women's Property Act, 1882 (c. 75), s. 21, where she has separate property, to maintain her children & grandchildren.—*PONTYPOOL UNION v. BUCK*, [1906] 2 K. B. 896; 76 L. J. K. B. 66; 95 L. T. 795; 71 J. P. 5; 23 T. L. R. 17; 4 L. G. R. 1148, D. C.

Liability for neglect—Failure to provide food & shelter.]—*See CRIMINAL LAW*, Vol. XV., p. 793, No. 8566.

773. Grandparents.]—*DACRES (LADY) v. CHUTE* (1682), 2 Cas. in Ch. 104; 22 E. R. 867, L. C.; *subsequent proceedings* (1683), 1 Vern. 160.

774. —.]—A parent is bound by nature to support a child; but this has not been extended to grandchildren, & therefore not entitled to interest.—*HAUGHTON v. HARRISON* (1742), 2 Atk. 329; 26 E. R. 600, L. C.

Annotations:—*Refd. Mole v. Mole* (1758), 1 Dick. 311. *Mentd. Ive v. King* (1852), 16 Beav. 46; *Re Faulding's Trust* (1858), 26 Beav. 263.

775. — Father alive.]—A grandfather is not bound to provide for a grandchild, especially where a father is living at the time of the will, & after testator's death.—*ELTON v. ELTON* (1747),

appointed:—*Held*: the personal estate, & the proceeds or profits of the real estate come to her hands, must first be applied towards payment of debts, & then to reimburse her for sums spent in the infants' maintenance.—*Re BRAZILL, BARRY v. BRAZILL* (1865), 11 Gr. J.—CAN.

t. *Father's executors.]—*Under Desti-

tute Persons Act, 1894, an order may be made against the exors. of the father of a destitute person for the maintenance of such destitute person out of the estate of his deceased father, although no order has been made against the father himself whilst living; but such an order cannot be made without evidence that there are

3 Atk. 504; 1 Ves. Sen. 4; 1 Wils. 159; 26 E. R. 1091, L. C.

Annotation:—*Mentd. Booth v. Booth* (1799), 4 Ves. 399.

776. Father-in-law.]—*R. v. PENNOYR* (1726), Sess. Cas. K. B. 141; 1 Bott. 400; 93 E. R. 143.

777. Stepfather.]—A husband is not bound to maintain his wife's child by a former husband.—*TUBB v. HARRISON* (1790), 4 Term Rep. 118; 100 E. R. 926.

Annotations:—*Distd. Stone v. Carr* (1799), 3 Esp. 1. *Consd. Cooper v. Martin* (1803), 4 East, 76.

778. — In loco parentis.]—Though a husband is not bound to provide for the children of his wife by a former husband, yet if he takes them into his house, & they become part of his family, he shall be deemed to stand *loco parentis*, & be liable in a contract made by his wife for their education.—*STONE v. CARR* (1799), 3 Esp. 1, N. P.

779. —.]—Deft., who was the stepfather of pl'ts., & who stood towards them in the position of a father, was held in the circumstances not entitled, in the absence of an agreement, to charge for their maintenance while they lived with him after their mother's death out of the income from the property to which they were entitled under their mother's will, & which he received while they lived in his house, deft. having failed to discharge the *onus* of proving that such an agreement had been made.—*Re MOULTON, GRAHAME v. MOULTON* (1906), 94 L. T. 454; 22 T. L. R. 380, C. A.

780. —.]—One who marries a widow, having children by her former husband, is not bound to maintain such children, though they were maintained by the widow before her second marriage, when her second husband acquired her former means. Therefore, if the second husband maintain such children, it is a good consideration for a promise by them when they come of age to repay the expense of their maintenance respectively: especially where the second husband was a man of small substance, & the children had a competent provision to receive when they came of age, which was to accumulate for them in the meantime, & he made no application to Chancery for an allowance out of the fund, as he might have done.

The wants of the children are only a ground for an order of maintenance on the parent, if of sufficient ability. But when she has parted with that ability by her second marriage she is no longer liable . . . ceasing to be of ability, the maintenance of the children could not have been enforced by an order against her & therefore could not have been enforced at all (*LAWRENCE, J.*).—*COOPER v. MARTIN* (1803), 4 East, 76; 102 E. R. 759.

Annotations:—*Consd. Eastwood v. Kenyon* (1840), 11 Ad. & El. 438. *Refd. Urmston v. Newcomen* (1836), 4 Ad. & El. 899; *Maund v. Mason* (1874), L. R. 9 Q. B. 254.

781. —.]—If a husband educate his wife's child by a former husband, he cannot recover compensation from such child when it comes of age.—*PELLY v. RAWLINS* (1804), Peake, Add. Cas. 226, N. P.

See, now, Married Women's Property Act, 1882 (c. 75), s. 1 (1).

assets of the deceased father in the hands of the exors.—*SMILEY v. MURRAY* (1897), 16 N. Z. L. R. 327.—N.Z.

a. *Stepmother.]—*A stepmother is not liable *super jure natura* to aliment a stepson.—*MACDONALD v. MACDONALD* (1846), 8 Dunl. (Cl. of Sess.) 830; 18 Sc. Jur. 453.—SCOT.

*C. Liability of Parent to Third Parties.**(a) In General.*

782. Necessity for contract by parent—Express or implied—Question for jury.]—If a lad goes on liking with a view to his being bound an apprentice, his intended master cannot charge for his board & lodging for the first month, nor perhaps for so long time as he conducts himself properly. But if he stays for many months, behaving ill after complaints to his father of his misconduct, it will be for the jury to say whether there was any contract, either express or implied, that his father should pay for his board & lodging.—*EARRATT v. BURGHART* (1828), 3 C. & P. 381, N. P.

Annotation:—Distd. Harrison v. James (1862), 7 H. & N. 804.

783. ——— Board & lodging.]—*REED v. REW* (1720), 11 Mod. Rep. 336; 88 E. R. 1074.

784. ———.]—If a person take a lad a month on liking, with the intention of his being bound as an apprentice, if he & the lad suit one another, & the lad stay several months without any indenture being executed. If no fresh agreement were entered into he is not entitled to charge for the board & lodging of the lad whom he employed in his trade, & by consequence he is not entitled to set it off in an action by the lad's father for money lent.—*WILKINS v. WELLS* (1825), 2 C. & P. 231, N. P.

Annotation:—Distd. Earratt v. Burghart (1828), 3 C. & P. 381.

785. ———.]—A. placed his son with B., a chemist & druggist, who intended to pass his examination at Apothecaries' Hall, but was delayed in so doing by ill-health. It was intended that A.'s son should be apprenticed to B., but he stayed for five years with B. having his board & lodging, & being taught the business of a chemist & druggist, & he then left B., & was never apprenticed to him:—*Held*: to entitle B. to recover for board, lodging, & teaching of A.'s son, the jury must be satisfied that A.'s son was placed with B. upon an agreement or understanding that B. was to be paid for his board & lodging & for teaching him; but if the jury were not so satisfied, or if they thought that A.'s son was not to be paid for till B. had passed his examination at Apothecaries' Hall & that A.'s son was then to be apprenticed to B. as an apothecary, B. was not entitled to recover anything for the board & lodging & teaching during the five years.—*ATWATERS v. COURTNEY* (1841), Car. & M. 51, N. P.

786. ———.]—No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so.

Every man is to maintain his own children as he himself shall think proper, & it requires a contract to enable another person to do so, & charge him for it in an action.—*SEABORNE v. MADDY* (1840), 9 C. & P. 497, N. P.

787. ———.]—Deft. being desirous of apprenticing his son to pltf., it was verbally agreed between them that the son should go on trial for a month, & if the parties were satisfied, he should be bound apprentice for four years, deft. to pay a premium of £100 by instalments. The son went on trial & remained above sixteen months, when deft. removed him. No deed of apprenticeship was executed, or any part of the premium paid:—*Held*: pltf. could not recover for the son's board & lodging during any part of the time he remained with them.—*HARRISON v. JAMES* (1862), 7 H. & N. 804; 31 L. J. Ex. 248; 158 E. R. 693.

788. Liability excluded by contract.]—Where the father of a child, legitimate in point of law, placed it with its grandmother, pltf., at her request, on an express undertaking given by her, that the father would never be asked a shilling either for her maintenance, clothes, education, or journey; & the child was subsequently delivered to its mother, who was living in adultery, where she was ill-treated, & became at last in a state of helplessness & destitution, & was again taken care of by her grandmother; the father having no notice of the ill-treatment of the child, or of the change of custody from time to time:—*Held*: the father might reasonably be taken to have supposed that the child remained in the custody of pltf., at whose instance it was delivered over, & pltf. was providing for it at her own expense, so as to rebut any implied promise on his part to pay pltf. for the board, maintenance, clothing, & education of his child, even supposing that such an undertaking can be implied at law, by reason of the relationship of father & child.

Qu.: whether at common law, a parent is bound to support his legitimate offspring, so as to raise an implied contract on his part, on the neglect to do so, to pay a stranger for necessities supplied by him for the use & sustenance of the child.—*URMSTON v. NEWCOMEN* (1836), 4 Ad. & El. 899; 6 Nev. & M. K. B. 454; 5 L. J. K. B. 175; 111 E. R. 1022.

Annotations:—Reid. Dickenson v. Wright (1860), 5 H. & N. 401; *Coldingham Parish Council v. Smith*, [1918] 2 K. B. 90.

Authority of wife to pledge husband's credit—For necessities for children.]—See *HUSBAND & WIFE*, Vol. XXVII., pp. 193, 195, 205, Nos. 1609, 1610, 1614, 1641, 1779–1785.

PART X. SECT. 1, SUB-SECT. 1.—*C. (a).*

783 i. Necessity for contract by parent—Express or implied—Board & lodging.]—Where a father whose children are maintained by another, & who could have obtained possession of their persons by *habeas corpus*, allows them to be so maintained he is liable for their support & maintenance to the person in whose care such children are.—*HUGHES v. REES* (1884), 10 P. R. 301; *reversd.* 9 O. R. 118.—CAN.

783 ii. ———.]—Action for maintenance of infant. Deft.'s wife, having died, deft. requested pltf.'s wife to take charge of the child, which she did for over three years, when the child was returned to her father. There was no formal promise by the deft. to pay for the keeping of the child:—*Held*: if there was no formal promise to pay by deft. there was no formal promise to keep the child

without remuneration, & as there was a request, an agreement to pay should be implied.—*MUNRO v. IRVINE* (1893), 9 Man. L. R. 121.—CAN.

783 iii. ———.]—Pltf. cared for & maintained deft.'s infant son for a period of more than twelve years, the child when two years old going to live with pltf. & remaining until he was taken away by deft. at the age of fifteen:—*Held*: some compensation was contemplated between the parties; there was an implied contract, enforceable at law, to pay a *quantum meruit*.—*LATIMER v. HILL* (1915), 9 O. W. N. 236; 35 O. L. R. 36.—CAN.

783 iv. ———.]—Defts. being married & the parents of a child, the wife's sister took the child soon after its birth, upon an agreement made between the wife & her sister, to which the husband was not a party, that the wife should pay \$2.50 per week for the child's keep, as a member of the

sister's family & her husband (pltf.). A new agreement was afterwards made in place of the old one, that nothing should be paid, but that the child should be given to pltf.'s wife & him. Pltf. & his wife maintained the child until it was taken from them by defts., & pltf. then brought this action in which he was awarded in a county ct. \$452, as the value of the child's maintenance:—*Held*: pltf. was entitled to the sum awarded.—*CHILDS v. FORFAR* (1921), 67 D. L. R. 17; 51 O. L. R. 210.—CAN.

b. ——— In writing—Board & education for more than one year.]—Upon an action brought against the exors. of a testator for the board & education of testator's daughter, an oral contract with testator, at the most for three years, was proved, & knowledge of his death being shown by pltf. themselves, by charges made in their account:—*Held*: the contract not

Sect. 1.—Maintenance: Sub-sect. 1, C. (a), (b)

Maintenance of illegitimate child.]—See BASTARDY, Vol. III., pp. 384–387, Nos. 229–252.

Child maintained in hospital.]—See PUBLIC HEALTH.

Liability under Public Health Act, 1875 (c. 55), s. 132.]—See PUBLIC HEALTH.

(b) For Debts contracted by Infant.

789. Debts due to extravagance.]—SIMPSON v. ROBERTSON (1793), 1 Esp. 17, N. P.

790. Reasonable allowance already made.]—Where a father gives his son a reasonable allowance for his expenses, the son is solely liable; neither shall the father be liable even for necessities.—CRANTZ v. GILL (1796), 2 Esp. 471, N. P.

791. No liability apart from contract.]—HEALING v. HEALING, No. 757, ante.

792. ——— Express or implied—Clothes supplied to child.]—A father is not liable to pay for clothes furnished to his son, though under age, without some proof of a contract on his part, either express or implied.—BLACKBURN v. MACKEY (1823), 1 C. & P. 1, N. P.

*Annotations:—*Consd. Mortimore v. Wright (1840), 6 M. & W. 482. Refd. Urmston v. Newcomen (1836), 4 Ad. & El. 899; Shelton v. Springett (1851), 11 C. B. 452.

793. ——— ———.]—A father is not bound to pay for clothes furnished to his son, without some contract, express or implied, on his part to do so.—FLUCK v. TOLLEMACHE (1823), 1 C. & P. 5, N. P.

794. ——— ———.]—To charge a father with the amount of clothes supplied to his son, it is essential that the clothes should have been supplied either with the assent of the father, or by his authority; & the father is the person to judge what is proper for his son.—ROLFE v. ABBOTT (1833), 6 C. & P. 286, N. P.

*Annotation:—*Refd. Law v. Wilkin (1837), 6 Ad. & El. 718.

795. ——— ———.]—A schoolmaster has no right to charge for wearing apparel which he has caused to be supplied to a scholar without the sanction, express or implied, of the parent or guardian of such scholar.—CLEMENTS v. WILLIAMS (1837), 8 C. & P. 58, N. P.

796. Implied authority to pledge credit.]—HEALING v. HEALING, No. 757, ante.

797. ——— Question for jury.]—Where a minor orders articles which are necessary & suitable to his situation in life, it is a question for the jury, under all the circumstances of the case, whether they can infer an authority given to that effect by the father.—BAKER v. KEEN (1819), 2 Stark. 501, N. P.

*Annotations:—*Refd. Rolfe v. Abbott (1833), 6 C. & P. 286; Shelton v. Springett (1851), 11 C. B. 452.

798. ———.]—A father sent his son, aged fourteen, to a school at a distance. Being in

want of clothes, the boy ordered a suit at a tailor's in the town, wore them, & took them home in his box. There was no evidence that his father saw them, or knew of the supply, or had given any directions as to the mode by which he was to be supplied:—*Held*: there was a case to be submitted to the jury, of an authority in the son to give the order on behalf of his father.—LAW v. WILKIN (1837), 6 Ad. & El. 718; 1 Nev. & P. K. B. 697; Will. Woll. & Dav. 235; 6 L. J. K. B. 166; 112 E. R. 276.

*Annotations:—*Dbtd. Mortimore v. Wright (1840), 6 M. & W. 482. Refd. Shelton v. Springett (1851), 11 C. B. 452.

799. ——— Necessaries.]—MACLISE v. NICHOLL (1844), 3 L. T. O. S. 74.

See, further, Part V., Sect. 6, ante.

800. ——— Mere relationship insufficient.]—The moral obligation which a father is under to provide for his child imposes on him no liability to pay the debts incurred by the child, & he is not so liable, unless he has given the child authority to incur them or has contracted to pay them. Deft.'s son, an infant of twenty years of age, had lodged for some time with pltf., during a part of which he had earned wages, & paid for his board, etc. He afterwards fell ill, & was unable to pay for the necessities with which pltf. continued to supply him. Pltf. applied to his father for money, who wrote in answer, that he could not advance any at the time, but his son would come into possession of money in the following month, when he would be twenty-one, & would then be able to pay what he owed pltf. himself:—*Held*: this letter was no admission of a liability in the father.

From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law. . . . If a father does any specific act, from which it may reasonably be inferred that he has authorised his son to contract a debt, he may be liable in respect of the debt so contracted: but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts (LORD ABINGER, C.B.).—MORTIMORE v. WRIGHT (1840), 6 M. & W. 482; 9 L. J. Ex. 158; 4 Jur. 465; 151 E. R. 502.

*Annotations:—*Refd. Linegar v. Hodd (1848), 17 L. J. C. P. 106; Shelton v. Springett (1851), 11 C. B. 452; Dickenson v. Wright (1860), 5 H. & N. 401; Bazeley v. Forder (1868), L. R. 3 Q. B. 559; Healing v. Healing (1902), 51 W. R. 221; Coldingham Parish Council v. Smith, [1918] 2 K. B. 90.

801. ———.]—The mere moral obligation on a parent to maintain his child, affords no legal inference of a promise to pay a debt contracted by him, even for necessities.—SHELTON v. SPRINGETT (1851), 11 C. B. 452; 138 E. R. 549.

*Annotations:—*Refd. Lee v. Bessie (Owner), [1912] 1 K. B. 83; Coldingham Parish Council v. Smith, [1918] 2 K. B. 90.

one upon testator, if this action could not be maintained thereon against the exors. after his death.—INSTITUTE OF LADIES OF THE S. (1861),

PART X. SECT. 1, SUB-SECT. 1.—
C. (b).

799 i. Implied authority to pledge credit—Necessaries.]—Pltf., upon their order, furnished to several of deft.'s sons, who were at the time living with their father, certain articles of wearing apparel, charging the same to deft. & delivering them at his house. Previously to this deft. had caused to be

inserted once in one of the daily papers published in the place, & taken in by the person by whom pltf. was employed a notice to the effect that he would not be responsible for any debt contracted in his name from that date without his written order; but after the goods in question had been furnished to his sons, he wrote to pltf. stating that he would not in any way be responsible for any debt incurred by any of his sons from & after that date unless under his written order:—*Held*: in the absence of evidence repelling the presumption of deft.'s authority to his sons to contract the liability in his name, the fact of the delivery of the articles at deft.'s house for his sons, & the language of

his letter to pltf. were quite sufficient to justify the jury in finding deft. liable, & it was not necessary to go further & prove the infancy of the sons.—HAYMAN v. HEWARD (1868), 18 C. P. 353.—CAN.

c. No liability apart from contract—Express or implied—Dental services.]—Applt. instructed his unemancipated minor son to visit a dentist & have a tooth extracted. He specially instructed him not to have any teeth filled. The son visited resp., & informed him of these instructions, but resp. persisted in doing other work, & actually in the course of his services extracted eight teeth & filled seven. Another unemancipated minor son also

802. Subsequent promise to pay—Construction of letter.]—Pltf., a tailor, having furnished goods to deft.'s son, an infant, while at A., deft. repudiating all liability on his part, on the ground that the goods were not necessities, wrote to pltf. as follows: "Should you think fit to keep entirely from him, by yourself or agent, & not trust him any further sum, or molest him in any way, & he does not, through your influence, introduction, or advice, contract any further debt, I will pay you one moiety, & try to provide the means for him to pay the other. If you do not at once agree to this, you are open to take any step you may think proper; but, in case you do, I wish to have the account sent to him here per return of post." Pltf. sent the account, but did not in terms accept the proposal contained in the above letter, though he did not in fact molest the son: & some months afterwards he caused his attorney to write to deft. intimating his willingness to accept from him one half his claim, but reserving to himself his rights against the son for the remaining half:—*Held*: these letters did not constitute such an agreement as to entitle pltf. to sue the father for the moiety of the account.—**ANDREWS v. GARRETT** (1859), 6 C. B. N. S. 262; 33 L. T. O. S. 92; 141 E. R. 456.

Annotation:—**Mentd.** *Holmes v. Mitchell* (1859), 7 C. B. N. S. 361.

Compare **AGENCY**, Vol. I., p. 408, No. 1066.

803. Money lent—At parent's request.]—Indebitatus assumpsit will not lie against the father, at whose request pltf. lent money to his son.—**BUTCHER v. ANDREWS** (1698), Carth. 446; Comb. 473; 1 Salk. 23; 90 E. R. 858.

Annotation:—**Mentd.** *Marriott v. Lister* (1762), 2 Wills. 141.

804. Liability assumed by parent—No right to recover.]—A father voluntarily paid a debt due to a bank from his son, & the father afterwards died insolvent:—*Held*: there was no debt from the son to the father's estate.—**GRAHAM v. WICKHAM** (1862), 31 Beav. 478; 54 E. R. 1224; *on appeal* (1863), 1 De G. J. & Sm. 474, L. JJ.

805. Goods supplied at parent's request—Dealings by parent with goods—Credit given to child.]—Goods are supplied to a minor upon a fraudulent representation by his father, that he is about to relinquish his business in favour of the son, although the credit is given to the son, the father dealing with the proceeds, is responsible in *assumpsit* for goods sold & delivered.—**BIDDLE & LOYD v. LEVY** (1815), 1 Stark. 20.

Annotation:—**Mentd.** *Rumsey v. N. E. Ry.* (1863), 14 C. B. N. S. 641.

806. Medical attention—At parent's request.]—**STONEHOUSE v. BODVIL** (1662), T. Raym. 67; 83 E. R. 37.

807. — Without parent's knowledge.]—A. had several of his children residing in a house distant from his own, in the charge of B., a servant:—*Held*: if an accident happened to one of the children, A. was liable to pay for its cure, although he did not know the surgeon who was called in, & although the accident might have arisen from the carelessness of the servant.—**COOPER v. PHILLIPS** (1831), 4 C. & P. 581.

visited resp. without the knowledge of his father, & had eighteen fillings performed. Applt. was not proved to have been aware of the work that was being done:—*Held*: on appeal from a magistrate's judgment against applt. for the total amount of all these services, there was no contract express or implied by which the judgment could be justified; the services were

not necessities; &, save as to a tender to pay for the extractions only, the judgment must be set aside.—**MCCALLUM v. HALLEN**, [1916] E. D. L. 74.—S. AF.

*d. Medical attention—Without parent's consent.]—*If a doctor or a dentist performs services of an important character to a minor, residing

(c) *When Father and Mother Separated.*

Implied authority of wife to pledge husband's credit—For maintenance of children.]—*See* **HUSBAND & WIFE**, Vol. XXVII., p. 205, Nos. 1779-1785.

808. Jurisdiction of court—Maintenance after dissolution of marriage—Order for payment to interveners out of settled fund—Custody awarded to interveners.]—After a marriage has been dissolved on the ground of the husband's adultery & cruelty, applications for the custody of the children were made by both the parents, & also by the relatives of the husband who had been allowed to intervene & be heard upon the question. An application was also made by petitioner for an alteration of the marriage settlements. The ct., being of opinion that neither of the parents was fit to have the care of the children, ordered that the interveners should have the custody of them, the parents being allowed reasonable access. With respect to the settlements estimating the husband's annual income, after paying the wife's outstanding debts & the cost of the suit, at £1,159, of which £943 was the income of settled property, to which the wife had contributed £3,000, it ordered that out of the settled property £200 a year should be paid to the interveners for the maintenance & education of the children.—**CHETWYND v. CHETWYND** (1865), L. R. 1 P. & D. 39; 35 L. J. P. & M. 21; 13 L. T. 474; 11 Jur. N. S. 958; 14 W. R. 184.

Annotations:—**Mentd.** *Hamilton v. Hector* (1871), 40 L. J. Ch. 692; *Godrich v. Godrich* (1873), L. R. 3 P. & D. 134; *Gladstone v. Gladstone* (1876), 1 P. D. 442; *Constantinidi v. Constantinidi*, [1905] P. 253; *Collins v. Collins* (1910), 26 T. L. R. 600.

809. — — —.]—**THOMASSET v. THOMASSET**, No. 26, *ante*.

810. — — — Not affected by previous agreement of parties.]—The statutory power of the ct. in relation to the maintenance & education of children after a decree for judicial separation or for dissolution of marriage is not affected by any previous agreement between the parents.—**BISHOP v. BISHOP**, **JUDKINS v. JUDKINS**, [1897] P. 138; 66 L. J. P. 69; 76 L. T. 409; 45 W. R. 567; 13 T. L. R. 366; 41 Sol. Jo. 559, C. A.

811. Annuity provided for maintenance—Subsequent cohabitation—Rights of children to annuity.]—After a separation between a husband & wife an action was brought by the wife's mother against the husband for necessities supplied to the wife, & was settled by arbn. Under the award two deeds were executed, by one of which a previous post-nuptial agreement & warrant of attorney were recited, & in pursuance of them an annuity was made payable to the wife for her separate use out of trust property to which the husband was beneficially entitled. By the other deed covenants were entered into by trustees on behalf of the wife that she would not molest the husband, & for indemnifying him against her debts, & that out of the annuity granted by the other deed the wife would support the children whom the husband covenanted to leave under her charge; & there was a proviso in the latter deed making it void on the husband & wife again cohabiting. The wife's conduct rendered her unfit to have the care of

with his father, involving a considerable expenditure, without asking for or obtaining the consent of the father, where such consent can readily be obtained or asked for, in such a case the services rendered are performed at the risk of the doctor or dentist, &, if the father repudiates liability, he is entitled to do so.—**MCCALLUM v.** [1916] E. D. L. 74.—S. AF.

l. 1.—Maintenance: Sub-sect. 1, C. (c); sub-sect. 2, A., B. & C. (a).]

the children:—*Held*: after subsequent cohabitation the children had no title to maintenance out of the annuity.—*CROUCH v. WALLER* (1859), 4 De G. & J. 302; 33 L. T. O. S. 215; 7 W. R. 523; 117, L. C.
—*Mentd.* *Nicol v. Nicol* (1886), 31 Ch. D. 524.

SUB-SECT. 2.—MAINTENANCE OUT OF INFANT'S PROPERTY.

A. In General.

See, now, Trustee Act, 1925 (c. 19), s. 31.

812. Powers of maintenance—Education included.]—Testator directed his trustees to pay to his widow the sum of £100 *per annum* for the maintenance & support of each of his children until he or she should attain twenty-one, with power to increase or decrease such allowance; & he empowered his trustees, with the consent of his widow, to advance any sums not exceeding in the whole one-fourth of the presumptive share of any child for his or her placing out or advancement in life, or otherwise for his or her benefit; the residue to be held in trust for all the children of testator, who being sons should attain twenty-one, or being daughters should attain twenty-five or marry, without any provision for the maintenance of unmarried daughters during the interval.

On a petition by the trustees, under Lord St. Leonards' Act, for the opinion of the ct.:—*Held*: (1) the trustees had no power either under 23 & 24 Vict. c. 145, s. 26, or by way of interest on their contingent shares, to allow maintenance to unmarried daughters during the interval; but the advancement clause enabled them to advance the necessary sums of money for the purpose; (2) the trustees would be justified in increasing the allowance for infant daughters of testator so as to meet the expenses of education as included in maintenance support.—*Re BREEDS' WILL* (1875), 1 Ch. D. 226; 45 L. J. Ch. 191; 24 W. R. 200.

813. — Trustees without legal estate.]—The legal operation & effect of clauses for maintenance & advancement where no legal estate is vested in the trustees discussed & stated.

The question then arises, what is the legal operation & effect of these clauses? Where the legal estate in fee is vested in trustees, the powers are equitable powers only. But where no legal estate is vested in the trustees, as is the case in reference to the questions raised in this action, it is necessary, in order to give effect to the clauses as they stand, to imply some legal right or estate in the trustees; unless such an implication is made, the trustees could not execute the power of "applying" the rents which is conferred upon them, nor could they accumulate the surplus

rents according to the direction given to them; nor could they raise the money for advancement. Ought then a legal estate or merely legal powers to be implied? If the former, it would, I apprehend, regard being had to the maintenance clause, be arguable that it was at least a legal estate to arise on the determination of the preceding life estate, & to continue during the respective lives of the children presumptively entitled so long as they were under age in their respective shares, & that such an estate would be a determinable estate of freehold *pur autre vie*, & sufficient to support the limitation to the minors respectively if construed as contingent remainders. But, in my opinion, to imply an estate in the trustees would be going beyond what is necessary & would not be justifiable, having regard to the other parts of the will where the estates are expressly devised to trustees. I think then the right construction is to imply a legal power in the trustees named in the will to enter upon the devised lands, & to take the profits sufficient to enable them to execute the express power of maintenance, & the direction or trust to accumulate the surplus rents; & also a legal power in the same trustees by way of revocation of uses or otherwise, sufficient to enable them to raise the money required for advancement under the express power of advancement. These powers would pass to new trustees. The power to appoint new trustees expressly declares that the powers & discretions vested in the trustees named in the will shall be exercisable by the trustees or trustee, for the time being, of the will (*CHITTY, J.*).—*DEAN v. DEAN*, [1891] 3 Ch. 150; 60 L. J. Ch. 553; 65 L. T. 65; 39 W. R. 568; 7 T. L. R. 579.

Annotations:—*Reid. Re Stamford & Warrington, Payne v. Grey*, [1911] 1 Ch. 255. *Mentd.* *Symes v. Symes*, [1896] 1 Ch. 272; *Re Wrightson, Battle-Wrightson v. Thomas*, [1904] 2 Ch. 95; *White v. Summers*, [1908] 2 Ch. 256; *Re Norrington, Norrington v. Norrington* (1923), 40 T. L. R. 96.

B. Jurisdiction of Court.

814. Jurisdiction to order maintenance—Out of sum recovered by infant.]—Where an infant recovers by a decree of the ct., the ct. may, with the approbation of the infant's relations, allot the infant a maintenance, though no provision in the trust for that purpose; & this is founded on natural equity.—*ENGLEFIELD v. ENGLEFIELD* (1691), 2 Vern. 236; 23 E. R. 753.

815. — Fund must be free from incumbrances.]—Where the ct. can be satisfied that the fund is clear, an allowance for maintenance will be allowed, pending the account, to the residuary legatee; not, if an accounting party.—*WARTER v. —* (1806), 13 Ves. 92; 33 E. R. 229, L. C.

Annotation:—*Mentd.* *Digby v. Boycott* (1845), 4 Hare, 444.

816. — Consistently with benefit to children.]—*WELLESLEY v. WELLESLEY*, No. 1178, *post*.

817. — Infant out of jurisdiction.]—The ct. has authority to order maintenance for infants out of the jurisdiction, if the circumstances of

application the welfare of the infants is the paramount consideration. The ct. will not direct the payment over of the money of infants unless satisfied that it will be applied for the benefit of the infants.—*Re LLOYD* (1914), 31 O. L. R. 476.—CAN.

817 i. — Infant out of jurisdiction.]—*Re LLOYD* (1914), 26 O. W. R. 3; 5 O. W. N. 974; 31 O. L. R. 476; 19 D. L. R. 659; 6 O. W. N. 507.—CAN.

i. — Up to what age maintenance can be ordered.]—Maintenance under statute can only be ordered where the infant is under twelve, & is

PART X. SECT. 1, SUB-SECT. 2.—A.

a. Voluntary maintenance.]—When the father of a child impliedly concurred in the appropriation of the interest of the child's funds to her maintenance, he himself benefiting by this appropriation in being relieved of the burden of her support, the ct. refused to permit such money to be recovered back as money appropriated.—*MCCARTHY v. GREEN* (1871), 5 Nfld. L. R. 414.—NFLD.

PART X. SECT. 1, SUB-SECT. 2.—B.

816 i. Jurisdiction to order mainte-

nance—Consistently with benefit to children.]—An application by the mother & guardian of infants for payment to her, as guardian, by the administrators with the will annexed of the estate of a deceased person, of moneys to which the infants were entitled under the will, where appots. & the infants were resident in a foreign country, & her appointment as guardian was made by a foreign court, testator [having been domiciled in Ontario & the moneys invested in Ontario by the administrators, was refused without prejudice to an application for an allowance for future maintenance. Upon such an

the case require it; & where an infant had been taken by his father, who had absconded, without having surrendered to a commission of bkpcy., to America, & the father would not suffer the infant to return to England, the ct., upon appeal, gave liberty to the guardian to apply annually for an allowance for the infant's maintenance & education in America, on condition of producing certificates, showing the proper application of the money.—**STEPHENS v. JAMES** (1833), 1 My. & K. 627; 39 E. R. 818, L. C.

Annotations:—**Reid**. **Johnstone v. Beattie** (1843), 10 Cl. & Fin. 42; **Hope v. Hope** (1854), 4 De G. M. & G. 328.

818. ——— & lunatic.]—This branch of the ct. has jurisdiction to order the income of the fortune of an infant resident abroad & there found a lunatic to be applied for his benefit, without the petition being heard by the Lord Chancellor.—**VOLANS v. CARR** (1848), 2 De G. & Sm. 242; 11 L. T. O. S. 123; 12 Jur. 643; 64 E. R. 109.

819. ——— Up to what age maintenance can be ordered—**Matrimonial Causes Acts**.]—The ct. has no jurisdiction under the Matrimonial Causes Acts to make an order providing for the maintenance or education of a child above the age of sixteen.—**BLANDFORD v. BLANDFORD**, [1892] P. 148; 61 L. J. P. 97; 67 L. T. 392; 8 T. L. R. 381.

Annotations:—**Consd.** **Midwinter v. Midwinter**, [1893] P. 93. **Overd.** **Thomasset v. Thomasset**, [1894] P. 295.

820. ———.]—**THOMASSET v. THOMASSET**, No. 26, *ante*.

821. ——— Limited to infant's property.]—**THOMASSET v. THOMASSET**, No. 26, *ante*.

C. Income Directed to be Accumulated.

(a) Jurisdiction of Court.

822. Vested legacy.]—Maintenance allowed where principal & interest of a legacy to a child is vested, though interest directed to accumulate till legatee attains twenty-one.—**STRETCH v. WATKINS** (1816), 1 Madd. 253; 56 E. R. 94.

Annotation:—**Mentd.** **Blewitt v. Roberts** (1841), Cr. & Ph. 274.

823. Donees life tenants—Gifts over.]—Where there is a gift of a fund to a class for life, & a direction to accumulate, & after their deceases equally between such of their respective issues as shall survive them & attain twenty-one, that being a gift of capital, no part of it can be applied for their maintenance; although it might be so applied, or the accumulations intercepted in case there was no gift over.—**PARSONS v. COKE** (1862), 10 W. R. 641.

transferred by the ct. to the mother's custody.—**Re EVES** (1869), 15 Gr. 580.—**CAN.**

g. ——— *Interest on fund in court.*]—Where a legacy bequeathed to an infant had been paid into ct., the interest thereon was ordered to be paid out as it accrued, for the education & maintenance of the infant, on its being shown that the money was required for these purposes.—**GRIFFIN v. MCGILL** (circa 1868), 2 Ch. Ch. 318.—**CAN.**

h. ——— *Funds in hands of administrator.*]—Where an infant's fund is in ct. or under the control of the ct., a summary order may be granted for the application of it in maintenance, upon a simple notice of motion; but if the money is outstanding in the hands of trustees or others, unless they submit to the jurisdiction, summary proceedings are inappropriate. A summary application by the guardian of infants for payment to him or into ct., by the administrator of the estate of the infants' father, of a fund in his hands, was dismissed, where it was opposed by the administrator.—**Re**

COURTS (1893), 15 P. R. 162.—**CAN.**

PART X. SECT. 1, SUB-SECT. 2.—C. (a).

822 i. Vested legacy.]—Under the will of their father two infants were entitled each to a vested legacy of \$500, which trustees were directed to invest at interest until the infants should be of full age, & then pay to them:—**Held**: a judge in chambers had jurisdiction, upon a summary application, to make an order authorising the trustees to apply the interest for the maintenance of the infants; but such an order should not be made except upon the clearest & most satisfactory evidence; as much evidence, at least, as is required upon an application for the sale of infants' lands for their maintenance should be required, & the like safeguards against deception & mistake should be insisted upon.—**Re WILSON** (1891), 14 P. R. 261.—**CAN.**

824 i. Where for benefit of infants.]—A trustor by his settlement destined certain shares of his estate on the

824. Where for benefit of infants.]—Testator left property to the value of £10,000 a year to be accumulated for twenty-one years, & directed the accumulations to be laid out in the purchase of land, to be then held in trust for Sir H. Havelock for life, & afterwards for his eldest son for life & his first & other sons in tail, with a similar trust for Sir H. Havelock's second son & his issue, with subsequent limitations over:—**Held**: as Sir H. Havelock was possessed of a moderate income only, which was insufficient for the maintenance & education of his sons, to fit them for their prospective positions in life, a sum of £2,700 *per annum* should be allowed him for the benefit of the infants.—**HAVELOCK v. HAVELOCK**, *Re ALLAN* (1881), 17 Ch. D. 807; 50 L. J. Ch. 778; 44 L. T. 168; 29 W. R. 859.

Annotations:—**Distd.** **Re Alford**, **Hunt v. Parry** (1886), 32 Ch. D. 383. **Foll.** **Re Collins**, **Collins v. Collins** (1886), 32 Ch. D. 229. **Consd.** **Re Smeed**, **Archer v. Prall** (1886), 54 L. T. 929.

825. ———.]—Testator gave the residue of his real & personal estate to trustees, upon trust to receive the rents & profits, & he desired them to invest in their names the surplus income from his real & personal estate not otherwise bequeathed by the former part of his will "such investments to be brought within the period limited for such investments" & when such period had been reached then he devised & bequeathed such real & personal estate to his sister for life, & after her decease to his nephew W., for life & after his decease to his children in tail male, & then he devised the same to his nephew J. for life & then to A. in tail male respectively.

W., J., & A. were infant children of testator's sister. Testator died possessed of considerable real & personal property. An application was made on behalf of W. J., & A., that £2,000 a year might be paid to their mother out of the income of testator's residuary estate for their maintenance & education:—**Held**: notwithstanding the direction to accumulate, inasmuch as there was an indication of intention to benefit a particular family, the order for payment of £2,000 a year to the mother for the benefit of her infant children should be made.—**Re COLLINS**, **COLLINS v. COLLINS** (1886), 32 Ch. D. 229; 55 L. J. Ch. 672; 55 L. T. 21; 50 J. P. 821; 34 W. R. 650; 2 T. L. R. 423.

Annotation:—**Reid**. **Re Walker**, **Walker v. Duncombe**, [1901] 1 Ch. 879.

826. According to intention of donor—Instrument containing overriding maintenance clause.]—Upon an application for maintenance out of

death of his widow, to his daughters in liferent & their children in fee, & he declared that the interest of his grandchildren in the shares liferented by their mothers should not vest in them until they attained majority. On the death of truster's widow, predeceased by one of his daughters, but survived by that daughter's husband & only child, a petition was presented by the child, & her father, who was poor, with the concurrence of the trustees, under the settlement referred to, praying the ct. to authorise the trustees to pay to the child & her father the free income of her prospective share until she attained majority. The ct. authorised the trustees to make a specified annual payment from the income of petitioner's invested share of the trust estate.—**MARTIN**, **PETITIONER** (1904), 6 F. (Ct. of Sess.) 592; 41 Sc. L. R. 400; 11 S. L. T. 741.—**SCOT.**

826 i. According to intention of donor—Instrument containing overriding maintenance clause.]—Testator appointed real estates to his daughter for life, &

Sect. 1.—Maintenance: Sub-sect. 2, C. (a) & (b).]

property given to infants by a will which contained an accumulation clause, & also a maintenance clause:—*Held*: the infants were, if a proper case were shown, entitled to maintenance notwithstanding that the period of accumulation had not expired, inasmuch as the will itself authorised the maintenance by providing a power of maintenance so worded as to be unaffected by the trust for accumulation.—*Re SMEED, ARCHER v. PRALI* (1886), 54 L. T. 929; 2 T. L. R. 535.

827. —.]—Testator devised real estates upon trusts under which in the events which happened A. became infant tenant in tail in possession. The will directed that during the minority of any person for the time being tenant in tail in possession the trustees should apply £500 *per annum* out of the income for the maintenance & education of the minor & should accumulate the surplus income for the benefit of the minor on attaining twenty-one. Testator also bequeathed nearly half a million in money to be invested in real estate to be held upon the same trusts as the devised estates. The net income of the settled property exceeded £14,000 *per annum*.

The ct. sanctioned a scheme for allowing £4,000 *per annum* out of the income for the upkeep of the family mansion & the maintenance thereof of the infant tenant in tail in a manner befitting the social position he would occupy in life. This allowance included £100 *per annum* for subscriptions to local charities.—*Re WALKER, WALKER v. DUNCOMBE*, [1901] 1 Ch. 879; 70 L. J. Ch. 417; 84 L. T. 193; 49 W. R. 394.

828. Not in absence of special circumstances.]—Where testator has by his will made a settlement of his estate, subject to a prior trust for the accumulation of the whole income during a term of years not exceeding the legal limit, the ct. has in the absence of special circumstances, no jurisdiction to order an allowance to be paid out of the income for the maintenance & education of the person who will, if he is living at the end of the term, be the tenant for life, even if there is no other way in which a provision can be made for his maintenance & education. Testator devised his real estate to trustees for a term of twenty years after his death, & after the expiration of the term, & in the meantime subject thereto, to the use of pltf. for life, with remainder to the use of his first & other sons successively in tail, with remainders over. Under the trusts of the term the rents were to be accumulated for a period of twenty years after testator's death. The income

after her death to her first & other sons successively in tail male & provided that in the event of her marrying without her mother's consent the rents & profits should be accumulated by his trustees during the minority of her eldest son & empowered them to apply the rents & profits in reduction of charges upon the estate. By a subsequent clause in the will he empowered his trustees to apply any part of the annual income to which any object, being a minor, of the trusts already declared should be entitled or presumptively entitled, towards the maintenance of such object. The daughter married without her mother's consent, & had two sons infants. An action was brought in the name of the eldest infant to administer the real & personal estate of testator & the rents & profits of the real estate, which were very large, were applied by the receiver in reduction of charges. The income of the infant's parents was considerable but not sufficient to

suitably maintain & educate him, having regard to the position in life which he would occupy on attaining his majority:—*Held*: the trustees had power, notwithstanding the accumulation clause, to make an allowance by way of maintenance, & it was a proper case for making the advance asked for.—*KING-HARMAN v. CAYLEY*, [1899] 1 I. R. 39.—IR.

827 i. —.]—Where testator directed a fund (in the result £125 only) to be invested until his youngest child attained twenty-one, the interest to be paid to the widow, & the capital then divided between her & his children:—*Held*: the ct. was bound to apply the property as directed by the will, & an application by the widow & two children, both under two years of age, for payment of the fund to her for her & their maintenance & support, was refused.—*Re GILES* (1878), 4 V. L. R. 37.—AUS.

827 ii. —.]—By his will testator

of testator's residuary personalty was subject to a similar trust. At the end of the twenty years the residuary personalty & the accumulations of the income & of the rents were to be laid out in the purchase of real estate, which was limited to the same uses. The will contained no provision for the maintenance of pltf. during the term. He was not the heir-at-law of testator, but he was the eldest son of a favourite niece of testator, who had before her marriage lived a good deal with him & had been educated at his expense. Testator was a tenant farmer. The rental of his real estate was about £440 *per annum*; his personal estate was about £10,000. An order had been made in the action allowing £300 a year for the maintenance & education of pltf. during his minority. After he had attained twenty-one pltf. applied for the continuance of the allowance until further order:—*Held*: there being no special circumstances there was no jurisdiction to interfere any further with the trust for accumulation.—*Re ALFORD, HUNT v. PARRY* (1886), 32 Ch. D. 383; 55 L. J. Ch. 659; 54 L. T. 674; 34 W. R. 773.

829. Increased maintenance—Beyond limit imposed by instrument.]—Testator gave the residue of his estate to trustees, upon trust out of the income to pay an annuity of £220 to his widow & then to pay to his daughter two yearly sums of £100 for the maintenance & education of her infant son & daughter respectively by a former marriage, as regarded the son so long as he should be under twenty-five, & as regarded the daughter so long as she should be under twenty-one or unmarried. The residue of the income was to be accumulated during the life of the widow, & on her death testator after certain provisions for his son & daughter, directed his trustees to pay £10,000 to his daughter's son on his attaining twenty-five; & to pay to her daughter £10,000 on her attaining twenty-one, or marrying under that age, & in the event of her dying before she should have attained twenty-one or married, the £10,000 was to fall into the residue; & testator gave the residue of the trust estate equally between his daughter, & her two children. Upon a summons taken out after testator's death in the matter of & on behalf of the infants, with the consent of testator's widow, who was seventy-seven years of age, & of their mother & her second husband, so far as they were able to consent, an order was made increasing the allowance for the maintenance & education of the infant son & daughter by £150 & £120 *per annum* respectively, to be paid out of the income of the estate & the accumulations thereof. But it was ordered that the trustees

bequeathed to his grandson D., his farm, implements, etc., but by a codicil provided that, until D. attained the age of twenty-one years, the exors. should keep control & manage the farm, & expend the net revenue arising therefrom in the improvement & cultivation of the land, without accounting to D. or any one else for such revenue. D. applied, through his next friend, to have an annual allowance made to him for his support & education:—*Held*: testator having directed the surplus revenue to be used in the improvement of the farm, that disposition could not be legally interfered with & the money diverted to another purpose.—*Re WADDELL'S ESTATE, LYNCH v. WADDELL* (1902), 35 N. S. R. 435.—CAN.

k. Property devised for maintenance sold—Maintenance directed out of accumulations of other property.]—Testator devised property for the maintenance of his son & grandchildren,

should hold the interests of the infants respectively under testator's will as a security for the purpose of recouping to any person entitled thereto such sums of money as would be equivalent to the sums which would have arisen from such part of the income as should be applied in payment of the increased allowances, in case the same, instead of having been so applied had been accumulated as directed by the will.—*Re COLGAN (INFANTS)* (1881), 19 Ch. D. 305; 51 L. J. Ch. 180; 46 L. T. 152; 30 W. R. 266.

Annotation :—*Reid. Re Tanner* (1884), 53 L. J. Ch. 1108.

830. ———.] — *Re WALKER, WALKER v. DUNCOMBE*, No. 827, *ante*.

831. To extend beyond attainment of full age.] — *Re ALFORD, HUNT v. PARRY*, No. 828, *ante*.

(b) *Application of Accumulation.*

See, generally, Trustee Act, 1925 (c. 19), s. 31 (2).

832. To what purposes—Payment of debts.] — (1) A legacy of £5,000 was bequeathed to trustees, upon trust to pay & apply so much of the interest as they in their uncontrolled discretion should think necessary or expedient, yearly & every year from the time of testator's decease until A. should attain thirty-two, in aid of the allowance which A.'s father should or ought to make for that purpose, in order to prepare A. for his establishment in, & to enable him to follow, some profession or business & subject thereto to accumulate the income of the £5,000 until A. should attain thirty-two, or die, whichever should first happen; & on A., attaining thirty-two years to pay the interest of the £5,000 & of the accumulated fund arising therefrom to A during his life so long as he should not have been found bkpt., or taken the benefit of the Insolvent Acts or have assigned his estate for the benefit of, or have compounded with, his creditors for payment of less than the debts due to them respectively; & subject to the trust above mentioned, the £5,000 & the accumulated fund were to be held in trust for the child or children of A. in manner therein mentioned, with a gift over in default of a child or children becoming entitled under such trust.

A., soon after attaining his majority, became involved in debt, & in consequence unable to provide for his wife & infant child or to pursue any profession or business. The ct. directed a portion of the fund which had arisen from accumulations of surplus income to be applied in payment of his debts.

(2) Power of trustees to resort for future maintenance to accumulations of dividends which would, if required, have been applicable to past maintenance.—*EDWARDS v. GROVE* (1860), 2 De G. F. & J. 210; 29 L. J. Ch. 839; 2 L. T. 620; 45 E. R. 602, L. C. & L. JJ.

833. ——— Past maintenance.] — *Re PITTS' SETTLEMENT, COLLINS v. PITTS*, [1884] W. N. 225.

834. "Person ultimately entitled"—Whether

remainderman entitled—*Infant's estate defeasible on contingency.*]—Property was bequeathed to trustees in trust for an infant, with a gift over in case of his death under twenty-one. The trustees accumulated the income of the property not required for his maintenance, in pursuance of the powers given by 23 & 24 Vict. c. 145, s. 26. The infant died under twenty-one:—*Held*: the accumulations of income to the time of the death of the infant, belonged to the infant, & were not to be held for the benefit of the remainderman who ultimately became entitled to the property from which the accumulations arose.—*Re BUCKLEY'S TRUSTS* (1883), 22 Ch. D. 583; 52 L. J. Ch. 439; 48 L. T. 109; 31 W. R. 376.

Annotations :—*Foll. Re Wells, Wells v. Wells* (1889), 43 Ch. D. 281. *Reid. Re Scott, Scott v. Scott*, [1902] 1 Ch. 918; *Re Boulter, Capital & Counties Bank v. Boulter*, [1918] 2 Ch. 40.

835. ——— Infant's interest vested.] — *Re HUMPHREYS, HUMPHREYS v. LEVETT*, No. 1061, *post*.

836. ——— Infant entitled to share of residue.] — Testator bequeathed a legacy to his trustees, upon trust, if & when R. should attain twenty-one, to pay the income thereof, to her during her life, with remainders over, & testator bequeathed to his trustees one-sixth part of the proceeds of the residue of his estate upon trust to pay the income thereof to R. for her life. The will empowered the trustees in their discretion during the minority of R. to apply the whole or part of the income of the legacy for her maintenance, & directed that the surplus should be accumulated so as to follow the corpus of the fund from which it arose. Testator died in March, 1884. R. attained twenty-one in May, 1889. In July, 1886, an order was made that £200 *per annum* should be allowed for her maintenance, & that the trustees of the will should, out of the funds subject to the trusts thereby declared in favour of the infant, pay on account of the maintenance £100 a year to her guardian. The residue of the £200 was to be paid out of other property to which she was entitled. After the date of this order, & thenceforth during the minority of the infant, the trustees paid the £100 a year to the guardians out of the gross income arising from the legacy & the share of residue, without distinguishing between the two funds, & accumulated the surplus. The income produced by the legacy was less than £100:—*Held*: (1) R. was, within Conveyancing Act, 1881 (c. 41), s. 43 (2), so far as the accumulations had arisen from the income of the share of the residue, the person who had ultimately become entitled to the property from which they had arisen & that they must be paid to her; (2) the trustees not having exercised any discretion as to the fund out of which the allowance for maintenance should be paid, the ct. would now exercise that discretion & direct that it should be deemed to have been paid primarily out of the income of the legacy, that being most for the benefit of R.

& directed the income of other property to be accumulated during their infancy, & the corpus divided on their attaining twenty-one. Testator having sold a portion of the former property, & the son dying shortly after his father, the ct. made an order for the application of a portion of the income of the latter property to the maintenance of the infants.—*Re HIGGINBOTHAM* (1878), 4 V. L. R. 57.—AUS.

PART X. SECT. 1, SUB-SECT. 2.—C. (b).

833 1. To what purposes—Past maintenance.]—It was provided in a will J.—VOL. XXVIII.

that the interest on investments should be paid by trustees for the benefit of certain infants to their guardian appointed by the will, or to such guardian, except the father of the infants, as the ct. should appoint; & that if the father applied to the ct., the trustees were to allow the interest to accumulate & be invested till the infants became of age. The guardian named ceased to act, & after the lapse of two years (notice having been given to the father) it was ordered that the petitioner, the aunt of the infants, with whom they had lived since the death of their mother, testatrix, should be appointed

guardian, & should be paid for the past maintenance of the infants.—*Re HEYWOOD* (1880), 8 P. R. 292.—CAN.

1. ——— Maintenance & education.]—Testamentary trustees who hold a fund for children to be paid on their attaining majority are bound to pay to the children's father out of the income the sum necessary for their maintenance & education.—*MACKINTOSH v. WOOD* (1872), 10 Macph. (Ct. of Sess.) 933; 44 Sc. Jur. 512.—SCOT.

—Where trustees were directed to hold £5,000 & shares

Sect. 1.—Maintenance: Sub-sect. 2, C. (b), D. & (a) & (b).]

With regard to making the apportionment of the allowance between the two funds *Lucas v. King*, No. 929, *post*, is an authority in point & shows that I have power to do so now. If the trustees had exercised their discretion in the matter I am not satisfied that I could have interfered with what they had done (NORTH, J.).—*Re WELLS, WELLS v. WELLS* (1889), 43 Ch. D. 281; 59 L. J. Ch. 113; 61 L. T. 806; 38 W. R. 327.

Annotations:—As to (1) *Apprvd. Re Humphreys, Humphreys v. Lovett*, [1893] 3 Ch. 1. *Reid. Re Scott, Scott v. Scott*, [1902] 1 Ch. 918; *Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685.

837. "Property from which the same arise"—Meaning of—Whether corpus or interest.]—Testator gave his residuary property to trustees, upon trust for conversion & to hold a portion of the proceeds upon trust for his children who being sons should attain twenty-five, or being daughters should attain twenty-one or marry, to be divided between them in equal shares, & he directed his trustees to retain the share of each daughter upon trust to pay the income to her for life, & after her death for her children.

Two of the daughters, having attained twenty-one, claimed payment of the accumulations of such part of the income in the meantime of their shares as had not been applied for their maintenance:—*Held*: they were the persons who had become ultimately entitled to the property from which the accumulations had arisen within Conveyancing Act, 1881 (c. 41), s. 43 (2), & the accumulations must be paid to them. *Semble*: the meaning of sub-sect. 2 is as follows: The trustees shall hold the accumulations for the benefit of the person who in the events which happen becomes entitled to the income from the accumulation of which the accumulations arise.—*Re Scott, Scott v. Scott*, [1902] 1 Ch. 918; 71 L. J. Ch. 475; 86 L. T. 348; 50 W. R. 454; 18 T. L. R. 470.

Annotations:—*Overd. Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685. *Reid. Re Boulter, Capital & Counties Bank v. Boulter*, [1918] 2 Ch. 40; *Re Mellor, Alvarez v. Dodgson*, [1922] 1 Ch. 312.

838. ———.]—The words "property from which the same arises" in conveyancing Act, 1881 (c. 41), s. 43 (2), mean the property the income arising from which has been accumulated. *Re Scott, Scott v. Scott*, No. 837, *ante*, *overd.*—*Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685; 73 L. J. Ch. 810; 91 L. T. 573; 53 W. R. 270; 48 Sol. Jo. 698, C. A.

Annotations:—*Consd. Re Boulter, Capital & Counties Bank v. Boulter*, [1918] 2 Ch. 40. *Reid. Re Abrahams, Abrahams v. Bendon*, [1911] 1 Ch. 108; *Re Mellor, Alvarez v. Dodgson*, [1922] 1 Ch. 312.

Legality of accumulations generally.]—See REAL PROPERTY.

D. Interest of Donee Vested in Possession.

See, now, Trustee Act, 1925 (c. 19), s. 31.

What is a vested interest.]—See, generally, SETTLEMENTS; WILLS.

839. Maintenance allowed if interest payable.]—If a younger brother has a provision under a settlement, & lives with the elder, whose estate is charged with the portion, he shall have an

allowance for this maintenance out of the interest due.—*Boycot v. Cotton* (1738), West temp. Hard. 520; 1 Atk. 552; 26 E. R. 347, L. C.

Annotations:—*Reid. Henty v. Wrey* (1882), 21 Ch. D. 332. *Mentd. Parker v. Hodgson* (1861), 1 Drew. & Sm. 568; *Balfour v. Cooper* (1883), 23 Ch. D. 472.

840. Gift contingent—Donor parent or in loco parentis.]—On settlement before marriage, a proviso, that if a husband & wife die, leaving issue unprovided for, that then the trustees might enter upon an estate, & take the rents thereof, till they had received £200 for the benefit of such unprovided children, in such manner & proportion as the survivor of the husband & wife should appoint: The wife survived, & appointed the £200 for a daughter, *pltf.'s* wife being an unprovided child: bill brought to have the £200 raised.

The judge decreed the £200 & interest by way of maintenance, from the death of the mother.—*GREEN v. BELCHIER* (1737), West temp. Hard. 217; 1 Atk. 505; 26 E. R. 319, L. C.

Annotations:—*Reid. Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685. *Mentd. Allan v. Backhouse* (1813), 2 Ves. & B. 65; *Metcalf v. Hutchinson* (1876), 1 Ch. D. 591.

841. ———.]—BUTLER v. FREEMAN & BUTLER, No. 759, *ante*.

842. ———.]—Where portions are given to younger children under a settlement made by a father or other person standing *in loco parentis* & the settlement contains no provision for the maintenance of the children, interest by way of maintenance for the children during minority will be allowed on their portions although their interests are contingent.—*Re GREAVES' SETTLED ESTATES, JONES v. GREAVES*, [1900] 2 Ch. 683; 69 L. J. Ch. 596; 82 L. T. 799; 49 W. R. 236; 44 Sol. Jo. 610.

———.]—See EXECUTORS, Vol. XXIII., pp. 450 *et seq.*; Trustee Act, 1925 (c. 19), s. 31 (3).

843. ——— Gift to a class.]—Maintenance to infant devisee when allowed, though not authorised by the words of the will.

The ct. has never gone further than this, that though the words of the will do not authorise the application of interest to the maintenance of the infants, yet if it can collect before it all the individuals who may be entitled to the fund, so as to make to each a compensation for taking from him part, it will grant an allowance for maintenance; but if the will contains successive limitations under which persons not in being may become entitled, it is not sufficient that all the parties then living, presumptively entitled, are before the ct., for none of the living may be the parties eventually entitled to the enjoyment of the property. In such a case, the order would be in effect to give for the maintenance of one person the property of another (LORD ELDON, C.).—*MARSHALL v. HOLLOWAY* (1820), 2 Swan. 432; 36 E. R. 681, L. C.

Annotations:—*Mentd. Morison v. Morison* (1838), 4 My. & Cr. 215; *Ibbetson v. Ibbetson* (1840), 10 Sim. 495; *Bainbridge v. Blair* (1845), 8 Beav. 588; *Ferrand v. Wilson* (1845), 4 Hare, 344; *Browne v. Stoughton* (1846), 14 Sim. 369; *Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; *Turvin v. Newcome* (1856), 3 K. & J. 16; *Christie v. Gosling* (1866), L. R. 1 H. L. 279; *Martelli v. Holloway* (1872), L. R. 5 H. L. 532; *Tewart v. Lawson* (1874), L. R. 18 Eq. 490; *Re Stamford & Warrington, Payne v. Grey*, [1911] 1 Ch. 255; *Re Lewis, Busk v. Lewes*, [1918] 2 Ch. 308.

ETC. (1877), 4 R. (Ct. of Sess.) 1093; 14 Sc. L. R. 650.—SCOT.

n. ——— Education—Change of residence.]—*CHRISTIE v. CHRISTIE'S* (1877), 4 R. (Ct. of Sess.) 1093.

of residue for behoof of a mother in life & of such of her children as should reach the age of twenty-five years & the survivors in fee & when the provisions had not at the death of the life-renter vested in any of the children by reason of none of them

having attained that age:—*Held*: the children as a class were entitled to the accruing income for their education & maintenance, it being admitted that testator had placed himself *in loco parentis* to them & that the advances were necessary.—*DUNCAN'S TRUSTEES*,

844. ———.]—(1) Wherever children born, & to be born, have a common interest in a fund, the fund, if necessary, may be applied for the maintenance of the children.

(2) If the father is not of ability, the ct. will allow maintenance for the children, although the mother has a competent separate estate.—**HALEY v. BANNISTER** (1820), 4 Madd. 275; 56 E. R. 707.

Annotations:—Generally, *Mentd.* **Ellis v. Maxwell** (1841), 3 Beav. 587; **Bryan v. Collins** (1852), 16 Beav. 14; **Tench v. Cheese** (1854), 19 Beav. 3; *Re Cattell*, **Cattell v. Cattell**, *Re Cattell*, **Cattell v. Dodd**, [1914] 1 Ch. 177.

————.]—See **EXECUTORS**, Vol. XXIII., pp. 457 *et seq.*

845. Gift vested but payment postponed.]—What is the rule of the ct. with respect to vested legacies payable on a future day? The admitted rule is that the legacy does not carry interest until the day of payment shall have arrived (**WIGRAM, V.-C.**).—**FESTING v. ALLEN** (1844), 5 Hare, 573; 67 E. R. 1038.

Annotations:—*Consd.* **Dundas v. Wolfe Murray** (1863), 1 Hem. & M. 425; *Re Judkin's Trusts* (1884), 25 Ch. D. 743. *Apld.* **Re Inman**, **Inman v. Rolls**, [1893] 3 Ch. 518. *Reid.* **Re Mid-Kent Ry. Act**, 1856, *Ex p.* **Styan** (1859), **John**, 387; *Re Dickson*, **Hill v. Grant** (1884), 28 Ch. D. 291; *Re Medlock*, **Ruffle v. Medlock** (1886), 55 L. J. Ch. 738. *Mentd.* **Boulton v. Beard** (1853), 3 De G. M. & G. 608; **Holmes v. Prescott** (1864), 3 New Rep. 559; **Rhodes v. Whitehead** (1865), 2 Drew. & Sm. 532; *Re Edmondson's Estate* (1868), L. R. 5 Eq. 389; **Best v. Donmall** (1871), 40 L. J. Ch. 160; *Re Orlebar's Settltmt. Trusts* (1875), L. R. 20 Eq. 711; **Cunliffe v. Brancker** (1876), 3 Ch. D. 393; **Jull v. Jacobs** (1876), 3 Ch. D. 703; **Patching v. Barnett** (1880), 49 L. J. Ch. 665; *Re Finch*, **Abbiss v. Burney** (1881), 17 Ch. D. 211; **Blackman v. Fysh**, [1892] 3 Ch. 209.

846. Portions not vesting till twenty-one.]—W. by will gave all his real estate to trustees until his son attained twenty-five, remainder to his son, W. the younger for life, remainder to trustees to preserve, remainder to his first & other sons in tail, with remainders over, & in case his son should leave any child other than an eldest or only son, the trustees had power, at any time after the son's death to demise a mtge. for years to raise £5,000 for portions for younger children as W. the younger should appoint, & in default equally between them, to be vested & payable at twenty-one. W. the younger never appointed, & died leaving an infant son & three younger children. On bill filed & application for maintenance for them:—*Held*: there being a third person, the eldest son interested, & not *sui juris*, no maintenance could be allowed.—**WILCOX v. BROWN** (1854), 2 W. R. 153.

PART X. SECT. 1, SUB-SECT. 2.—D.

845 i. Gift vested but payment postponed.]—Testatrix conveyed her whole estate, heritable, & movable, to trustees for payment of her debts & sundry special legacies, after which trustees were directed "to pay over" the residue of the whole estate when converted into money, in six equal shares, & in particular, "to the child or children of deceased, my nephew also one-sixth part or share, & failing of any one of them by decease before their marriage or majority, the share of the child or children so predeceasing shall fall & accrete to the survivor or survivors in equal portions"; part of the trust provisions indicated that a trust of some duration was contemplated; there were two children of C. who concurred, with their curator *ad litem*, in claiming payment of this sixth share, both being in minority & unmarried:—*Held*: the capital sum of the provision was not exigible by the children prior to their majority or marriage, but there was no provision made in the trust deed for the accumu-

lation of the interest on the capital, & the interest was claimable termly as it accrued, by the children respectively, for their maintenance & education.—**CAMPBELL v. REID** (1840), 2 Dunl. (Ct. of Sess.) 1084; 15 Fac. Coll. 1163.—**SCOT.**

846 i. Portions not vesting till twenty-one.]—**CALDBECK v. CALDBECK**, [1911] 1 I. R. 144.—**IR.**

o. Land to be conveyed on attaining majority.]—By a deed of trust certain lands were conveyed to trustees for the benefit of an infant, to whom the trustees were to convey in fee on her attaining twenty-one:—*Held*: the infant took a vested interest; & the ct. directed an inquiry as to her past & future maintenance.—**STEWART v. GLASGOW** (1869), 15 Gr. 653.—**CAN.**

PART X. SECT. 1, SUB-SECT. 2.—E. (a).

847 i. Father able to maintain.]—During the lifetime of a father, maintenance for his children will not, as a general rule, be ordered out of their property, it being his duty to support

1. Where Father of Infant Living.

(a) In General.

Duty of parent to maintain.]—See Sub-sect. 1, *ante*.

847. Father able to maintain.]—Where a father is sufficiently competent, the ct. will give no direction with regard to an infant's maintenance.—**JACKSON v. JACKSON** (1737), *West temp.* Hard. 31; 1 Atk. 513; 26 E. R. 324, L. C.

848. ———.]—**BUTLER v. FREEMAN & BUTLER**, No. 759, *ante*.

849. ———.] **DARLEY v. DARLEY**, No. 1090, *post*

850. ———.]—No maintenance shall be given when the parent is of ability to support the children.—**PULSFORD v. HUNTER, JENNINGS v. HUNTER** (1792), 3 Bro. C. C. 416; 29 E. R. 618, L. C.

Annotations:—*Consd.* **Fox v. Fox** (1875), L. R. 19 Eq. 286. *Reid.* **Leake v. Robinson** (1817), 2 Mer. 363; *Re Ashmore's Trusts* (1869), L. R. 9 Eq. 99; *Re Martin*, **Tuke v. Gilbert** (1887), 57 L. T. 471; *Re Wintle*, **Tucker v. Wintle**, [1896] 2 Ch. 711; *Re Ussher*, **Foster v. Ussher**, [1922] 2 Ch. 321.

851. ——— **Instrument directing maintenance.]**—Maintenance not allowed by the ct., where the parent is of ability, although directed by the will. Where the parent is reported not of ability, the sums allowed shall be only from the time of the report, not of the decree.—**HUGHES v. HUGHES** (1784), 1 Bro. C. C. 387; 28 E. R. 1193.

852. ———.]—In a case in which a legacy was given, in the events which happened, to two infants, to be paid to them at twenty-one, with a direction for maintenance out of the income during their respective minorities, & an ultimate limitation over in case they should both die under twenty-one without issue, the ct., upon a petition for maintenance out of the income of the fund, refused to dispense with the usual reference as to the father's ability to maintain the infants.—**LUCKNOW v. BROWN** (1848), 12 Jur. 1017.

(b) Where Maintenance Contracted for by Marriage Settlement.

853. Whether maintenance allowed.]—Although, where fortunes are given to children, living the father, with provisions for maintenance that shall not be raised, but accumulate while the father is of ability to maintain the children; yet where the woman's fortune, on a second marriage, was settled to the use of herself for life; remainder to the children of the marriage, making a provision for maintenance out of the interest of the fund, the

them, if able.—*Ex p.* **STYMEST** (1870) N. B. Dig. 647.—**CAN.**

p. Necessity for appointment as guardian.]—A father domiciled in England, by the law of which he was not the guardian of his children's estate unless appointed to be so by the ct., presented a petition for himself & his two pupil children craving the ct. to ordain Scots testamentary trustees, who were in possession of a fund belonging to the children, to pay to petitioner for their behoof the whole or part of the annual income of the fund. The petition was presented with the consent & concurrence of the trustees. The order craved was not granted. Thereafter the father was appointed guardian of his children's estates by the Supreme Ct. of New Zealand where he was then living:—*Held*: the Scots testamentary trustees should be authorised to make payment to the father of £150 per annum from the income of the funds for the maintenance & education of the children.—*Re SEDDON* (1891), 19 R. (Ct. of Sess.) 101; 29 Sc. L. R. 100.—**SCOT.**

Sect. 1.—Maintenance: Sub-sect. 2, E. (b) & (c).]

ct. ordered an allowance to be made.—**MUNDY v. HOWE (EARL)** (1793), 4 Bro. C. C. 223; 29 E. R. 863, L. C.

Annotations :—**Folld. Stocken v. Stocken** (1838), 4 My. & Cr. 95. **Distd. Thompson v. Griffin** (1841), Cr. & Ph. 317. **Consd. Ransome v. Burgess** (1866), L. R. 3 Eq. 773. **Distd. Re Kerrison's Trusts** (1871), L. R. 12 Eq. 422. **Consd. Wilson v. Turner** (1883), 22 Ch. D. 521. **Refd. Hoste v. Pratt** (1798), 3 Ves. 730.

854. — Trust for maintenance—Means of father immaterial.]—If under a marriage contract a fund has been settled upon trust for the children of the marriage, at twenty-one, with a proviso that till their shares become payable the interest shall be applied towards their maintenance; the father is entitled to receive such interest for that purpose, without reference to his own ability to maintain them.

The proviso that the issue should have maintenance out of the trust fund equally formed an integral part of the contract & was one of the considerations which moved the husband to join as a party on the settlement. He therefore had a right to have it strictly enforced in his own favour without reference to the question of his ability (**LEACH, M.R.**).—**MEACHER v. YOUNG** (1834), 2 My. & K. 490; 39 E. R. 1031

Annotations :—**Folld. Stocken v. Stocken** (1838), 4 My. & Cr. 95. **Consd. Thompson v. Griffin** (1841), Cr. & Ph. 317; **Ransome v. Burgess** (1866), L. R. 3 Eq. 773; **Wilson v. Turner** (1883), 22 Ch. D. 521.

855. — — — — —.]—A covenant to settle on particular persons all the covenantor's personal estate, subject only, nevertheless, & without prejudice to any other dispositions, qualifications, or changes, which he should make by his will of or concerning the same or any part thereof, is only a provision for a case of intestacy, & does not prevent the covenantor from bequeathing the whole of his personal estate to other persons.

By a marriage settlement, personal estate was settled, by the father of the wife, in trust for her for life, with remainder to her children, equally, as tenants in common, & in default of a child attaining a vested interest in trust for the husband, with a direction that after the wife's death the trustees should apply the income at their discretion for the maintenance & education of the children during their minorities:—**Held**: after the wife's death the husband was entitled to require that the income should be applied to the maintenance & education of the children, notwithstanding that he was himself of ample ability to maintain & educate them.—**STOCKEN v. STOCKEN** (1838), 4 My. & Cr. 95; 7 L. J. Ch. 305; 2 Jur. 693; 41 E. R. 38.

Annotations :—**Consd. Ransome v. Burgess** (1866), L. R. 3 Eq. 773. **Distd. Re Kerrison's Trusts** (1871), 40 L. J. Ch. 637; **Wilson v. Turner** (1883), 22 Ch. D. 521. **Refd. Thompson v. Griffin** (1841), Cr. & Ph. 317.

856. — — — — —.]—Trustees were directed to receive the income of a fund of £1,000 & pay & apply the same for the benefit, maintenance, & education of the children of the marriage & to pay & divide the fund & all the accumulations thereof among the children at twenty-one. There was no express direction to accumulate. The father wholly maintained the children, six in number, at a much larger expense than the income of the fund:—**Held**: he was entitled to receive the accumulation of income for the past time & the future income during the infancy of his children.—**BIRCH v. SUMNER** (1857), 3 Jur. N. S. 712.

857. — — — — —.]—By a marriage settlement, the trustees were to stand possessed of £2,000, coming from the wife's father, upon trust after the decease of the wife for the children of the

marriage equally, their shares to be vested at twenty-one or marriage; with a proviso, that until the principal should become payable to the children, the trustees should apply the whole or so much of the dividends as they should think fit, for the education or maintenance of such children. The wife died, leaving one child:—**Held**: this was a discretionary trust for maintenance, & not simply a power, & the father was entitled to have an allowance for past & future maintenance of his child, without reference to his ability to provide such maintenance; & an inquiry was directed as to the *quantum* to be so applied.—**RANSOME v. BURGESS** (1866), L. R. 3 Eq. 773; 36 L. J. Ch. 84; 15 W. R. 189.

Annotations :—**Distd. Re Kerrison's Trusts** (1871), 40 L. J. Ch. 637. **Overd. Wilson v. Turner** (1883), 22 Ch. D. 521.

858. — — — — —.]—Two sums of £10,000 each were vested in trustees, one under a settlement, & the other under a codicil to a will, on certain trusts for the wife & husband & children, with a power to the husband & wife jointly during their lives, by any deed, etc., to be by them, or the survivor of them, sealed, etc., to appoint the whole or any part of their dividends for the maintenance of the children; & it was declared that the trustees should & might apply the income, or a competent part, for maintenance as they thought proper. The husband survived the wife, & filed a bill to determine whether he was entitled to apply the income of the trust-funds for the maintenance of his ability:—**Held**: he was, & there was a trust for maintenance, & not a mere power.—**NEWTON v. CURZON** (1867), 16 L. T. 696.

859. — Suspension of trust during father's lifetime.]—By a marriage settlement, sums of stock, the wife's property were settled in trust for the husband during the joint lives of himself & his wife; with remainder to the survivor for life; & it was declared that if the husband should survive & marry again, & there should be issue of the marriage then living, his life interest in a moiety of the funds should cease, & that moiety should be transferred to the same persons, & be applied to the like purposes & in the like manner, as it would be transferable & applicable to if the husband were dead. Then followed trusts of the funds for the children as the husband & wife should jointly appoint, & as the survivor should appoint; & in default of any appointment, for all the children, except an eldest or only son, who for the time being should become entitled, in possession or remainder, to the husband's real estates under a deed of even date, the shares to be vested in the children at the usual periods, but not to be transferred until the death of the surviving parent; & it was declared that, after the death of both parents, the trustees should apply so much, as they should think fit, of the income of each child's share, until its share should become transferable, for its maintenance, & should accumulate the surplus; & the trustees were empowered, after the death of both parents, to advance the children out of the capital of their shares, notwithstanding they should be under twenty-one. The wife died. There was issue of the marriage four sons & three daughters, all infants. The husband appointed part of the funds to his eldest son, & then married again. The ct. refused to direct, without a reference as to the husband's ability, the income of the moiety of the funds which the husband forfeited by marrying again, to be applied for the children's maintenance, there being, in consequence of the exception of an eldest or only son, etc., a suspension of the trust for the benefit of the children, during

the father's lifetime.—*KEKEWICH v. LANGSTON* (1840), 11 Sim. 291; 4 Jur. 1155; 59 E. R. 886.

860. — Trust discretionary.] — *Semble*: where, in a marriage settlement, the wife's property is settled upon herself for life, for her separate use, with remainder to her children, & a mere power is given to the trustees to apply the income of the property towards the maintenance & education of the children; the father will not be entitled to require that any part of the income shall be applied to the maintenance of the children, so long as he is himself of ability to maintain them.—*THOMPSON v. GRIFFIN* (1841), Cr. & Ph. 317; 5 Jur. 90; 41 E. R. 512.

Annotations:—*Consd.* *Ransome v. Burgess* (1866), L. R. 3 Eq. 773; *Wilson v. Turner* (1883), 22 Ch. D. 521.

861. — —.]—By [a settlement, power was given to the wife to appoint a fund to her children, for any interests & either absolutely or conditionally; & it empowered the trustees, during the minorities of the children, to apply the income for their maintenance & education, notwithstanding the husband might be of sufficient ability to maintain & educate them. The wife appointed the fund equally among all her children, & directed the income, during their minorities, to be paid to her husband, to be applied by him for their maintenance & education. The children had other means of maintenance. The trustees of the settlement declining to pay the income of the trust fund to the children's father:—*Held*: this was a trust, & the ct. would apply a proper sum for the maintenance & education, & not necessarily the whole; & a reference to chambers was directed, to inquire how much ought to be allowed, regard being had to the provision from other sources.—*WHITE v. GRANE* (1854), 18 Beav. 571; 23 L. J. Ch. 863; 2 W. R. 320, 328; 52 E. R. 224.

Annotations:—*Mentd.* *Re Greenslade, Greenslade v. McCowen*, [1915] 1 Ch. 155; *Re Joicey, Joicey v. Elliot*, [1915] 2 Ch. 115.

862. — —.]—By a marriage settlement certain personal property was settled upon trust for the wife for life, & after her death for the children; & it was declared that the trustees should after the death of the wife apply the whole or such part as the trustees should think fit of the annual income of the expectant share of any child for or towards the maintenance of such child. The trustees after the death of the wife paid the whole income of the trust fund to the husband during the infancy of the child of the marriage without exercising any discretion as to its application to his maintenance:—*Held*: there was no absolute trust to apply the income to the maintenance of the children, but a discretionary trust equivalent to a power; & as the trustees had not exercised any discretion, the estate of the husband must be held liable to repay the whole amount of the income received.—*WILSON v. TURNER* (1883),

22 Ch. D. 521; 53 L. J. Ch. 270; 48 L. T. 370; 31 W. R. 438, C. A.

Annotations:—*Consd.* *Re Bryant, Bryant v. Hickley*, [1894] 1 Ch. 324. *Reid.* *Klug v. Klug*, [1918] 2 Ch. 67.

863. — Voluntary post nuptial settlement.]—The doctrine that where there is a fund subject to a trust for the maintenance of children & the children are maintained by their father without any resort to the fund, the father is entitled to be recouped out of the accumulated income, only applies where the trust for maintenance is contained in an ante-nuptial marriage settlement which has a basis of contract to support it. Therefore, where a father provided a fund of which he made a voluntary settlement after marriage upon his wife & children, & created a discretionary trust for maintenance of the children out of the income of the fund, & afterwards maintained them himself without calling for any contribution from the income of the fund:—*Held*: he, & consequently his trustee in bkpcy., was not entitled to receive any portion of the accumulations of the income which might have been so applied.

If this were a case of an ante-nuptial settlement, & therefore having its basis in contract, & where probably money of the wife would also be put into settlement, the case would have been completely settled by authority; because it has been treated as settled law, from *Mundy v. Howe (Earl)*, No. 853, *ante*, downwards—contrary, in my opinion, as well as in expressed opinions of LORD COTTENHAM & VICE-CHANCELLOR KINDERSLEY, to sound principle—that where there is a trust for maintenance in a settlement made upon marriage, & the father has maintained the children without calling for contributions from the fund, he is in the position of a purchaser of so much of the fund as it would have been proper to apply towards maintenance (*MALINS, V.-C.*).—*Re KERRISON'S TRUSTS* (1871), L. R. 12 Eq. 422; 40 L. J. Ch. 637; 25 L. T. 57; 19 W. R. 967.

Annotation:—*Consd.* *Wilson v. Turner* (1883), 22 Ch. D. 521.

(c) *Where Maintenance Gift to Parent.*

864. Father entitled to maintenance given—*Though able to maintain children.]—*Testator gave a share of his personal estate to his son-in-law, in trust to apply the same for the maintenance & use of his children by testator's daughter:—*Held*: the son-in-law was entitled to apply the interest of the share for his children's maintenance, notwithstanding he might be of ability to maintain them.—*HAWKINS v. WATTS* (1834), 7 Sim. 199; 58 E. R. 812.

865. — —.]—Testator bequeathed an annuity to his granddaughter, to be applied whilst she was under age in & towards her maintenance & education, in such manner as his trustees should in their absolute & uncontrollable discretion think

PART X. SECT. 1, SUB-SECT. 2.—
E. (c).

864 i. Father entitled to maintenance given—*Though able to maintain children.]—*J. B. M. having absolute power to dispose of property, devised it to her husband, J. M., for life in trust that he should "apply the same or so much thereof as he should from time to time think proper for or towards the maintenance & education or otherwise the benefit of my son D. M., & shall & do invest the unapplied income, etc., in such stocks, etc., as the said J. M. in his absolute & uncontrolled discretion shall think fit, with power to him at any time & from time to time to use & apply all or any part of such accumulated income for the

benefit of my said son, or to pay the same over to him, as the said J. M. may from time to time think proper," & after the death of J. M. she devised the property & all accumulations, which should not have been applied or paid over, in trust for her son D. M. absolutely; & if he should die in the lifetime of J. M. to J. M. absolutely. After testatrix's death, J. M. received the rents & maintained the son in a manner suitable to his rank until his own death. Independently of testatrix's property he was during his life of ability to maintain his son. J. M. having died, his administratrix, in an action brought by D. M., claimed credit for a considerable sum for the maintenance & education, etc., of the minor by J. M. during several years.

It was sought on behalf of pltf. to have this credit disallowed on the ground that the father, having been of sufficient ability to maintain & educate his child was not entitled to apply any of the trust funds for the purpose:—*Held*: J. M. was, under testatrix's will, entitled notwithstanding his own ability to apply so much of the income of the trust funds as he should from time to time think proper for & towards the maintenance & education or otherwise for the benefit of his son D. M.—*MALCOMSON v. MALCOMSON* (1885), 17 L. R. Ir. 69.—

q. — —.]—Under a devise of land to a father "during his life, for the support & maintenance of himself

Sect. 1.—Maintenance: Sub-sect. 2, E. (c), (d) & (e). F. & G.]

fit, & whether her father should be able to maintain & provide for her or not. The trustees having made a very small payment on account of the annuity, & having made no provision for the maintenance or education of the infant, who had been wholly provided for by her father, the ct. declared that, in the event of its appearing that the father had properly maintained & educated the infant from testator's death, he should receive the whole annuity for the time past & till further notice; he undertaking properly to maintain & educate her, & to abide by the order of the ct.—**STEPHENS v. LAWRY** (1842), 2 Y. & C. Ch. Cas. 87; 12 L. J. Ch. 71; 63 E. R. 38.

866. ———.]—Testator bequeathed one-fifth of his residuary personal estate to trustees upon trust for all & every the children or child of his son J. born & to be born, & who being a son or sons should live to attain twenty-one, or, being a daughter or daughters should live to attain that age or be married, to be equally divided between them, if more than one share & share alike as tenants in common, & he directed that the dividends, interest, & income of the share or expectant share of each such child should be paid to his son J. during his life & after his decease then during the minority of each such child should be retained by the trustee or trustees & be applied by him or them as the event should happen, in, for or towards the maintenance, clothing & advancement of each such child, in such proportion manner & form as his son J., or as the event might happen, his trustee or trustees should think fit. At the date of the will & of testator's death J. had three children, one of whom, a son afterwards attained twenty-one, married, & lived separately from his father:—**Held**: (1) a trust was constituted in J. of the income for the maintenance, clothing & advancement of his children, which trust did not terminate upon all or any of his three children attaining majority in his lifetime; (2) J. was not entitled to apply the income arbitrarily according to his own will & pleasure; (3) he was entitled to apply the income of a child's prospective share towards the child's maintenance, clothing & advancement without reference to his ability to maintain & educate that child; (4) the son who had attained his majority was not entitled to an immediate transfer of one-third of the fund, inasmuch as it did not appear that testator intended to exclude after-born children, & at all events he did intend to authorise an unequal distribution from time to time of the income for the benefit of J.'s children.—**BATEMAN v. FOSTER** (1844), 1 Coll. 118; 3 L. T. O. S. 3; 63 E. R. 346.

867. ——— Though larger than sum required.]—Testator gave an annuity to a trustee in trust to pay the same to his daughter for her separate use for life, remainder to her husband to enable him to maintain his children by her until the youngest attained twenty-one, & if the husband should die before the youngest child attained twenty-one then upon trust for the trustee to apply the annuity in like manner as the husband was directed to do:—**Held**: (the daughter being dead) the husband was bound to apply the annuity for the maintenance

of the children, but if he maintained them properly they would not be entitled to an account against him.—**LEACH v. LEACH** (1843), 13 Sim. 304; 7 Jur. 273; 60 E. R. 118.

(d) Inability of Father to Maintain.

868. In style suitable to expectations of child.]—In order to entitle the father of an infant legatee to maintenance it is not necessary that he should be absolutely insolvent; but that he should not be in sufficient circumstances to maintain his child suitably to his expectation, the ct. will not allow maintenance to a grandchild legatee out of a fund not vested.—**BUCKWORTH v. BUCKWORTH** (1784), 1 Cox, Eq. Cas. 80; 29 E. R. 1072, L. C.

869. ———.]—Maintenance under the circumstances given to a father, who had £6,000 a year of his own & although no report of debts had been made.

It is very loose to consider any particular income as enabling a father to maintain his children. To a nobleman £6,000 a year would not be thought enough to exclude him from requiring some maintenance. To a private gentleman it may be otherwise (**GRANT, M.R.**).—**JERVOISE v. SILK** (1813), Coop. G. 52; 35 E. R. 474.

Annotation:—**Mentd.** Digby v. Boycott (1845), 4 Hare, 444.

870. Benefit intended to whole family.]—Trust by will for all the children of A., when & as they shall severally attain sixteen; with a direction for maintenance: those born after the eldest attained sixteen were excluded: maintenance was directed without regard to the father's ability.

This provision is manifestly intended for the benefit of the family. The ability of the father must depend on the number of children. It cannot be laid down as an absolute rule that it [an allowance for maintenance] has the effect of a legacy to the father (**LORD LOUGHBOROUGH, C.**).—**HOSTE v. PRATT** (1798), 3 Ves. 730; 30 E. R. 1243, L. C.

Annotation:—**Mentd.** Picken v. Matthews (1878), 10 Ch. D. 264.

871. Property very small—Inquiry dispensed with.]—The interest of small legacies ordered to be paid to the mother, for maintenance, upon her affidavit, that the father was abroad in very embarrassed circumstances.—**WALKER v. SHORE** (1808), 15 Ves. 122; 33 E. R. 701, L. C.

Annotations:—**Mentd.** Taylor v. Martindale (1842), 1 Y. & C. Ch. Cas. 658; Evans v. Jones (1846), 2 Coll. 516; King v. Cullen (1848), 2 De G. & Sm. 252; Harvey v. Stracey (1852), 1 Drew. 73; Baldwin v. Rogers (1853), 3 De G. M. & G. 649; Neathway v. Reed (1853), 3 De G. M. & G. 18.

872. ———.]—**p. DUDLEY** (1820), 1 Jac. & W. 254, n.; 37 E. R. 372.

873. ———.]—Dividends, to which infants were entitled, ordered, without a reference, to be paid to their father for their maintenance; the parties being poor & the property of small amount.—**PAYNE v. LOW** (1830), 1 Russ. & M. 223; 39 E. R. 86.

874. ———.]—Order made that the dividends of a very small sum of stock, belonging to six infants, should be paid to their guardian until the youngest should attain twenty-one, or further order.—**Re BUTTERFIELD** (1850), 19 L. J. Ch. 373; 15 L. T. O. S. 520; 15 Jur. 96.

& his three children, with remainder to the heirs of his body, or to such of his children as he may devise the same to," there is no trust in favour of the children so as to give them a beneficial interest apart from & independently of

their father, but the children being in needy circumstances will be entitled as against the father's execution creditor, who has been appointed receiver of his interest, to have a share of the income set apart for their

maintenance & support, & in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver.—**ALLEN v. FURNES** (1891), 20 A. R. 34.—**CAN.**

875. Mother with separate estate.]—HALEY v. BANNISTER, No. 844, ante.

(e) *Father Deprived of Custody by Court.*

876. Maintenance allowed.]—Order for a guardian & maintenance for infants upon ill-treatment by their father.—WHITFIELD v. HALES (1806), 12 Ves. 492; 33 E. R. 186, L. C. Annotation:—*Reid. Re Meade* (1871), 19 W. R. 313.

877. —.]—WELLESLEY v. BEAUFORT (DUKE), No. 2098, post.

F. *Where Father of Infant Dead.*

878. Maintenance allowed—Mother remarried.]—Mother married to a second husband, not obliged to maintain the children by the first, but shall have an allowance from the interest of their fortunes.—BILLINGSLEY v. CRITCHET (1783), 1 Bro. C. C. 268; 28 E. R. 1121. Annotation:—*Consd. Cooper v. Martin* (1803), 4 East, 76.

879. — Mother's means immaterial.]—After the death of their father, infants petitioned for an allowance for maintenance out of their fortunes:—*Held*: such maintenance was to be determined irrespective of the means of their mother to support them out of her own fortune.—DOUGLAS v. ANDREWS (1849), 12 Beav. 310; 19 L. J. Ch. 69; 14 L. T. O. S. 502; 14 Jur. 73; 50 E. R. 1080. Annotation:—*Mentd. Re Eyre, Johnson v. Williams*, [1917] 1 Ch. 351.

880. — Public trustee appointed trustee of estate.]—*Re BASS, BASS v. PUBLIC TRUSTEE*, [1914] W. N. 368.

See, also, No. 844, ante, No. 961, post.

G. *Interference with Discretion of Trustees.*

881. Failure of trustees to exercise direction—Allowance for past maintenance.]—Maintenance allowed for the time past. Under particular circumstances, a power to the trustees to apply dividends for maintenance with the approbation of the parents, or the survivor, & by the death of the trustees, or their not acting, their discretion not having been exercised, an inquiry was directed, whether it would have been reasonable & proper in the trustees to apply any & what part of the dividends, having regard to the situation, circumstances & ability, of the father, & the fortunes of the children.—MABERLY v. TURTON (1808), 14 Ves. 499; 33 E. R. 612.

Annotations:—*Reid. Edwards v. Grove* (1860), 2 De G. F. & J. 210. *Mentd. Pilcher v. Randall* (1861), 4 L. T. 308.

882. —.]—Under a settlement, an infant, on the death of her father, was entitled to £800 per annum, for maintenance at the discretion of the trustees. The trustees not having their attention called to the trusts of the settlement, paid the whole dividends to the infant's grandmother, who allowed but £300 for maintenance to the stepfather of the infant, with whom she resided. Applications were made for an increased

maintenance but without effect. Upon the marriage of the infant, the real state of the trusts was discovered, & a bill was filed against the grandmother for an increase upon the past maintenance allowance:—*Held*: as it appeared the trustees would have exercised their discretion, had they been called upon, in giving a considerable extra allowance, it was right to grant a reference to inquire into the amount expended beyond the £300 per annum.—STOPFORD v. CANTERBURY (LORD) (1840), 11 Sim. 82; 4 Jur. 842; 59 E. R. 805.

883. —.]—W. by will directed his trustees to apply the whole of the income of his personal estate, or such part as they should in their absolute discretion think fit, in or towards the maintenance, education, apprenticeship, or in any other manner for the benefit of the child or children of his sister J., until they should respectively attain the age of twenty-three years, & to accumulate the residue of such income; & he gave the capital of his personal estate to such of the children of J. as should attain the age of twenty-three years as tenants in common in equal shares. W. died in 1888. His sister survived him, & had two children only, both born in his lifetime. By an order made in Jan. 1889, upon a summons taken out by the trustees, it was declared that the gift of capital to the children who attained twenty-three was void for remoteness; but that, on account of other clauses in the will, the persons to take it could not be ascertained until the death of J., & the trustees were ordered to accumulate the surplus income until further order. In 1895 the two children of J., one of whom had attained twenty-three & the other twenty-one, took out this summons for the determination of the questions whether the trust for maintenance was not good, & whether the trustees ought not to have applied, & ought not now to apply, the accumulated income for maintenance, etc.:—*Held*: (1) the trust for maintenance could be severed from the gift of the capital, & was good; (2) the accumulation by the trustees had plainly not been an exercise of their discretion, & they had now, notwithstanding that one child had attained twenty-three, a discretion to apply all or any part of the income which accrued down to the date of her attaining twenty-three in payment of the past maintenance of the two children, & to apply any part of the income which had accrued since that date, or should accrue before the younger child attained twenty-three, in or towards his maintenance.—*Re WISE, JACKSON v. PARROTT*, [1896] 1 Ch. 281; 65 L. J. Ch. 281; 73 L. T. 743; 44 W. R. 310

Annotations:—*As to* (1) *Consd. Re Blew, Blew v. Gunner*, [1906] 1 Ch. 624. *As to* (2) *Expld. Re Cooper, Cooper v. Cooper*, [1913] 1 Ch. 350.

884. Discretion exercised honestly—Whether court will interfere.]—Testator having directed his two trustees to apply a moiety of rents or such part

PART X. SECT. 1, SUB-SECT. 2.—F.

879i. Maintenance allowed—Mother's means immaterial.]—Testator bequeathed a legacy to an infant daughter, payable on her attaining twenty-one, & charged the same on the shares of two of the devisees, but the will was silent as to interest:—*Held*: the infant was entitled to maintenance out of the estate of testator, during her minority, to the extent, if necessary, of the interest on the legacy. An inquiry as to the ability of the widow to maintain the infant was refused.—BINKLEY v. BINKLEY (1869), 15 Gr. 649.—OAN.

r. —.]—Testator by his will bequeathed his share in a certain

partnership business to remain in the business until his infant son attained the age of twenty-one years, when the son was to claim its value or be allowed a share in the partnership business. In the event of the son not attaining maturity, testator directed that half of the above share was to be paid to his widow, & the other half to be equally divided amongst the members of his own family. He further directed, "A fair interest to be paid to my wife until the boy shall be of age." The widow, in consideration of money lent, executed a deed purporting to assign all her interest in the will, & in particular the income & interest arising & to arise from the share in the partner-

ship business:—*Held*: the widow was not entitled absolutely during the minority of the son to the interest in the share in the partnership, but that the income of such share was burdened with the maintenance of the son; & the exor. was not justified in paying the interest & profits to the widow, or to an assignee of the widow, until he was satisfied that the infant son was being otherwise properly maintained by the mother.—*TOPLISS v. ATTON* (1906), 26 N. Z. L. R. 17.—N.Z.

PART X. SECT. 1, SUB-SECT. 2.—G.

884i. Discretion exercised honestly—Whether court will interfere.]—A discretion given to exors. to apply the

Sect. 1.—Maintenance: Sub-sect. 2, G. & H. (a)
(b) i.]

as they or he should in their or his discretion see fit in the maintenance & education or advancement in life of his younger children during the life of his wife; & one of the trustees having died, the ct. would not interfere with the discretion to be exercised by the surviving trustee.—*LIVESEY v. HARDING, LIVESEY v. BECKETT* (1830), as reported in *Taml.* 460; 48 *E. R.* 183.

885. ———.]—Trustees were by will authorised, if they thought fit, to apply the income of shares to which children were presumptively entitled towards the maintenance of the children, notwithstanding the father of the children might be of sufficient ability to maintain them. A suit was instituted for the administration of the estate of testator:—*Held*: the ct. would not control the discretion of the trustees, &, if they thought it fit that the income should be paid to the father for the maintenance of the children, an order would be made for payment accordingly.—*BROPHY v. BELLAMY* (1873), 8 *Ch. App.* 798; 43 *L. J. Ch.* 183; 29 *L. T.* 380, *L. C. & L. JJ.*

Annotations:—*Consd. Tempest v. Camoys* (1882), 21 *Ch. D.* 571. *Mentd. Re Bryant, Bryant v. Hickley* (1893), 42 *W. R.* 183.

886. ———.]—Testator gave a legacy of £3,000 to three children or the survivors or survivor who should attain twenty-one; but if all three died under twenty-one there was a gift over. The will contained a direction to the trustees to apply the whole or such parts as they should think fit of the income of the legacy for the maintenance & education of the legatees while under twenty-one:—*Held*: the ct. had power to control the discretion of the trustees in the allowance to be made for children & the ct. in opposition to the trustees directed that the whole income should be paid to the father of the children for their maintenance together with an equal amount for past maintenance.—*Re HODGES, DAVEY v. WARD* (1878), 7 *Ch. D.* 754; 47 *L. J. Ch.* 335; 26 *W. R.* 390.

Annotation:—*Reid. Tabor v. Brooks* (1878), 10 *Ch. D.* 273.

887. ———.]—A female infant was entitled contingently on her attaining twenty-one or marrying, to a fund of which her deceased mother had been tenant for life. The trustees had power "to apply all or any part" of the income, about £538 a year, for her maintenance & education. On a summons in the matter of the infant the judge held that he had jurisdiction to control the discretion of the trustees as to the *quantum* to be allowed & made an order on them to pay £400 a year to the father for her maintenance & education. The trustees appealed & in answer to an inquiry by the ct. stated their intention to allow £250 to the father for her maintenance & education:—*Held*: the order was irregular & must be discharged the ct. having no jurisdiction on a

interest of a legacy to the maintenance & education of the legatees, nephews & niece of testator, is not subject to the control of the ct. where there is no charge of fraud, or the like, against the trustees.—*Forbes v. Macdonald* (1872),

884 ii. ———.]—A will empowered the trustees in their discretion to apply the income to which any beneficiary who was a minor was or might be entitled for the benefit of any minor in such manner &, if more than one, in such shares & proportions as they should in their absolute discretion think fit:—*Held*: the mere fact that the trustees had not advanced any part of the income for the benefit of the

beneficiaries constituted no sufficient ground for the interference of the ct., in the absence of any proof that they had not exercised a sound & honest discretion in the matter.—*Re SCOTT, ATKINSON v. FOUBISTER* (1900), 19 *N. Z. L. R.* 172.—*N. Z.*

t. *No real discretion existing.*]—Deft., having in her hands a fund to the benefit of which pltf., an infant, was entitled, asserted that, by the terms of the trust upon which she held it, she had a discretion as to the application of it for the benefit of pltf. She nevertheless paid the money into a bank to her own credit as trustee for pltf., & agreed that she would not use it except for his benefit, & would pay

summons in the matter of an infant to make any order for payment by trustees or other persons. *Qu.*: whether the ct. could control the discretion of the trustees as to the amount to be allowed for maintenance & education so long as such discretion was honestly exercised.—*Re LORTHOUSE* (1885), 29 *Ch. D.* 921; 54 *L. J. Ch.* 1087; 53 *L. T.* 174; 33 *W. R.* 668, *C. A.*

—.]—*Re WELLS, WELLS v. WELLS*, No. 836, *ante*.

889. ———.]—Testator, B., by his will directed that, after the decease or remarriage of his wife L., his trustees should apply the whole, or such part as they should think fit, of the income of any child's share of his, testator's residuary estate for or towards such child's maintenance, & appointed L., & four other persons trustees of his will. L., remarried, but the infant children of her marriage with B., continued to live with her. On an application by the infants that the trustees might be ordered to provide for their maintenance pursuant to the above provision of B.'s will:—*Held*: (1) there was no absolute trust to so apply the whole or any part of the income, but only a discretionary trust, carrying an obligation to entertain & consider the question, & then a discretion in the execution of the duty; &, consequently, the ct. could not overrule the discretion of the four trustees, who, after having considered all the circumstances & their duty under the circumstances, had, in the exercise of an honest discretion, refused to make any allowance for maintenance out of testator's estate; (2) assuming the ct. had a discretion, it would exercise that discretion, similarly to these trustees.—*Re BRYANT, BRYANT v. HICKLEY*, [1894] 1 *Ch.* 324; 63 *L. J. Ch.* 197; 70 *L. T.* 301; 42 *W. R.* 183; 38 *Sol. Jo.* 79; 8 *R.* 32.

890. *No honest exercise of discretion.*]—*STEPHENS v. LAWRY*, No. 865, *ante*.

891. ———.]—*Re ROPER'S TRUSTS*, No. 1020, *post*.

Exercise of powers as to advancements.]—*See Sect. 2, sub-sects. 3, 4, post*.

H. Out of What Property Maintenance Payable.

(a) Contingent and Determinable Life Interest.

See, now, Trustee Act, 1925 (c. 19), s. 31.

Contingent interests.]—*See EXECUTORS*, Vol. XXIII., pp. 450–453, 457–459, Nos. 5219–5269, 5306–5325.

Determinable life interest.]—*See EXECUTORS*, Vol. XXIII., p. 459, No. 5326.

(b) Out of Capital.

i. Personal Property.

See, generally, EXECUTORS, Vol. XXIII., pp. 449, 450, Nos. 5207–5213.

892. *Power of trustees—Without authority of court.*]—(1) General rule, that a trustee shall not

it to him at majority:—*Held*: deft. was a mere trustee for pltf., without the discretion which she contended for, & a summary order, made before delivery of statement of claim in an action to recover the fund & for an injunction, requiring deft. to pay the fund into ct., & thereupon perpetually staying the action was affirmed.—*WHITEWOOD v. WHITEWOOD* (1900), 19 *P. R.* 183.—*CAN.*

PART X. SECT. 1, SUB-SECT. 2.—
H. (b) i.

a. When court will authorise.]—Although the general rule is, that the ct. will not break in upon principal money for the maintenance & education

of his own authority break in upon the capital of an infant's fortune.

(2) The ct. very rarely has broken in upon the capital for the mere purpose of maintenance, though frequently for advancement.—*WALKER v. WETHERELL* (1801), 6 Ves. 473; 31 E. R. 1150.

893. ———.]—Stock having been bequeathed to trustees, to be applied for the benefit of testator's two granddaughters till twenty, & then to be divided between them. On a bill filed by one of the granddaughters against the surviving trustee after the lapse of many years, the ct. refused to assume against pltf. that her share had been expended in her maintenance. *Qu.*: whether, under such a direction, the trustees could have properly applied the capital of the fund in maintenance.—*CLARK v. WYBURN* (1848), 13 L. T. O. S. 441; 12 Jur. 613.

894. ———.]—Trustees applied a part of the capital of a fund belonging to infants, who had been left destitute by their father, for their benefit. They were allowed the amount.—*PRINCE v. HINE* (1859), 26 Beav. 634; 53 E. R. 1043.

895. ———.]—Trustees may in a case of necessity, be justified in breaking in upon the capital of a trust fund, either for the maintenance & education, or for the advancement in life of infant children even where there is a gift over to the issue of such children in the event of their dying under twenty-one.—*Re TIBBS' TRUST* (1869), 17 W. R. 304.

896. When court will authorise — Capital very small.]—Money expended for maintenance & education, shall be allowed out of a small legacy given to an infant, though it breaks into the principal. Otherwise, where the legacy is considerable.—*BARLOW v. GRANT* (1684), 1 Vern. 255; 23 E. R. 451.

Annotations:—*Mentd.* *Barton v. Cooke* (1800), 5 Ves. 461; *Hamley v. Gilbert* (1821), Jac. 354; *Cowper v. Mantell* (1856), 22 Beav. 231; *Lonsdale v. Berchtold* (1857), 3 K. & J. 185; *Re Sanderson's Trust* (1857), 3 K. & J. 497; *Borton v. Dunbar* (1860), 2 De G. F. & J. 338; *Presant & Presant v. Goodwin* (1860), 1 Sw. & Tr. 544.

897. ———.]—An infant's property being very small, maintenance ordered out of the principal, without a reference.—*Ex p. GREEN* (1820), 1 Jac. & W. 253; 37 E. R. 372.

898. ———.]—Order made upon petition, that part of a small sum of stock bequeathed to an infant should be sold, & the proceeds applied in paying a debt incurred for necessities on his account, & that the residue of the stock should be transferred into ct., & the dividends paid to his mother towards his maintenance.—*Re SWIFT, Ex p. SWIFT* (1828), 1 Russ. & M. 575; 39 E. R. 221.

899. ———.]—Order made upon petition that exors. should be at liberty to apply certain

small sums, part of the capital of the residuary shares bequeathed by a father to his infant children, towards their maintenance, education & advancement, though the shares did not vest till the children came of age.—*Ex p. CHAMBERS* (1829), 1 Russ. & M. 577; 39 E. R. 221, L. C.

900. ———.]—The shares of infants in testator's estate, not exceeding £20 each, ordered to be paid at once to the person who was maintaining them, upon his undertaking to apply the same for their maintenance.—*FARRANCE v. VILEY* (1852), 21 L. J. Ch. 313; 18 L. T. O. S. 345.

901. ———.]—The whole of a small legacy & its accumulations, were paid out of ct. to the solr. of an infant who had no other property, upon his undertaking to apply it in discharging a sum claimed for past maintenance & for a prospective outfit, & after deducting the costs, to pay any remaining balance to the infant at majority.—*Re WELCH* (1854), 23 L. J. Ch. 344; 2 W. R. 310.

902. ———.]—Income not sufficient for maintenance of infant.]—*BRIDGE v. BROWN* (1843), 2 Y. & C. Ch. Cas. 181; 63 E. R. 79.

Annotation:—*Mentd.* *Goldstein v. Salvation Army Assce. Soc.*, [1917] 2 K. B. 291.

903. ———.]—*Re MAIS* (1852), 21 L. J. Ch. 875; 19 L. T. O. S. 324; 16 Jur. 608.

904. ———.]—Under a marriage settlement, stock was vested in trustees, in trust to pay the interest & dividends to the wife for life, remainder to the husband for life, with a power to them & the survivor to appoint the principal among the children of the marriage. The wife died, & the husband appointed a third part thereof absolutely & at once in trust for an infant child, payment to be postponed till twenty-one. The ct., on the application of the infant that the trustees might apply a sufficient part of the capital of his share of the stock in payment of the expenses incurred & to be incurred for his education as a cadet, & his advancement in India, granted the prayer of the petition so far as related to payment of part of the expenses incurred, & as to the expenses of education & residence as a cadet at Addiscombe, & ordered the rest of the petition to stand over.—*Re LANE* (1853), 17 Jur. 219.

905. ———.]—Case in which the ct. will order advances out of capital to be made for the maintenance of children themselves entitled to the income, & as tenants in tail to the capital, to their mother.—*NOTTLEY v. PALMER, NOTTLEY v. NOTTLEY* (1865), as reported in 13 L. T. 647; 11 Jur. N. S. 968; 14 W. R. 170.

Annotations:—*Refd.* *Re Howarth* (1873), 8 Ch. App. 416, n. *Mentd.* *Re Butler's Will* (1873), L. R. 16 Eq. 479.

906. ———.]—Under the will of her father, a domiciled Scotsman who made his will in the Scottish form, an infant was entitled to a legacy.

of infant legatees, still in a proper case the ct. will so apply it, as well as to the advancement of the infants.—*ASHBOUGH v. ASHBOUGH* (1864), 10 Gr. 430.—CAN.

b. ———.]—*Past maintenance.*]—The ct. will not allow to a relative money expended by him in past maintenance of the infant, out of the proceeds of land of the infant sold in lieu of a partition.—*KELLAR v. TACHE* (circa 1865), 1 Ch. Ch. 388.—CAN.

c. ———.]—Trustees may be allowed payments made for maintenance & education out of capital.—*STEWART v. FLETCHER* (1869), 16 Gr. 235.—CAN.

d. ———.]—*COOK v. NOBLE* (1886), 12 O. R. 81.—CAN.

e. ———.]—Money paid into ct. to the credit of infants will not be paid out to their guardian appointed by a surrogate ct., upon his application, as

a matter of right; though, in a proper case, an allowance for their maintenance & education may be made to him out of such moneys.—*Re HARRISON* (1899), 18 P. R. 303.—CAN.

f. ———.]—During the infancy of deft. \$2,000 was paid into ct., to one-half of which she was entitled on attaining majority, & to the other half after the death of her mother. Deft. having come of age, but being of unsound mind, & residing abroad with her mother, who had been appointed her guardian by a foreign ct., the mother applied for payment out of the whole fund, having given in the foreign ct. specific security for the amount:—*Held*: the half of the fund in which appot. had a life interest might be paid out to proper trustees appointed to administer & safeguard it, or it might be paid out to appot. upon sub-

stantial security being given; the other half, being actually in the hands of the ct., was subject to the jurisdiction of the ct., & should be applied for the support & maintenance of the person of unsound mind, in the discretion of the ct., whatever sum should be shown to be necessary for maintenance being paid to the foreign guardian.—*Re THOMPSON, THOMPSON v. THOMPSON* (1900), 19 P. R. 304.—CAN.

g. ———.]—The administrator of an estate in distributing it paid into ct. \$500, the share of an infant, one of the next of kin of intestate. The infant now applied for an amount to be paid out necessary for her support & maintenance, she being in ill-health & unable to work:—*Held*: the application could be maintained if brought in proper way by petition duly verified, setting out amount in ct., in what way

Sect. 1.—Maintenance: Sub-sect. 2, H. (b) i., ii.

The will contained no expressed trust for maintenance. The Ct. of Session in Scotland appointed a *curator bonis* to the infant, who received the legacy, & invested it in the purchase of some New Zealand stock, in the sole name of the infant. It was the only property of the infant, & the income derived from it was not sufficient to provide for her maintenance & education. The Ct. of Session authorised the *curator bonis* to advance from time to time sums out of capital, not exceeding in all £100, for the purpose of supplementing the income of the infant, & enabling her to be placed at a suitable school. The *curator bonis*, as next friend, presented a petition, asking that the right to transfer £100 of the stock might vest in him, & that he might be at liberty to sell & transfer the same, & to apply the proceeds in or towards the maintenance or education of the infant, that the dividends which had accrued, & which might, during the minority of the infant, accrue on the stock, or on the residue thereof after the transfer, might be paid to him, he undertaking to apply them in or towards the maintenance or education of the infant; & that he might be appointed guardian:—*Held*: (1) the infant was a "trustee" of the stock, within the meaning of the Trustee Acts & an order was made vesting the right to transfer £100 of the stock in the next friend, who was appointed guardian to the infant, & liberty was given to him to sell & transfer the same, & to apply the proceeds in or towards the maintenance or education of the infant; (2) the dividends accrued & to accrue during the minority of the infant, should be paid to the guardian, he undertaking to apply them in or towards her maintenance or education.—*Re FINDLAY* (1886), 32 Ch. D. 221, 641; 55 L. J. Ch. 395.

Annotation:—As to (1) *Reid. Re Dehaynin*, [1910] 1 Ch. 223.

ii. Real Estate.

907. Power of court to order—Maintenance charged on income—Income insufficient to pay prior charges.]—Under a will an infant was entitled to maintenance out of the income of property which was devised to him, provided he attained twenty-one; & £100 a year was allowed by the master for that purpose: but the income of the property was scarcely sufficient to pay certain annuities & other prior charges thereon. Under those

she was next of kin, the administrator, father or mother or relatives should be notified, & circumstances of father & mother, if any.—*Re GREEN* (1908), 9 W. L. R. 630.—CAN.

h. —.]—*Re CARNAHAN* (1912), 6 D. L. R. 857; 23 O. W. R. 97; 4 O. W. N. 115.—CAN.

k. —.]—Maintenance out of the principal of minors fortune composed chiefly of accumulated interest, refused.—*Ex p. M'KEY* (1810), 1 Ball & B. 405.—IR.

PART X. SECT. 1, SUB-SECT. 2.—H. (b) ii.

909 i. Power of court to order.]—The ct. does not sanction the use of the corpus of an infant's estate for maintenance unless satisfied that such use will be more beneficial to the infant than preserving his property intact until he comes of age; there should be no encroachment on the principal except for unavoidable reasons falling little short of necessity.

909 ii. —.]—Maintenance in respect of an infant child allowed its mother out of an estate to which the

circumstances it was ordered that the trustees & exors. should be at liberty, out of any funds in their hands, to pay the £100 a year; & if the same should be insufficient, that what the guardians should pay for the infant's maintenance should form a charge upon his interest in the property.—*FENTIMAN v. FENTIMAN* (1842), 13 Sim. 171; 60 E. R. 66.

Annotations:—*Folld. Re Howarth* (1873), 8 Ch. App. 415. *Reid. Re Hambrough, Hambrough v. Hambrough* (1909), 79 L. J. Ch. 19.

908. — Income insufficient.]—A. devised all his real estate to trustees for a term of five hundred years, in trust, out of the rents, or by assignment, sale or mtge. of the term, to raise money to pay his debts, & for other purposes, & (*inter alia*), he authorised them to expend £200 a year in the education of two grandsons until certain events. The personal estate being insufficient to pay these annual sums:—*Held*: as there was no restriction as to the mode of raising the sums, the trustees were bound to make the term available for payment, & not only the annual income, but the corpus of the real estate was charged therewith.—*TORRE v. BROWNE* (1855), 5 H. L. Cas. 555; 24 L. J. Ch. 757; 26 L. T. O. S. 129; 10 E. R. 1017, H. L.

Annotations:—*Mentd. Booth v. Coulton* (1861), 2 Giff. 514; *Edwards v. Warden* (1876), 1 App. Cas. 281; *Wheatly v. Davies* (1876), 35 L. T. 306; *Re Hiscoc, Hiscoc v. Waite* (1902), 71 L. J. Ch. 347.

909. —.]—A widow, who was sole extrix. & testamentary guardian, with some beneficial interest in the income of the estate, misconducted herself, & in a suit for the administration of the estate, & to appoint another guardian in lieu of herself, had incurred costs for contempt, for non-payment of which she was now in custody. The ct. permitted a small sum out of the corpus to be raised for the purpose of purging the contempt, & for the interim maintenance of herself & children.—*DE COMBE v. DE COMBE* (1857), 30 L. T. O. S. 31; 3 Jur. N. S. 712.

910. — Past maintenance.]—Sum directed to be raised for past & future maintenance of an infant, & to be a charge upon his estate, both present & future.—*Re ALLEN* (1850), 8 Ch. App. 417, n.; 14 Jur. 324.

Annotations:—*Folld. Re Howarth* (1873), 8 Ch. App. 415. *Reid. Re Hambrough, Hambrough v. Hambrough* (1909), 79 L. J. Ch. 19.

911. Infant entitled in fee in possession.]—On an application by an infant for

infant was entitled.—*Re HANNA ESTATE*, [1921] 1 W. W. R. 1090.—CAN.

909 iii. —.]—The present income of a minor's property was insufficient to keep down the annual interest of the incumbrances; yet it appearing that the property was sufficient for the discharge of all the incumbrances, the ct. gave the minor maintenance out of it.—*Re CORKERS* (1846), 3 Jo. & Lat. 377.—IR.

910 i. — Past maintenance.]—A step-father's claim to be paid for past maintenance of a minor out of her capital rejected on the ground of his misconduct.—*FIELDER v. O'HARA* (1869), 16 Gr. 610.—CAN.

910 ii. —.]—It is in the discretion of the ct. whether to allow past maintenance out of the corpus of an infant's estate not intended by a testator to be so applied.—*EDWARDS v. D'URGEN* (1872), 19 Gr. 101.—CAN.

910 iii. —.]—The ct. will sanction the use of the corpus of an infant's estate for his past as well as future maintenance, where the doing so is shown to be for his benefit. The ct. will also do so where it is satisfied that the question of maintenance

arises incidentally in a suit, & that it was properly instituted in order to the administration of an estate, & not as an indirect mode of doing what ought to be done under 12 Vict. & the orders of this ct., made to carry out the same, as the question of maintenance past as well as future can properly be dealt with, inasmuch as a great deal of the information required by the statute & orders referred to can be obtained in taking the accounts in such suit. But where such a suit was instituted by a party asking for maintenance out of the corpus of the estate, the ct., as a check upon such suits, refused to make any direction as to maintenance.—*GOODFELLOW v. RANNIE* (1873), 20 Gr. 425.—CAN.

910 iv. —.]—Where an allowance for past maintenance of infants is sought out of the infants' estate, it is a rule that the principal is not to be encroached upon, unless for unavoidable reasons falling little short of necessity; & the ct. will not sanction a higher allowance for past expenditure than would have been awarded for maintenance if a prior application had been made therefor.—*CRANE v. CRAIG* (1886), 11 P. R. 236.—CAN.

maintenance, the ct. has jurisdiction, without suit, to charge the expenses of his past maintenance & the costs of the application on the corpus of a freehold estate to which he is entitled in fee.—*Re HOWARTH* (1873), 8 Ch. App. 415; 42 L. J. Ch. 316; 28 L. T. 54; 21 W. R. 449, L. JJ.

Annotations:—*Distd. Re Hamilton* (1885), 31 Ch. D. 291. *Distd. & Dtd. Cadman v. Cadman* (1886), 33 Ch. D. 397. *Expld. Re Hambrough's Estate, Hambrough v. Hambrough*, [1909] 2 Ch. 620. *Distd. Re Badger, Badger v. Badger*, [1913] 1 Ch. 385. *Reid. Martin v. Gale* (1876), 4 Ch. D. 428. *Mentd. Re Harrison & Bottomley*, [1899] 1 Ch. 465.

912. —.] — *CADMAN v. CADMAN*, No.

914, *post*.

913. — *Infants' estate tail.*] — Two infants were entitled to successive estates tail in remainder after the life estate of their father, which life estate had been sold under his bkpcy. There being no income applicable to the maintenance of the infants, an application was made on their behalf that a yearly sum might be allowed for that purpose, & borrowed on the security of a mtge. or charge on the real estate to which they were entitled as above, the amount for which the charge was to be given including the premiums on the insurance requisite for the protection of the lender:—*Held*: an order sanctioning the scheme could not be made, & the principle of *Re Howarth*, No. 911, *ante*, would not support it, for although judgment might be recovered against the infants for necessities supplied to them, it could not be recovered for premiums on the policies, & moreover, judgment could not be recovered against one infant for necessities supplied to the other & a judgment would not charge the estates of the infants, inasmuch as those estates were so circumstanced that they could not be delivered in execution.—*Re HAMILTON* (1885), 31 Ch. D. 291; 55 L. J. Ch. 282; 53 L. T. 840; 34 W. R. 203, C. A.

Annotations:—*Folld. Re Hambrough's Estate, Hambrough v. Hambrough*, [1909] 2 Ch. 620; *Re Badger, Badger v. Badger*, [1913] 1 Ch. 385. *Reid. Cadman v. Cadman* (1886), 33 Ch. D. 397; *Re Teissier's Trusts, De Teissier v. De Teissier* (1892), 37 Sol. Jo. 47. *Mentd. Re Jones & Judgments Act, 1864* (1895), 39 Sol. Jo. 671; *Re Harrison & Bottomley*, [1899] 1 Ch. 465.

914. —.] — The ct. has no jurisdiction to charge an infant's estate tail in remainder for the purpose of raising money to provide for his maintenance whether past or future; nor *semble*: his fee simple estate in possession, except for his own past maintenance.—*CADMAN v. CADMAN* (1886), 33 Ch. D. 397; 55 L. J. Ch. 833; 55 L. T. 569; 35 W. R. 1, C. A.

Annotations:—*Folld. Re Hambrough's Estate, Hambrough v. Hambrough*, [1909] 2 Ch. 620; *Re Badger, Badger v. Badger*, [1913] 1 Ch. 385. *Mentd. Re Harrison & Bottomley*, [1899] 1 Ch. 465.

PART X. SECT. 1, SUB-SECT. 2.— H. (b) iii.

916 i. *Whether court will direct.*] — Where testator bequeathed part of his residuary estate to two infant legatees, directing the interest to be applied to their support & education until twenty-one years of age, or such previous time as the trustees might see fit to pay over the same to the legatees; & that in case of the death of either, the whole should be paid to the survivor; the will containing no gift over in case of the death of both:—*Held*: the trustees & exors. had a discretion to apply part of the principal to the support & education of the legatees.—*Re McDougall* (1868), 14 Gr. 609.—CAN.

916 ii. —.] — Testator by his will devised the proceeds of certain real estate to his daughter-in-law, E. D., widow of his son, W. D., deceased, to her use & support of his son W. D.'s

children during her natural life or so long as she remained his widow; & in the event of the death of his said daughter-in-law, then to his grandchildren so long as they remained minors. He then devised the land to his grandson P. D., in fee, but subject to the above devise. After testator's death E. D. married again, & was still living:—*Held*: the intent of testator was that in any event the minors were to have the support out of the land during minority, & therefore were so entitled during such minority, upon the determination of the mother's estate by marriage as well as by death.—*HENRY v. GILLECE* (1880), 31 C. P. 243.—CAN.

916 iii. —.] — Maintenance will not be allowed out of funds which, by the direction of the will, are to accumulate & be laid out in the purchase of lands to be entailed on the minor in tail with remainder over.—*SHAW v. M'MAHON* (1845), 8 I. Eq. R. 584.—IR.

915. —.] — The ct. has no jurisdiction to authorise a mtge. of the interest of an infant tenant in tail in remainder for the purpose of raising money for his maintenance. Where, therefore, in an action, to which none of the remaindermen were parties, the ct. by a first order directed trustees to raise money for the maintenance of an infant tenant in tail in remainder by means of a mtge. of his interest in the settled estate, & by a second order the ct. declared that the infant was a trustee of his interest directed to be mortgaged within Trustee Act, 1893 (c. 53), s. 30, & directed certain persons to convey that interest by way of mtge. to secure the money, & in pursuance of the second order a disentailing deed by way of mtge. was executed:—*Held*: (1) the orders were made *per incuriam* & without jurisdiction, & were therefore of no effect; (2) the first order, being made without jurisdiction, was not an order directing a mtge. within the meaning of sect. 30 & the second order, being founded on the first, was equally made without jurisdiction, & the provisions of Trustee Act, 1893, could not support it; (3) notwithstanding the orders & the mtge., the land remained limited to the original uses of the settlement.—*Re HAMBROUGH'S ESTATE, HAMBROUGH v. HAMBROUGH*, [1909] 2 Ch. 620; 79 L. J. Ch. 19; 101 L. T. 521; 53 Sol. Jo. 770.

Annotation:—*Generally, Mentd. Churchward v. Churchward* (1910), 28 T. L. R. 401.

iii. *Reversionary and Contingent Interests.*

916. *Whether court will direct.*] — Settlement wherein the manor of D. is settled to the use of grandfather for life, remainder to his son the husband for life, remainder to trustees for a thousand years, for raising £20,000 for a daughter, if but one, payable at twenty-one or marriage, & in the meantime £300 *per annum* for her maintenance, & to be raised by trustees either by rents & profits, or by sale or mtge., & to be paid quarterly; the first payment to be made at such of the usual feasts as shall next happen after the father's death. Father dies, leaving one daughter & the grandfather living. Bill prayed a mtge. of the reversion for the infant's maintenance, but the ct. strongly inclined against it.—*PIERPOINT v. CHENEY* (LORD) (1718), 1 P. Wms. 488; Prec. Ch. 503; 2 Eq. Cas. Abr. 642; 24 E. R. 485, L. O.

Annotation:—*Expld. Clinton v. Seymour* (1799), 4 Ves. 440.

917. —.] — The ct. leans against the construction for raising portions or maintenance out of a reversionary term; & upon that principle, when the term fell into possession, & the portion was raised, refused to charge the difference between

916 iv. —.] — Testator gave all his property to his exor. in trust for testator's family, to be used by him for the support & education of testator's children, & for the maintenance of his wife, until his youngest child, J., attained twenty-one years. When J. had attained twenty-one his property was to be divided amongst his family & wife. Order made empowering the trustee to apply the share to which each of the children named in the will was contingently entitled, or such part of the share of each such child as might be necessary for that purpose, for or towards his or her maintenance & education. The ct., however, declined to treat the fund for this purpose as a common fund, as to do so would be to authorise the capital of the share of one child to be applied to the maintenance & education of another or others.—*DEMPEY v. COLLINS* (1899), 18 N. Z. L. R. 552.—N.Z.

Sect. 1.—Maintenance:—Sub-sect. 2, H. (b) iii. (c), & I.]

the sum annually allowed by the infant's grandfather for her maintenance & the sum charged.—*CLINTON v. SEYMOUR* (1799), 4 Ves. 440; 31 E. R. 226.

Annotation:—Consd. Codrington v. Foley (1801), 6 Ves. 364.

918. ——— In case of necessity.]—A reversionary term raised for securing maintenance & portions for daughters, shall, in cases of necessity, be mortgaged to pay either, & when fallen into possession shall pay all the arrears of maintenance incurred before it came into possession.—*RAVENHILL v. DANSEY* (1723), 2 P. Wms. 179; 2 Eq. Cas. Abr. 645; 24 E. R. 690, L. C.

919. ——— Although father living.]—The ct. will, under peculiar circumstances, sanction an allowance to infants out of the capital of their reversionary property, although the father be living.—*KILMINSTER v. NOEL* (1834), 4 L. J. Ch. 52.

920. ———.]—Upon petition the ct. directed that a portion of an addition to a policy on an existing life, to which an infant was entitled upon attaining twenty-one or marriage, should be sold, & the proceeds applied for her maintenance, the father of the infant being wholly unable to support her, & being about to emigrate, & the trustees of the settlement consenting to the proposed sale & application of the money raised.—*Re HAYS, Ex p. HAYS* (1849), 3 De G. & Sm. 485; 18 L. J. Ch. 441; 14 L. T. O. S. 4; 13 Jur. 762; 64 E. R. 573.

Annotation:—Reid. Re Lane (1853), 17 Jur. 219.

921. ——— When infant may become disentitled to corpus—Security by means of insurance.]—*RING v. JARMAN* (1851), cited in L. R. 14 Eq. at p. 252; 20 W. R. at p. 858.

Annotations:—Consd. Re Hamilton (1885), 31 Ch. D. 291.

Reid. De Witte v. Palin (1872), L. R. 14 Eq. 251.

922. ———.]—An only child being contingently entitled, under the settlement of her parents & a will, to the corpus of two funds, in which her mother had a life interest, & as to the settled fund without power of anticipation, & her father contributing nothing, a petition was presented on her behalf for the application of one-tenth of the corpus for her advancement, there being no clauses as to maintenance. A policy had been taken out to meet the contingency. Order made, with a declaration that it was so made, notwithstanding the clause against anticipation.—*Re ROBINSON* (1868), 19 L. T. 81; 16 W. R. 1106.

923. ———.]—The ct. has jurisdiction to charge reversionary property of infants with money required for their maintenance, even where some of the infants for whose benefit the money is raised may not ultimately become entitled in possession to the property charged. A security for this purpose approved, with a provision for restoring the money by means of an insurance against the contingency.—*DE WITTE v. PALIN*

919 i. ——— In case of necessity—Although father living.]—Where an infant's sole property was a sum of £2,500 payable on the death of his father, the ct. made an order charging a sum required for his present maintenance & advancement with interest at 5 per cent. on the principal sum, & providing that the sum to be advanced & interest thereon should be repaid only when the principal sum became payable.—*MORGAN v. MORGAN*, [1917] 1 L. R. 100.

921 i. ——— When infant may become disentitled to corpus—Security by means

of insurance.]—An order was made for payment, out of a fund in ct. to which an infant was contingently entitled, of an allowance for his maintenance, upon security being given by way of life insurance for the benefit of those who would be entitled upon the death of the infant under full age.—*Re CAMPBELL* (1899), 18 P. R. 400.—CAN.

PART X. SECT. 1, SUB-SECT. 2.—H. (c).

927 i. Fund most beneficial to infant.]—Testator bequeathed \$4,000 to his grandson, payable on his attaining

(1872), L. R. 14 Eq. 251; 26 L. T. 825; 20 W. R. 858.

Annotation:—Reid. Re Hamilton (1885), 31 Ch. D. 291.

924. ———.]—Where an infant was contingently entitled to property on her attaining the age of twenty-one years or being married, the ct. sanctioned a scheme for the payment of past & future premiums on a policy payable in case the infant died before twenty-one or marriage, & for the payment of past & future maintenance of the infant, such payments to be secured by a mtge. on the policy, & a charge upon the infant's contingent interest, the charge not to affect the interest of any persons other than the infant.—*Re BRUCE* (1882), 30 W. R. 922.

925. ———.]—The ct. refused to declare that sums advanced by a father for the benefit of his infant son were a charge on property to which the son would become entitled only in the event of his attaining twenty-one. *Semble*: the ct. has no jurisdiction to make such a charge, & the only proper form of order in such a case is that in *Re Arbuckle* (1866), 14 L. T. 538.—*Re TANNER* (1884), 53 L. J. Ch. 1108; 51 L. T. 507.

926. ——— Infant's interest in remainder expectant on death.]—An infant ward of ct. had no property except a reversionary interest in real estate expectant on the death of a lady aged eighty-five. The infant lived with her mother, who had no means. An allowance of £80 a year had been paid to them for maintenance under an order of the ct., but the fund out of which this had been paid was now exhausted. This was a summons by the infant by her next friend asking for authority to procure annual loans for the purpose of supplying her with necessaries pending the falling in of her reversionary interest, & that each such advance & the interest thereon might be declared to be a debt incurred for & on behalf of the infant for necessaries, & to be payable out of her estate; & that the infant might be bound on attaining her majority to ratify & confirm such contracts & to do everything necessary to give a valid security upon her reversionary interest in case the same had not then fallen into possession:—*Held*: (1) the ct. was bound by the decision in *Cadman v. Cadman*, No. 914, *ante*; (2) Land Charges Act, 1900 (c. 26), had not altered the law in this respect, & in the absence of any property of the infant which could be reached, the ct. could not make such an order.—*Re BADGER, BADGER v. BADGER*, [1913] 1 Ch. 385; 82 L. J. Ch. 264; 108 L. T. 441; 57 Sol. Jo. 339, C. A.

(c) Where More than One Fund Available.

See, now, Trustee Act, 1925 (c. 19), s. 31 (1).

Two funds given in will.]—*See EXECUTORS*, Vol. XXIII., pp. 455–457, Nos. 5294–5305.

927. Fund most beneficial to infant.]—Where there are several funds provided by different persons for the maintenance of infants, the interest of the infants must alone determine which of the funds is first applicable.—*FOLJAMBE v.*

twenty-one, & in case of his death before that period the amount was to revert to the residuary estate, & it had been decided that in the events that had happened the grandson was absolutely entitled to one-half of the residuary estate, the income of which was amply sufficient for his maintenance:—*Held*: although testator had been *in loco parentis* to the infant, the infant was not entitled to claim interest on the legacy for his maintenance; but being entitled to one-half of the residue as next of kin & there being a *quasi* intestacy as to the interest on the

WILLOUGHBY (1824), 2 Sim. & St. 165 ; 57 E. R. 308.

Annotations.—*Consd.* Bruin v. Knott (1842), 12 Sim. 436. *Apld.* Lygon v. Coventry (1845), 14 Sim. 41.

928. —.]—A female infant was entitled, on attaining twenty-one or marrying under that age, to have a portion raised out of estates of which her brother was tenant in tail, & to be maintained out of the rents in the meantime ; & she was also entitled, on the happening of the same events, to a sum of stock, & to be maintained out of the dividends in the meantime ; subject to which the dividends were to be accumulated & added to the capital :—*Held* : she must be maintained out of the rents, & not out of the dividends, that arrangement being most beneficial to her.—LYGON v. COVENTRY (LORD) (1845), 14 Sim. 41 ; 60 E. R. 272.

929. —.]—Where an infant was entitled to maintenance out of two distinct funds, which were settled upon her about the same time by the same person, the one by will & the other by settlement :—*Held* : the income under the will was primarily chargeable with the maintenance, that being most for the infant's benefit, & the circumstance that the settlement contained a direction for the application of the whole income for maintenance, without any provision for the accumulation of surplus income, was not a sufficient indication of a contrary intention on the part of the settlor.—LUCAS v. KING (1863), 8 L. T. 623 ; 11 W. R. 818.

Annotations.—*Apld.* *Re* Wells, Wells v. Wells (1889), 43 Ch. D. 281. *Expld. & Distd.* *Re* Wakley, Vachell v. Wakley (1920), 123 L. T. 150.

930. —.]—MARTIN v. MARTIN, No. 1024, *post*.

931. —.]—*Re* WELLS, WELLS v. WELLS, No. 836, *ante*.

932. — Vested & contingent interests—Maintenance wholly out of contingent interest.]—Where a child had been for several years maintained by its mother, & afterwards died a minor, the mother was held entitled to be reimbursed such moneys only as the scale of maintenance which the child had actually received, required, although the extent of the child's fortune might have justified a more liberal allowance.

Where a child had a vested interest in certain property, & a contingent interest in other property, which lapsed at his death under twenty-one, the allowance for the past maintenance of the child was directed to be paid exclusively out of the fund in which the child had only a contingent interest, such balance not exceeding the amount which that fund alone would have justified.—BRUIN v. KNOTT (1845), 1 Ph. 572 ; 14 L. J. Ch. 440 ; 6 L. T. O. S. 233 ; 9 Jur. 979 ; 41 E. R. 750, L. C. ; *subsequent proceedings* (1848), 12 L. T. O. S. 3. *Annotation*.—*Consd.* Brown v. Smith (1878), 10 Ch. D. 377.

933. —.]—A legacy of £5,000 was given to trustees to be expended by them for the benefit & advancement of an infant as they in their absolute discretion should think fit. There was also a gift by the same will, of the income of a share of residue to the same infant for life on his attaining twenty-one, with a power to the trustees to apply the income during his minority for his maintenance & education. A suit for administration was instituted by the trustees immediately after testator's death, & orders were from time to time made in it for the advancement, & also the maintenance & education of the infant out of the

£5,000 legacy. On his attaining twenty-one :—*Held* : (1) he was absolutely entitled to the unapplied residue of the legacy ; (2) inasmuch as maintenance would have been ordered out of the income of the contingent share of petitioner, he was entitled to be recouped out of the past income of the residuary estate what had been expended out of the £5,000 legacy for his maintenance & education.—FURLEY v. HYDER (1872), 41 L. J. Ch. 583 ; 26 L. T. 864.

934. One fund supplementary to other—Resort had to primary fund first.]—A direction by will to apply so much interest as might be necessary towards the maintenance & education of testator's grandchildren upon the decease of their respective mothers, the residue to accumulate for them all, was confined to so much as should be actually necessary, regard being had to their situation at the death of their mother : their father having by his will left them a considerable property, with a provision for maintenance.—RAWLINS v. GOLDFRAP (1800), 5 Ves. 440 ; 31 E. R. 671.

935. —.]—Testator directed his trustees to hold a specified trust fund in trust for his son, to be absolutely vested in him on his death, but not to be payable or transferable to him until he attained the age of twenty-one years, & declared that his trustees should stand possessed of the shares in a co. which constituted the trust fund & postpone the sale thereof until his son attained twenty-one, & upon that event happening should transfer such shares to him ; & testator directed his trustees to accumulate during his son's minority any income of the shares, to be applied by them in or towards his maintenance & to add any accumulations to the capital. He also bequeathed a share of his residuary estate to his trustees for his son & declared that it should be lawful for them to apply the income for his maintenance, & after his death in trust for his children & if none for testator's other children in equal shares.

Testator died in 1905, the son died in 1918, & his exors. claimed that his maintenance during his minority should have fallen on his share of the residuary estate in exoneration of the specified trust fund ; & consequently they were entitled to the accumulations :—*Held* : the specified trust fund was the primary fund out of which the maintenance was to be supplied ; & the trustees could not resort to the income of the residuary estate as to which they had only a discretion, until they had exhausted the specified trust fund to which the direction applied.—*Re* WAKLEY, WAKLEY v. VACHELL, [1920] 2 Ch. 205 ; 89 L. J. Ch. 321 ; 36 T. L. R. 325 ; 64 Sol. Jo. 357 ; *sub nom.* *Re* WAKLEY, VACHELL v. WAKLEY, 123 L. T. 150, C. A.

Annotation.—*Mentd.* *Re* Marjoribanks, Marjoribanks v. Dansey, [1923] 2 Ch. 307.

I. Income of Stock.

See Infants Property Act, 1830 (c. 65), s. 32.

936. To whom payable—Father—In default of guardian.]—The Ct. of Ch. has jurisdiction under Infants' Property Act, 1830 (c. 65), s. 32, upon the petition of the father of the infant, where there is no guardian, to direct that the dividends on stock belonging to the infant shall be paid to the father for the maintenance of the infant.—*Re* NAISH (1840), 9 L. J. Ch. 252.

937. —.]—As natural guardian.]—Stock to which an infant was entitled under a Spanish

legacy, one-half of it should be paid into ct. to the credit of the infant ; the legacy itself to be paid into ct. upon the trusts of the will.—REES v. FRASER

(1879), 26 Gr. 233.—CAN.

PART X. SECT. 1, SUB-SECT. 2.—1.

937 1. To whom payable—Father—

As natural guardian.]—Where £90 stock was invested in the name of P., an infant, & the bank declined to pay the dividends for want of a sufficient

Sect. 1.—Maintenance: Sub-sect. 2, I. & J. (a)

will with an executory devise over on her death, without issue, was transferred by her father, one of the exors., into her name. He afterwards obtained an order of a Spanish ct. directing him to take proceedings to obtain the dividends, & apply them for her maintenance. An action having been brought for the administration of the trusts of the stock, the ct. made an order under Infants' Property Act, 1830 (c. 65), s. 32, upon the petition of the father & the infant for payment of the dividends to the father.—**RAMON & DONEVECH v. RAMON & MARUGAN** (1878), 39 L. T. 532; *sub nom.* **RAMON v. RAMON**, *Re* **RAMON**, 27 W. R. 260.

938. — **Trustee of will under which property derived.**—A sum of consols was standing in the sole name of an infant, & it was desired to obtain payment of the dividends to be accumulated for her benefit, as they were not required for her maintenance. The Bank of England refused to act upon a suggested order requiring them to accumulate the dividends. Order made for payment of the dividends to the trustees of a will under which the property was derived, to be applied for the benefit of the infant.—*Re* **KEMP** (1888), 59 L. T. 209; 36 W. R. 729.

939. **Guardian must be appointed—On separate petition.**—*Semble*: Infants' Property Act, 1830 (c. 65), s. 32, empowering the ct., on the petition of the guardian of an infant, to direct payment of maintenance out of dividends of stock standing in infant's name, does not authorise the appointment of a guardian, & a direction for payment of dividends upon the same petition, although the guardian appointed is one of petitioners, but two petitions are proper.—*Re* **PONGERARD** (1847), 1 De G. & Sm. 426; 11 Jur. 744; 63 E. R. 1133.

J. Amount of Maintenance.**(a) In General.**

See, now, Trustee Act, 1925 (c. 19), s. 31 (1).

Payment out of principal.—*See* Sub-sect. 2, H. (b), *ante*.

940. **Confined to annual income.**—By marriage settlement, lands were limited to husband & wife for their lives, remainder to the heirs male of their bodies; & if there should be no issue male of their bodies, & one or more daughters, then to trustees for five hundred years from the decease of the survivor, in trust, by sale or mtge., to raise £1,000 for daughters' portions; but there was no time appointed for the payment of them. The father died leaving a daughter only. The portion vesting in the daughter in the lifetime of the mother, it was decreed to be raised by a sale, with reasonable maintenance in the mean time, though no maintenance was provided by the settlement.

No time being appointed for the payment of

the portion, nor any maintenance in the mean time, she [the daughter] is entitled to a reasonable maintenance, not exceeding the interest of the portion, from the death of the father; or at leastwise from such time as the portion might have been raised by a sale (**TREVOX, M.R.**).—**STAINFORTH & CLERKSON v. STAINFORTH** (1703), 2 Vern. 460; 23 E. R. 895; *sub nom.* **STAINFORTH v. STAINFORTH**, 1 Eq. Cas. Abr. 337.

Annotations:—**Consd.** **Corbet v. Maydew** (1710), 3 Rep. Ch. 190. **Expld.** **Adams v. Danvers** (1755), 9 Mod. Rep. 486. **Reid.** **Brome v. Berkley** (1728), 2 P. Wms. 484; **Hall v. Carter** (1742), 2 Atk. 354.

941. — **Where a guardian by his will remits to his ward whatever is due to him for his maintenance, it will include all demands for his education.**

(2) Guardians ought to limit the expenses of the maintenance, etc., of infants, within the bounds of the annual income of the infants.—**ANSTIS v. GANDY** (1735), 4 Bro. Parl. Cas. 313; 2 E. R. 212, H. L.

942. **Person charged with maintenance may agree to take less.**—**BERRISTE v. BERRISTE** (1690), Nels. 158; 21 E. R. 815.

943. **Court may review allowance.**—**PEARSE v. BROOKS** (1844), 3 L. T. O. S. 374.

Annotation:—**Mentd.** **Pearse v. Dobinson** (1867), 3 Ch. App. 1.

944. — **The ct. exercises a control in respect of any allowance ordered to be paid to a testamentary guardian, & on the marriage of a female testamentary guardian to whom an allowance for maintenance has been ordered to be made, inquiries into the altered state of circumstances.**—**JONES v. POWELL** (1846), 9 Beav. 345; 50 E. R. 376.

945. **Power to resort to past accumulations of income.**—**EDWARDS v. GROVE**, No. 832, *ante*.

(b) Factors determining Amount.

See, now, Trustee Act, 1925 (c. 19), s. 31 (1).

Increase of maintenance.—*See* Sub-sect. 2, J. (c), *post*.

946. **Circumstances of each case—Benefit of infant.**—(1) Where the mother is the sole guardian of the heir to large estates the sum allowed the mother for the upkeep of establishment & education of the heir ought to be such sum as prudent guardians would allow to her "as mother." To decide what is a reasonable sum all the circumstances of each case must be considered; the governing consideration being what is for the interest of the heir.

(2) Whether the guardian of a minor heir is a relative or not, strict yearly accounts of the administration of the minor's property ought to be kept.—**BARNES v. ROSS**, [1896] A. C. 625, H. L.

947. **Station in life—Amount of fortune—Income of £7,250.**—*Ex p.* **PETRE (LORD)** (1802), 7 Ves. 403; 32 E. R. 163, L. C.

948. — **Income of £1,500.**—Order made on petition without suit, for the allowance

receipt, upon petition of the infant's father P. stating that the £90 was his own proper money, & had been invested by his wife, since deceased, under misapprehension, in his absence, that he was in great distress & needed the dividends for the minor's support, & it further appearing that the minor was not a ward of ct., that no guardian had been appointed to him & that there was no cause depending in which the desired order could be made, the ct. ordered that the bank should pay the dividends due & to grow due "to petitioner as the natural guardian of the minor" for the minor's maintenance.—*Re* **MURPHY** (1839), 2 I. Eq. R. 24.—**IR.**

PART X. SECT. 1, SUB-SECT. 2.—J. (a).

940 i. **Confined to annual income.**—The entire cost of maintenance shall not exceed the sum total of interest of the capital of infant's fortune.—**CAR-MICHAEL v. WILSON** (1830), 3 Mol. 79.—**IR.**

1. **Reference to master.**—In a suit for maintenance out of the property of infants, the master is usually directed to inquire & state what would be a

proper sum to allow, but no authority is given for the payment until the report is brought before the ct. for its approval.—**MURPHY v. LAMPHIER** (1866), 12 Gr. 241.—**CAN.**

PART X. SECT. 1, SUB-SECT. 2.—J. (b).

m. Age.—Where, on a reference as to the amount to be allowed for the maintenance of children, it appeared that the amount recommended for past maintenance was extravagant, considering the ages of the children, & some of the charges

of \$450 a year for the maintenance of an infant, the income of whose property exceeded \$1,500 a year.—*Re CHRISTIE* (1840), 9 Sim. 643; 10 L. J. Ch. 79; 59 E. R. 506.

949. ——— Income of £10,000.]—*KAY v. JOHNSTON*, No. 2094, *post*.

950. ——— Income of £2,600.]—*Re CLARKE*, No. 1286, *post*.

951. ——— Upkeep of mansion house.]—Where testator directs the payment of an annual sum of money, just sufficient for the mere maintenance of a minor entitled to the possession of the settled estates, to be applied for such maintenance, & manifests a clear intention that such minor shall reside at the principal mansion on the estates, although no further allowance for the minor's maintenance will be ordered by the ct., yet such a sum will be directed to be paid out of the rents of the settled estates as will suffice to defray the expenses of keeping up the mansion as a residence for the minor.—*GRIGGS v. GIBSON, MAYNARD v. GIBSON* (No. 2), *Ex p. MAYNARD* (1866), 14 W. R. 538.

952. ———.]—Circumstances under which allowances will be made for maintenance, repairing, & furnishing considered.—*GRIGGS v. GIBSON* (1873), 21 W. R. 818, L. JJ.

Annotation:—*Appld. Re Walker, Walker v. Duncombe* (1901), 84 L. T. 193.

953. ———.]—*Re WALKER, WALKER v. DUNCOMBE*, No. 827, *ante*.

954. ——— Liability to subscribe to charities.]—On the petition of an infant, an annual sum was ordered to be paid, through the guardian, to the rector of a parish in which the infant had a considerable estate, to be applied by the rector in charity, & for the purposes of education, for the benefit of the poor of the parish.—*LANGTON v. BRACKENBURY* (1846), 2 Coll. 446; 15 L. J. Ch. 256; 10 Jur. 302; 63 E. R. 809.

955. ———.]—*Re WALKER, WALKER v. DUNCOMBE*, No. 827, *ante*.

956. ——— Expectations.]—Order made for a liberal allowance for the maintenance & education of a female infant, whose father was living, with a view to her being brought up in a manner suitable to her fortune & expectations.—*Re WILLIAMS, Ex p. WILLIAMS* (1846), 2 Coll. 740; 63 E. R. 941.

957. Position of parents—Father's position—Financial distress.]—*ROACH v. GARVAN*, No. 1494, *post*.

958. ——— Mother's position.]—*HEYSHAM v. HEYSHAM* (1785), 1 Cox, Eq. Cas. 179; 29 E. R. 1117.

Annotation:—*Consd. Re Stables* (1852), 21 L. J. Ch. 620.

959. ——— Parents may be supported out of allowance.]—An increased allowance for maintenance made out of the property of infants, for the purpose of supporting their parents who were in great indigence.—*ALLEN v. COSTER* (1839), 1 Beav. 202; 9 L. J. Ch. 131; 48 E. R. 917.

Annotation:—*Consd. Re Stables* (1852), 21 L. J. Ch. 620.

960. ——— But no direct benefit given.]—The ct. will not give a direct benefit out of an infant's income to his father.

A scheme by which an infant, whose father was living, was to be articed to a solr., & to live with an uncle residing in the same place, was approved of by the ct.; & the uncle was appointed to act in the nature of a guardian to the infant, & have an allowance out of his income. An applica-

tion that an allowance might be made to the father, who lived at a distance, & was in very narrow circumstances, was refused.—*Re STABLES* (1852), 21 L. J. Ch. 620; *sub nom. Re* ——— (AN INFANT), 19 L. T. O. S. 311.

961. Obligation to support family—Infant head of family.]—The ct. in the case of an elder brother will direct the master to make a larger provision for him, that he may be able, as the head of the family, to maintain the younger.—*LANOY v. ATHOL (DUKE & DUCHESS)* (1742), 2 Atk. 444; 9 Mod. Rep. 398; 26 E. R. 668, L. C.

Annotations:—*Mentd. Sykes v. Meynal* (1763), 1 Dick. 368; *Lechmere v. Charlton* (1808), 15 Ves. 193; *Graves v. Hicks* (1833), 6 Sim. 391; *Barnes v. Racster* (1842), 1 Y. & C. Ch. Cas. 401; *Bugden v. Bignold* (1843), 2 Y. & C. Ch. Cas. 377; *Hickling v. Boyer* (1851), 3 Mac. & G. 635; *Loosemore v. Knapman* (1853), Kay, 123; *Gibson v. Seagrim* (1855), 20 Beav. 614; *Flint v. Howard*, [1893] 2 Ch. 54.

962. ———.]—A jointress is not obliged to bring her jointure deed into ct., unless the party requiring will confirm it. Upon an application for maintenance for an eldest son, the ct. will make him a liberal allowance, to enable him to maintain his brothers & sisters, considering him *in loco parentis*.—*PETRE v. PETRE* (1747), 3 Atk. 511; 26 E. R. 1094, L. C.

963. ———.]—It might be conducive, for instance to the best interests of the parties, that the father should be enabled to educate all his children in a liberal way; a principle on which the ct. acts in the case of an infant eldest son by giving for his maintenance a much greater sum than he can possibly require in order that his brother & sisters may be so brought up & educated & placed in such situations as to do him credit in the world (LORD ELDON, C.).—*TWEDDELL v. TWEDDELL* (1822), Turn. & R. 1; 37 E. R. 992, L. C.

Annotations:—*Mentd. Bellamy v. Sabine* (1847), 2 Ph. 425; *Baker v. Bradley* (1855), 7 De G. M. & G. 597; *Hartopp v. Hartopp* (1856), 21 Beav. 259; *Arnold v. Bainbrigg* (1860), 2 De G. F. & J. 92; *Talbot v. Stanforth* (1861), 1 John. & H. 484.

964. ———.]—*WELLESLEY v. BEAUFORT (DUKE)*, No. 2098, *post*.

965. ———.]—This case arises from the circumstance of an allowance without account being made by the ct. to a person in a fiduciary position. . . . A very common instance is the case of a man of large fortune leaving an infant eldest son who takes the great bulk of his property, but leaving an insufficient provision for his widow & younger children. There, in allowing maintenance for the eldest son the ct. always had & always has regard to the position of the family, & makes a larger allowance than is absolutely necessary for the eldest son for the purpose of his maintenance & keeping up an establishment suitable for him, on the understanding that the widow & the younger children will live in the house & be maintained out of the allowance so made (JESSEL, M.R.).—*Re WELD (A PERSON OF UNSOUND MIND)* (1882), 20 Ch. D. 451; 51 L. J. Ch. 913; 46 L. T. 397; 30 W. R. 385.

Annotation:—*Mentd. Re Brown, Llewellyn v. Brown* (1900), 82 L. T. 83.

966. Illegitimate brother.]—Liberal allowance of maintenance made for an infant in regard to an illegitimate brother unprovided for.—*BRADSHAW v. BRADSHAW* (1820), 1 Jac. & W. 647; 37 E. R. 514, L. C.

967. ——— Other children unprovided for.]—*BURNET v. BURNET*, No. 969, *post*.

were otherwise objectionable, & the sum recommended for future maintenance appeared to be in excess of their

income & made no distinction in respect to their ages, one of them being but four years old, the case was sent

back to the barrister for further consideration.—*Ex p. GILBERT* (1868), N. B. Dig. 645.—CAN.

**Sect. 1.—Maintenance: Sub-sect. 2, J. (c), K.
L. (a).]**

(c) Increase of Maintenance.

968. Power of court to make prospective allowance—For increasing expenses.]—Upon the petition of an infant pltf. for an order for present maintenance & education, & to provide for a future increased allowance on his entering at a specified time & continuing at the university, the ct. ordered a present allowance, & made a prospective provision for an increased allowance from the future date until twenty-one, or the further order of the ct., to be applied by the testamentary guardian of the infant.—*NUNN v. HARVEY* (1848), 2 De G. & Sm. 301; 64 E. R. 135.

969. Increase of allowance—Younger children unprovided for.]—Application for an increase of maintenance, regard being had to two children unprovided denied, & reference to see whether it was proper to make any, & what increase to the allowance, for the maintenance of the infants.—*BURNET v. BURNET* (1782), 1 Bro. C. C. 179; 2 Dick. 602; 28 E. R. 1067.

970. — Beyond limit of will—Children entitled to fund absolutely.]—Increase of maintenance, beyond that prescribed by the will, ordered under circumstances: the infants being entitled to the fund absolutely among them, viz. a daughter to a portion at twenty-one: & the sons to the residue with survivorship.—*AYNSWORTH v. PRATCHETT* (1807), 13 Ves. 321; 33 E. R. 314.

971. — — —.]—*OZANNE v. KENNEDY*, [1869] W. N. 51.

972. — To compensate for deduction of income tax.]—Where a certain sum was allowed to a father for the maintenance of his children, the ct., on the father's petition to be allowed an additional sum on account of the deduction of the income tax, refused to make an order to that effect, intimating that the petition ought to be in the nature of an application for increased maintenance, & supported in the same way.—*DUFFIELD v. ELWES* (1842), 6 Jur. 1027.

973. — Same sum allowed to other children.]—*BENNET v. BIDDLES* (1843), 1 L. T. O. S. 251.

K. Past Maintenance.

974. Whether allowance made to parents.]—*HUGHES v. HUGHES*, No. 851, *ante*.

975. —.]—No allowance to a parent for maintaining an infant, for the time past.—*HILL v. CHAPMAN* (1787), 2 Bro. C. C. 231; 29 E. R. 129, L. C.

976. —.]—The ct. will not make an allowance to a father for the maintenance of a child for the time past, although it should appear that in fact he had not been of ability to maintain him, & although the will had expressly given the produce to the trustees for his maintenance.—*ANDREWS v. PARTINGTON* (1790), 2 Cox, Eq. Cas. 223; 3 Bro. C. C. 60; 30 E. R. 103, L. C.

Annotations:—*N.F. Sisson v. Shaw* (1804), 9 Ves. 285; *Maberley v. Turton* (1808), 14 Ves. 499. *Consd. Hamley v. Gilbert* (1821), Jac. 354. *Reid. Pulsford v. Hunter*, *Jennings v. Hunter* (1792), 3 Bro. C. C. 416; *Hoste v. Pratt* (1798), 3 Ves. 730; *Lee v. Brown* (1798), 4 Ves.

362; *Camden v. Benson* (1835), 4 L. J. Ch. 256; *Thorp v. Owen* (1843), 2 Hare, 607. *Mentd. Leake v. Robinson* (1817), 2 Mer. 363.

977. —.]—Maintenance allowed for the time past.

The old practice was, that if the father had by any means maintained his children the ct. would not reimburse him (*LORD ELDON, C.*).—*REEVES v. BRYMER* (1801), 6 Ves. 425; 31 E. R. 1126, L. C.

Annotation:—*Consd. Carmichael v. Hughes* (1851), 20 L. J. Ch. 396.

978. —.]—Maintenance allowed for the time past as well as the time to come.—*SHERWOOD v. SMITH* (1801), 6 Ves. 454; 31 E. R. 1141, L. C.

979. —.]—Bequest of stock, etc., & the interest & dividends to accrue, to testator's two great nieces, equally to be divided, & to be assigned, transferred, & paid, to them, when & as they should respectively attain twenty-one; with limitations of their respective shares in the event of death under twenty-one to their respective children; survivorship in case of no children; & a direction, that the exors. should during the respective minorities of the legatees receive the dividends, interest, etc., & that so much as should be necessary should be applied for maintenance, etc., & the residue accumulate for their respective benefits, until they should respectively become entitled to their respective parts or shares thereof. The surplus interest goes with the principal upon the death of one under twenty-one without children. Maintenance allowed for the time past.

That case [*Andrews v. Partington*, No. 976, *ante*] has been very much shaken. I have found two decrees allowing maintenance for the time past (*GRANT, M.R.*).—*SISSON v. SHAW* (1804), 9 Ves. 285; 32 E. R. 612.

980. —.]—*COLLIS v. BLACKBURN* (1804), 9 Ves. 470; 32 E. R. 684.

981. —.]—The father of infants had maintained & educated them since the death of their mother, when they became entitled to a sum of money in this ct. The father petitioned for a reference to the master on the subject of maintenance & education of the children, & for an allowance, as well for the time past as in future; but the ct. refused to make any reference to the master with respect to the maintenance of the infants in the time passed, but made the usual reference with respect to their future maintenance out of the funds, in case the father was not himself of ability to maintain them.—*SIMON v. BARBER* (1829), Tam. 22; 48 E. R. 10.

982. —.]—*SIMMONS v. BARKER* (1835), 4 L. J. Ch. 85.

983. —.]—The ct. will not direct an inquiry as to the propriety of an allowance to the father for the past maintenance of the infant, unless a special case be made.—*Ex p. BOND* (1835), 2 My. & K. 439; 4 L. J. Ch. 84; 39 E. R. 1012.

984. — In special circumstances—Parent compounding with creditors.]—(1) The ct. will not, unless under special circumstances, sanction an allowance to a parent out of his children's fortune,

the mother.—*Re KIRWAN* (1869), 8 N. S. W. S. C. R. (Eq.) 21.—*AUS.*

974 ii. —.]—A decree cannot be made against a father for past maintenance of his children, although payments might be made for that purpose out of funds of infants in ct.—*WOOD v. WOOD* (1885), 2 Man. L. R. 198.—*CAN.*

974 iii. —.]—*MACHRAY v. HIGGINS* (1892), 8 Man. L. R. 29.—*CAN.*

**PART X. SECT. 1, SUB-SECT. 2.—
J. (c).**

n. Power of court to make prospective allowance.]—An order made under Criminal Procedure Code, s. 316, fixing a sum for the maintenance of a child, containing a prospective order for an increase of the amount awarded as the child grows older, is unauthorised by the law.—*MUSSUMAT MUNGLO v.*

JUMNA DASS (1870), 2 N. W. 454.—*IND.*

PART X. SECT. 1, SUB-SECT. 2.—K.

974 i. Whether allowance made to parents.]—An infant who became entitled to certain property had been maintained by her mother since her father's death. On application for appointment of guardian, etc., the ct. ordered an allowance for the infant's past maintenance to be granted to

for their past maintenance, although he be not of ability to maintain them.

(2) The ct. will not grant a reference to the master to inquire as to the propriety of making an allowance for past maintenance, unless a special case be made for such inquiry. The fact of the father having compounded with his creditors is not of itself a sufficient ground for such reference.

—*Ex p.* MORGAN (1835), 4 L. J. Ch. 84.

985. ——— **Mother deserted by husband.**—Where in a suit for the administration of a testatrix's estate, the master's report was delayed in consequence of another pending suit, & it appeared upon the petition of one of the residuary legatees, an infant, & a married woman, that she had been deserted by her husband, & that there was likely to be a large residue, inquiries were directed to ascertain the facts stated in the petition, & the probable amount of petitioner's fortune, & what would be a proper allowance for the past & future maintenance of petitioner.—COSTER v. COSTER (1836), 1 Keen. 199; 48 E. R. 282.

986. ——— **Debts incurred for child's maintenance.**—A petition was presented by an infant who had for some years been entitled to property amounting to £290 *per annum*. Petitioner had been maintained by his father, who had incurred a large debt for the purpose, & was unable any longer to maintain his son. The petition stated that the father had been resident for many years in India, & it asked for a sum of £300 for past maintenance:—*Held*: the father having resided out of the country, & being unable to apply to the ct. before, was a special circumstance which would enable the ct. to grant the sum required for past maintenance.—CARMICHAEL v. HUGHES (1851), 20 L. J. Ch. 396.

987. ——— **Testator induced his son-in-law to give up his profession, & reside near him, & supported the son-in-law & his children till his own death. By his will he gave the children legacies of £5,000 each, to be set apart & invested, & to be paid to them as they attained twenty-five, with a proviso that, if any legatee intermarried with certain specified families, the bequest to such legatee should be void, & that the legacies should not be paid until the legatees covenanted to refund if they should so intermarry. The estate proved insufficient, & the son-in-law was obliged to sell his property & borrow money in order to maintain the legatees:—*Held*: (1) testator had placed himself *in loco parentis* to his grandchildren, & the legacies were vested subject to be divested, as the condition was subsequent; (2) the father of the legatees was entitled to an allowance out of past income for past maintenance to the extent of the money he had borrowed & raised by the sale of his property.—PARSONS v. PETERS (1864), 11 L. T. 501; 11 Jur. N. S. 150; 13 W. R. 214.**

988 i. ——— **In special circumstances—Debts incurred for child's maintenance.**—Maintenance allowed for the time past, the father being liable to debts he was obliged to contract in supporting the minors, & no fund in ct. to reimburse him, till the time of the application.—*Exp.* DARLINGTON (1809), 1 Ball & B. 240.—IR.

o. ——— **Practice.**—Where applications for past maintenance of infants are made, & especially where the only fund for the payment is the corpus of the estate, appct. should come on petition before a judge in chambers, showing & proving the special circumstances relied on to overcome the general rule that arrears of past maintenance are not given,

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which rule applies whether the claimant is father, mother, or other relative, a step-parent or a stranger. Where it appeared that a person making a claim for the past maintenance of his infant step-children, against the proceeds of the sale of their father's farm realised in administration proceedings, had not maintained the infants on the basis of being compensated therefor, but that his claim was an afterthought, a judge refused to confirm the master's recommendation of an allowance.—*Re* RENWICK, RENWICK v. CROOKS (1891), 14 P. R. 361.—CAN.

988 i. **Whether allowance made to step-parent.**—*Re* RENWICK, RENWICK v. CROOKS (1891), 14 P. R. 361.—CAN.

988. **Debt incurred in action on child's behalf.**—Where a father who was not of ability to maintain his daughter had, as her guardian, received the rents of her property, but had maintained her during her infancy & till her marriage, & had spent a considerable sum in the costs of a suit relating to her property, which ended beneficially for her, but of which her estate had to bear the costs:—*Held*: he was, in the circumstances of the case, entitled to retain the rents so received, by way of allowance for her education & his expenditure on her behalf.—WRIGHT v. VANDERPLANK (1856), 8 De G. M. & G. 133; 25 L. J. Ch. 753; 27 L. T. O. S. 91; 2 Jur. N. S. 599; 4 W. R. 410; 44 E. R. 340, L. JJ.

Annotations:—*Mentd.* Turner v. Collins (1871), 7 Ch. App. 329; Kempson v. Ashbee (1874), 39 J. P. 164; Mitchell v. Homfray (1881), 8 Q. B. D. 587; *Re* Maddever, Three Towns Banking Co. v. Maddever (1883), 31 W. R. 720; Allcard v. Skinner (1887), 36 Ch. D. 145; Tyars v. Alsop (1889), 61 L. T. 8; De Witte v. Addison (1899), 80 L. T. 207; Powell v. Powell, [1900] 1 Ch. 243; London & Westminster Loan & Discount Co. v. Bilton (1911), 27 T. L. R. 184.

989. ——— **Lunacy of infant—Order for maintenance out of infant's property.**—The ct. will not allow any past maintenance to a father of his infant lunatic son, after an order has been made for the lunatic's maintenance out of his own property.—*Re* BOOTH (1854), 22 L. T. O. S. 249.

990. ——— **Maintenance for long period—At greater expense than income of fund.**—BIRCH v. SUMNER (1857), 3 Jur. N. S. 712.

991. **Waiver of right of maintenance by parent—Right cannot be revived.**—JENKINS v. JENKINS, No. 760, *ante*.

992. ——— **Re KERRISON'S TRUSTS**, No. 863, *ante*.

993. **Whether allowance made to step-parent.**—SWINNOCK v. CRISP, No. 1092, *post*.

994. ——— **STOPFORD v. CANTERBURY (LORD)**, No. 882, *ante*.

995. ——— **A husband being held liable at the suit of the children of his wife's first marriage to replace trust funds received by him, claimed a large sum expended in maintaining, etc., the children after the second marriage. The claim was disallowed.**—GROVE v. PRICE (1858), 26 Beav. 103; 53 E. R. 836.

996. **Whether allowance made to brother.**—BOYCOT v. COTTON, No. 839, *ante*.

Power of court to allow—Trustees failing to exercise discretion.—*See* Nos. 881, 883, *ante*.

L. Gifts charged with Maintenance.

(a) Construction of Gift.

See, generally, WILLS.

997. **Principle of construction.**—The cases should be considered under two heads: first,

p. **Whether allowance made to brother-in-law.**—Applications for past maintenance of infants rest in the discretion of the ct. Where the infants' brother-in-law, a farmer, had lodged & fed them, but expended nothing for their clothes or education, during a period of two years & a half previous to applying for maintenance, knowing all the time that they were entitled to money in ct., & the judge refused to allow anything for past maintenance, but made a more liberal allowance for the future than he would otherwise have done.—*Re* BLAIR (1891), 14 P. R. 220.—CAN.

q. **Discretion of court.**—*Re* BLAIR (1891), 14 P. R. 220.—CAN.

Sect. 1.—Maintenance: Sub-sect. 2, L. (a).]

those cases in which the ct. has read the will as giving an absolute interest to the legatees, & as expressing also testator's motive for the gift; & secondly those cases in which the ct. has read the will as declaring a trust upon the fund or part of the fund in the hands of the legatee (*WIGRAM, V.-C.*).—*THORP v. OWEN* (1843), 2 Hare, 607; 12 L. J. Ch. 417; 1 L. T. O. S. 286; 7 Jur. 894; 67 E. R. 250.

Annotations:—Consd. Re Harris (1852), 7 Exch. 344. *Reid. Gloucester Corpn. v. Wood* (1843), 3 Hare, 131; *Lloyd v. Jackson* (1867), 15 W. R. 408. *Mentd. Kennett v. Gadbury* (1864), 12 W. R. 1072.

998. Gift at discretion of donee—Donee entitled to surplus.]—Direction for payment of residue to H. to be applied by her, at her discretion, for or towards the education of her son, & that she should not be liable to account to him or any other person for the disposal or application of it. The residue being considerable:—*Held*: H. was entitled to it, subject to the application of so much as the ct. might think fit to the education of the son during his minority.—*HAMLEY v. GILBERT* (1821), Jac. 354; 37 E. R. 885.

Annotations:—Apld. Camden v. Benson (1835), 4 L. J. Ch. 256. *Reid. Crockett v. Crockett* (1842), 1 Hare, 451; *Raikes v. Ward* (1842), 1 Hare, 445.

999. ———.]—Bequest to a widow for life in support of herself & her three children. One of the children, a daughter, attained twenty-one & afterwards married:—*Held*: the trust for such daughter's support ceased upon her marriage.—*CAMDEN v. BENSON* (1835), 4 L. J. Ch. 256.

Annotation:—Distd. Conolly v. Farrell, Conolly v. Butcher (1845), 8 Beav. 347.

1000. ———.]—Testator directed that all & every part of his property should be at the disposal of his wife for herself & her children. The widow took out administration to testator's estate, & executed a voluntary deed, whereby she settled the greater part of the fund of which the estate consisted upon trust for herself for life, with remainder to her children:—*Held*: under the will the children took an interest in possession in the property of testator at his decease, & the settlement was not binding upon them, & consequently was not binding upon the widow; & the mother maintaining & educating the children in a proper manner, the whole of the income of the residuary estate was ordered to be paid to her during the infancy of the children, or until further order, with liberty to her & her children to apply.—*CROCKETT v. CROCKETT* (1842), 1 Hare, 451; 11 L. J. Ch. 279; 6 Jur. 531; 66 E. R. 1109; *on appeal* (1848), 2 Ph. 553, L. C.

Annotations:—Consd. Thorp v. Owen (1843), 2 Hare, 607. *Apld. Hart v. Tribe* (1854), 18 Beav. 215. *Reid. Hodgson v. Green* (1842), 11 L. J. Ch. 312; *Webb v. Woods* (1852), 2 Sim. N. S. 267; *Byne v. Blackburn* (1858), 26 Beav. 41; *Ward v. Grey* (1859), 26 Beav. 485; *Bibby v. Thompson* (No. 1) (1863), 32 Beav. 646; *Izod v. Izod* (1863), 1 New Rep. 462; *Greene v. Greene* (1869), 17 W. R. 487; *Lambe v. Eames* (1871), 6 Ch. App. 597; *Newill v. Newill* (1872), 7 Ch. App. 253. *Mentd. Alexander v. Alexander* (1856), 27 L. T. O. S. 333; *Smith v. Smith* (1856), 2 Jur. N. S. 967; *Salmon v. Tidmarsh* (1859), 5 Jur. N. S. 1380; *Armstrong v. Armstrong* (1869), 38 L. J. Ch. 463; *Hicks v. Ross* (1872), L. R. 14 Eq. 141.

PART X. SECT. 1, SUB-SECT. 2.—L. (a).

1004 i. Express direction to maintain—During minority.]—Where testator gave the residue of his real & personal property to his exors. & trustees in trust to sell the same, & after satisfying certain charges, to expend & apply, for the maintenance & education of his minor children, such sums as they

thought necessary for this purpose, & in subsequent clauses of the will provided that such children were to draw, or be entitled to, equal shares of his estate, & that each should receive his or her share of the proceeds of the real estate, on marrying or arriving at maturity; & that until then the shares of such children should be invested & paid out as they required the same as

1001. ———.]—(1) Testator gave a legacy to his widow for her present expenses of herself & the children. After his death, one of the relations took one of the children out of the widow's custody:—*Held*: she was nevertheless entitled to the whole of the legacy.

(2) Testator gave a legacy to his widow for her own & the children's benefit as she should in her judgment think fit; at the same time recommending her not to diminish the principal:—*Held*: the children had no present interest in the fund; but the widow had an absolute discretion in the application of the dividends during her life for the benefit of herself & the children.—*HART v. TRIBE* (1854), 18 Beav. 215; 23 L. J. Ch. 462; 23 L. T. O. S. 124; 2 W. R. 289; 52 E. R. 85; *subsequent proceedings*, 19 Beav. 149.

Annotation:—As to (2) *Reid. Curnick v. Tucker* (1874), L. R. 17 Eq. 320.

1002. ———.]—(1) Bequest to widow of two-thirds of the residue, "to be at her sole & entire disposal, for the maintenance of herself & such child or children as I may leave by her":—*Held*: the widow had an uncontrolled power over the income so long as the children were maintained, & the right of the children to maintenance did not cease at twenty-one.

(2) Bequest of the principal & interest of one-third of the residue to a widow, "being well assured that she will husband the means that may be left to her by me with every prudence & care, for the sake of herself & children":—*Held*: this raised no precatory trust, & the widow took absolutely.—*SCOTT v. KEY* (1865), 35 Beav. 291; 6 New Rep. 349; 11 Jur. N. S. 819; 13 W. R. 1030; 55 E. R. 907.

Annotation:—As to (2) *Reid. Greene v. Greene* (1869), 17 W. R. 487.

1003. ——— Application of surplus.]—To put an end to litigation between a husband & wife, the husband conveyed property to trustees, upon trust to pay his wife £3,700 a year, or so much as she should "order or require." The wife was, out of that sum, to keep up an establishment for herself & children upon such a scale as she should think fit; & the husband was to have the benefit of it under certain restrictions. But if she should not require the whole for the purposes aforesaid the surplus was to be paid to the husband:—*Held*: (1) so long as she kept up the establishment, she was not liable to account for the surplus in her hands; (2) this was like the case of guardians of infants & committees of lunatics having allowances made to them for maintenance, & who are not accountable for their expenditure, so long as they properly maintain those committed to their care.—*JODRELL v. JODRELL* (1851), 14 Beav. 397; 51 E. R. 339.

Annotations:—As to (1) *Reid. Hart v. Tribe* (1854), 23 L. J. Ch. 462. *As to* (2) *Consd. Macrae v. Harness* (1910), 103 L. T. 629.

1004. Express direction to maintain—During minority.]—Testator gave his residuary estate to trustees in trust for his sister's younger children equally, & to vest in them at the usual periods; & he directed his trustees, during the minorities of the children, to pay the interest of their shares to his sisters or to the guardians of the children,

aforesaid:—*Held*: their maintenance & education were a charge on their own shares only, & not on the whole residue.—*GIBSON v. ANNIS* (1865), 11 Gr. 481.—*OAN.*

1004 ii. ———.]—Testator devised land to his wife for life, "subject to the conditions of supporting & educating therefrom my children until they are of age, respectively," & after her

to be applied for their maintenance & education :—*Held* : the sisters were entitled to receive the interest of their children's shares during the minorities of their children.—*BERKELEY v. SWINBURNE* (1834), 6 Sim. 618 ; 3 L. J. Ch. 165 ; 58 E. R. 723.

Annotation :—*Apld.* *Browne v. Paull, Hoggins v. Paull* (1850), 1 Sim. N. S. 92.

1005. ———.]—Testator gave one-third of his residuary estate to his wife, & the other two-thirds to trustees in trust for his children at twenty-one : & directed that, until the shares of his children should be payable to them, the income thereof should be paid to his wife, to be by her applied, or, in case of her death, to be applied, by the trustees, for the maintenance of the children :—*Held* : the wife was entitled to the income of the children's shares during their minorities, she maintaining them in a proper manner.—*HADOW v. HADOW* (1838), 9 Sim. 438 ; 59 E. R. 426.

Annotations :—*Apld.* *Browne v. Paull, Hoggins v. Paull* (1850), 1 Sim. N. S. 92. *Refd.* *Crockett v. Crockett* (1842), 1 Hare, 451 ; *Ralke v. Ward* (1842), 1 Hare, 445 ; *A.-G. v. Coole*, [1921] 3 K. B. 607.

1006. ———.]—Testator gives his residuary property to trustees upon trust to sell & stand possessed of the proceeds upon trust to pay an annuity, & to invest the residue & pay the divi-

dends & interest to his wife for life, to be by her expended in & about the maintenance of herself & the maintenance & education of his children *nominatim*, & of any child of which she might then be pregnant ; & after her decease he gives the principal unto & amongst all his before-named children, to be equally divided among them, share & share alike, to be paid to them as they shall severally attain the age of twenty-one years, with benefit of survivorship amongst them. Two who attain twenty-one, with the mother, petition for the payment out of their shares :—*Held* : the children who had attained twenty-one took vested interests expectant upon the death of the mother ; & on the undertaking of the two sons to secure to the mother the dividends which would have accrued, a portion of the fund might be paid out.

Under such a clause any child who at any time is in a condition to require maintenance is entitled to be maintained by the mother. The ct. will only order payment out by anticipation of vested shares, even where the tenant for life consents, where the residue of the fund is amply sufficient to furnish an income to maintain the wife & other children.—*BERRY v. BRIANT* (1862), 2 Drew. & Sm. 1 ; 31 L. J. Ch. 327 ; 5 L. T. 818 ; 8 Jur. N. S. 69 ; 10 W. R. 242 ; 62 E. R. 521.

decease, & his youngest child having attained eighteen, he devised the same land to his son, L. The widow died, & L. also died before the youngest child attained eighteen :—*Held* : L. did not take the estate charged with the support or education of the younger children, nor was it chargeable in the hands of L. with arrears therefor, which had accrued during the life estate of the widow.—*PERRY v. WALKER* (1866), 12 Gr. 370.—CAN.

1004 iii. ———.]—Testator bequeathed his chattels & \$1,500 to his widow. His estate he directed to be sold & the \$1,500 to be paid out of the proceeds. After providing for the investment of the estate, he proceeded : "the yearly interest accruing from the same to be paid over to my said wife yearly for the term of six years, or until my son shall become twenty-one ; the above mentioned gifts & bequests to my wife shall be given to her in lieu of dower, & on the further condition that she will clothe, maintain & suitably provide for my said son until he shall become twenty-one ; on the coming of age of my said son, my exors. shall pay over to him the whole of the principal sum of money remaining in their hands after satisfying the above expenses & legacies ; in case my said son should die before coming of age, then the money so remaining as above, & to which he would then be entitled, shall be paid over to my two eldest brothers." The son died under twenty-one :—*Held* : all the gifts to the widow were upon the condition of maintaining the son ; but the condition having become impossible of performance by the son's death, the gifts were denuded of the condition.—*GRAHAM v. BOULTON* (1885), 9 O. R. 481.—CAN.

1006 i. ———.]—Testator, amongst other things, devised to his wife the proceeds of all his rentable property, after paying necessary outlays for the maintenance & support of herself & six infant children, & gave certain parts of his estate to his children to be conveyed to them on the death of their mother ; & the will further provided that the widow should have the power, with the approval & consent of the exors. & trustees, of whom she was one, to put any of the said children into possession of the real or personal property bequeathed to them after attaining the age of twenty-one :—*Held* : the property was subject, as

a first charge thereon, to make good any deficiency there might be in the amounts derived from other properties, to afford a proper sum for the maintenance of the infants.—*COLLINGWOOD v. COLLINGWOOD* (1874), 21 Gr. 102.—CAN.

1006 ii. ———.]—Testator devised certain lands to his two sons, declaring that the legacies thereafter mentioned should be a charge thereon. He then bequeathed certain pecuniary legacies to his daughters, adding, "I give & devise also unto (his said daughters) their support & maintenance, so long as they or either of them remain at home with (his two sons) ;" & he gave his personal property to his two sons in equal shares :—*Held* : the support & maintenance of pl'ts. was, by the will, made a charge upon the lands ; & they might for sufficient reasons cease to live at home, & yet still be entitled to such support & maintenance.—*SWAINSON v. BENTLEY* (1884), 4 O. R. 572.—CAN.

1006 iii. ———.]—Testator devised certain lands to his widow, to have & to hold the same for the following uses : "To sell & dispose of the same as she should think proper & right, & the moneys thereupon coming & arising to use & apply for the payment of my just debts, & for the maintenance of herself & my minor children, & the education of such children as she may see to be fit & necessary," & he authorised his wife to convey the said lands in fee simple to the purchasers & directed that in the event of any of the said lands remaining unsold at the time when his youngest surviving child should attain twenty-one, then the above devises & powers should cease, & the lands be subject to the trusts of his will previously declared under which the lands were ultimately to be divided among his children. Testator was twice married :—*Held* : the children & grandchildren of testator's first marriage had no right to demand an account of the lands sold under the above provisions, or investigate the amount used for maintenance. *Semble*, the widow took absolutely the balance of the proceeds of sale not required for debts.—*COWAN v. BESSERER* (1884), 5 O. R. 624.—CAN.

1006 iv. ———.]—Testator by his will, after several specific bequests, gave the residue of his real & personal estate to his trustees upon trust to pay to each of his daughters, J. & L. for life,

the annual allowance of \$8,000 each, which they were then receiving, to be paid to them semi-annually, & to pay for the education, maintenance & ordinary requirements of his son G., & then proceeded : " & I direct my trustees in their discretion, if they find my son G. deserving of the same, to make such annual allowance to him as to them may seem warranted by the proceeds of the income of my estate, & if my said trustees are satisfied as to his steadiness they are to treat my said son G. in respect to the said allowance in the same manner as my said daughters, J. & L. ; in the case of each of my said daughters the capital sum necessary to produce the allowance made to her be paid after her death to such person or persons as she may by will direct " :—*Held* : G. was only entitled to his maintenance & education during minority, for there was nothing in the will to indicate an intention to extend the trust for maintenance & education beyond that period ; G. was not entitled to any annual allowance in addition to his maintenance & education during his minority.—*MACDONALD v. MCLENNAN* (1885), 8 O. R. 176.—CAN.

1006 v. ———.]—Testator made his will as follows : "I leave to M. the west half of lot 9 during her natural life. I leave to my son A." (an imbecile) "his board & lodging with £5 per year during his natural life, to be given as hereinafter mentioned. I leave to B." (certain other lands) "under the following restriction : i.e. he is to pay A. £3 every year during his natural life. I leave to R. the west half-lot 9, after his mother's death, on the following condition : i.e. £2 in each year to be paid by him to A., & to keep A. in board & lodging during his natural life." The devise to R. failed, he being an attesting witness :—*Held* : A.'s maintenance as from the death of testator, & not as from the death of M., was a charge on the west half-lot 9 in the hands of the heirs ; & the land having for some time after testator's decease, been occupied under mistake of title by R. & his assigns, who had paid for A.'s maintenance, the heirs could not enjoy the land without making good the charge thereon to those who had thus exonerated them.—*MUNIE v. LINDSAY* (1886), 11 O. R. 520 ; 10 P. R. 432.—CAN.

1006 vi. ———.]—*EDGEWORTH v. EDGEWORTH* (1829), Beat. 328.—IR.

Sect. 1.—Maintenance: Sub-sect. 2, L. (a) & (b),

1007. Donee's liability to account.]

LEACH v. LEACH, No. 867, *ante*.

1008. ———.]—Where an annuity was bequeathed to A., an unmarried woman, who afterwards married, in trust to pay & apply the same in her discretion for the benefit of B., then an infant, during his life & for his advancement, maintenance, or support, or otherwise for his benefit, & without being responsible or answerable for any of the moneys so laid out or the exercise of the discretion so vested in the said trustee as to the mode & extent of expending & laying out the same:—*Held*: (1) A. was not entitled to retain the annuity, like a guardian who has a sum allowed for maintenance, subject to the condition of maintaining the infant, & could not apply any portion of the annuity for her own benefit, but was bound to account for all sums not applied for the benefit of B.; (2) A.'s separate estate was not liable for any moneys misapplied.—WAINFORD v. HEYL (1875), L. R. 20 Eq. 321; 33 L. T. 155; 39 J. P. 709; *sub nom.* WAYNFORD v. HEYL, 44 L. J. Ch. 567; *sub nom.* WARNFORD v. HEYL, 23 W. R. 849.

Annotations:—*Generally, Mentd.* Collett v. Dickenson (1878), 26 W. R. 403; *Re* Turnbull, Turnbull v. Nicholas, [1900] 1 Ch. 180; Edwards v. Porter, [1925] A. C. 1.

1009. ——— Application of surplus.]—Testator gave all his property to trustees, in trust to pay an annuity to his wife, & subject to that payment, to convey, assign or transfer all his property unto & equally between his children, when & as they severally attained twenty-one; &, in the meantime, to pay to his wife or otherwise apply the rents & proceeds of their respective shares for or towards their respective maintenance, education & advancement. But, in case of the decease of any of the children under twenty-one, then upon trust to convey, assign or transfer the shares of such of them as should so die, and the accumulations, if any, unto & equally between such of them as should attain twenty-one. Testator's widow maintained & educated the children for several years, & advanced three of them out of the income received by her from testator's property, exclusive of her annuity; & the income being more than sufficient for those purposes, a considerable surplus remained in her hands:—*Held*: the surplus belonged, not to the children, but to the widow.—BROWNE v. PAULL, HOGGINS v. PAULL (1850), 1 Sim. N. S. 92; 20 L. J. Ch. 75; 16 L. T. O. S. 550; 15 Jur. 5; 61 E. R. 36.

Annotations:—*Consd.* Jodrell v. Jodrell (1851), 14 Beav. 397. *Reid.* A.-G. v. Coole, [1921] 3 K. B. 607.

1010. ———.]—A gift of dividends to A., to be by him used & applied for the maintenance of the children of his late wife during their minorities:—*Held*: to confer a life interest in A. for his own benefit after the youngest child had attained twenty-one.—*Re* WALKER'S TRUSTS (1853), 1 W. R. 408.

1011. ———.]—Testator gave the residue of his estate to his exors. on trust to pay to his wife or permit her to receive annual income thereof during her life "for her use & benefit & for maintenance & education of my children," & after her decease

upon trust to divide his residuary estate equally between all his children living at his decease:—*Held*: wife took income subject to a trust for maintenance & education of the children & not limited to children under twenty-one or unmarried.

All the children having attained twenty-one, one of the daughters having married, & the widow having become bkpt., two unmarried daughters, who were living with their mother, issued a summons asking the ct. to determine whether they were entitled to be maintained out of the income of the residue during the remainder of their mother's life. A similar summons had been issued by the married daughter. The ct. directed an inquiry whether any, &, if any, which, of the children required maintenance.—*Re* BOOTH, BOOTH v. BOOTH, [1894] 2 Ch. 282; 63 L. J. Ch. 560; 42 W. R. 613; 8 R. 256.

Annotation:—*Appld.* *Re* G., [1899] 1 Ch. 719.

1012. Request for care of infant.]—Where testator gave his real estates, & also his residuary property to his wife for life, with remainder to an infant great-nephew for life; a statement in the will that it was his particular wish & request that his wife & the infant's grandfather would superintend & take care of the infant's education, so as to fit him for any respectable profession or employment:—*Held*: under the circumstances, & upon the effect of the whole instrument, to charge the maintenance & education of the infant upon the interest taken by testator's widow under the will.—FOLEY v. PARRY (1833), 2 My. & K. 138; Coop. temp. Brough. 219; 39 E. R. 897, L. C.

Annotations:—*Consd.* Kilvington v. Gray (1839), 10 Sim. 293. *Appld.* Batt v. Anns (1841), 11 L. J. Ch. 52. *Consd.* Gardiner v. Barber (1854), 2 Eq. Rep. 888. *Reid.* Raikes v. Ward (1842), 1 Hare, 445; Lloyd v. Jackson (1867), 15 W. R. 408; Parnall v. Parnall (1878), 26 W. R. 851; Wilkins v. Jodrell (1879), 49 L. J. Ch. 26. *Mentd.* Shaw v. Lavless (1838), 5 Cl. & Fin. 129; Ewan v. Morgan (1858), 32 L. T. O. S. 19.

1013. Gift to enable donee to maintain.]—A mother appointed a fund to her child, to be transferred at twenty-one or marriage, & directed the dividends in the meantime to be paid to the father, "in order the better to enable him to support, maintain, & educate the child":—*Held*: the father took the dividends clothed with a trust, & that he could not assign them.—WETHERELL v. WILSON (1836), 1 Keen, 80; Donnelly, 4; 5 L. J. Ch. 235; 48 E. R. 237.

Annotations:—*Reid.* Crockett v. Crockett (1842), 1 Hare, 451; Raikes v. Ward (1842), 1 Hare, 445; Kearsley v. Woodcock (1843), 3 Hare, 185; Thorp v. Owen (1843), 2 Hare, 607.

1014. Infant "to be provided for"—Apprenticeship.]—Testator bequeathed as follows:—"I leave B. under the protection of my wife P., to be by her apprenticed & taken care of, & to be provided for to the best of her judgment, as long as the said P. remains unmarried":—*Held*: B. was entitled to maintenance out of testator's estate.—BATT v. ANNS (1841), 11 L. J. Ch. 52, L. C.

1015. Gift "to own use & use of children"—Widowhood of wife.]—Testator desired his trustees to pay the whole of the income of his property to his wife "for her own use & the use of our children," but if she married again he gave her one-third

1009 i. ——— Application of surplus.]—Testator gave, subject to an annuity to his wife for life, the income of his real & personal estate to trustees upon trust for his two children in equal shares, but so that up to the age of twenty-five years it should be employed as far as necessary for their maintenance, & after that age to pay it to them for life, & after their death,

the whole estate to the children's issue in certain shares:—*Held*: there was an absolute gift of the income to the children in equal shares, & each child was absolutely entitled, on attaining the age of twenty-one, to the accumulations of the balance of rents & profits arising from half the estate over & above what had been expended on his or her maintenance.—SMIDMORE v.

MAKINSON (1908), 6 C. L. R. 243.—AUS.

1009 ii. ———.]—CLARK v. CLARK (1870), 17 Gr. 17.—CAN.

1015 i. Gift "to own use & use of children"—Widowhood of wife.]—Testator made his will as follows: "I therefore will unto my beloved wife M. for the benefit of herself & children

only, the other two-thirds to be received for the benefit of the children in providing for their education & outfits in life. The wife's third to be for her life, & then to go to the children with the remainder:—*Held*: during the widowhood of their mother, the children were not entitled to any portion of the income, or to have any part set apart for their maintenance or advancement.—*KENNEDY v. KENNEDY* (1854), 2 W. R. 298.

1016. Gift "for sake of children."—*SCOTT v. KEY*, No. 1002, *ante*.

Precatory trusts, generally, *see* WILLS, & TRUSTS & TRUSTEES.

(b) *Failure of Primary Donee to Maintain.*

1017. Through bankruptcy—What part of income available for creditors.]—By a post-nuptial settlement, £4,000 was vested in trustees, upon trust to invest, & to pay the income to the husband & wife for their joint lives, & then to the survivor for life; & after the death of either, to stand possessed of one moiety of the trust fund for the survivor absolutely, & of the other moiety for the children of the marriage, as the parents should jointly appoint; & in default of such appointment, for the children in equal shares, with powers of advancement; & it was thereby declared that the income of the trust moneys was made payable to the parents & the survivor of them, upon the condition only, that they & the survivor of them should, during the minority of the children, provide them with suitable diet, clothing, maintenance & support, in proportion to the circumstances & condition of life of the parents, & the expectancies of such child or children; but that, in case of an advance to any of the children the parents or the survivor should be released from the condition. In 1844 the husband petitioned the Ct. of Bkpcy., & under 5 & 6 Vict. c. 116, a conditional order was made for his protection upon payment of a yearly sum. In 1845 the husband & wife assigned by way of mtge. all their interest in the income & capital of the trust fund. The fund was then transferred into ct., under Trustees' Relief Act. On petition by the six infant children, stating that their parents were in embarrassed circumstances, & had for some time past omitted to provide them with suitable diet, etc. (following the words of the deed), & that no advance had been made to them or any of them; & it appearing that the parents were in a respectable station in life, & in no business, the ct. ordered the whole income to be applied for the maintenance of petitioners. *Qu.*: the effect of a conditional order for protection under 5 & 6 Vict. c. 116, as to vesting the assets of the insolvent in the official assignee.—*Re DALTON* (1852), 1 De G. M. & G. 265; 21 L. J. Ch. 681; 18 L. T. O. S. 214; 20 L. T. O. S. 3; 16 Jur. 253; 42 E. R. 554, L. C.

jointly, two life policies for each \$1,000, & their premium dividends, to have & to hold for their joint & mutual benefit, & to be by her spent in the most judicious & beneficial manner for all: also whatever interest I may have in the business of E. & D., & in the arranging of it, I trust much to my long & well tried partner, W., in giving a just return to my heirs, for long & faithful services rendered by me in the business there being no written agreement of the partnership":—*Held*: the widow was entitled during the minorities of the children, to receive the income of their shares, in trust, to apply the same as one fund, as she might think most beneficial for the maintenance & education of the whole family.—*ROSE v. EDSALL* (1872), 19 Gr. 544.—CAN.

PART X. SECT. 1, SUB-SECT. 2.—
L. (b).

r. Operation of Statute of Limitations.]—Testator, by his will, made Jan. 21, 1878, devised certain lands to a son subject to his maintaining testator's three daughters, until marriage. Deft., one of these daughters, married on Oct. 7, 1880, & testator on Oct. 22, 1880, executed a codicil declaring that the land devised to his son should be charged with the maintenance of the same three daughters. Testator died in 1881. No claim for maintenance had been made by deft. on the devisee, who died in 1915, but she claimed against his exor.:—*Held*: the right to maintenance, if it ever existed, was a mere charge & not a trust, & was barred by Stat. Limita-

1018. Through misconduct—Application of surplus.]—Hotel-keeper by his will bequeathed his property to trustees, upon trust to permit his widow to carry on the business, so long as it could be carried on with advantage to his estate, & to permit her to receive the profits, so that she might maintain herself & her family, & educate testator's children. He also directed that if the profits were insufficient for this purpose, the deficiency should be supplied out of the income of the general estate, which, subject to this direction, was to be accumulated, & with the principal, to be divided among testator's children on their attaining twenty-one. There was a proviso that if from any cause it should be advisable to discontinue the business, which the trustees were to have power to do, the stock-in-trade should be sold, & the proceeds form part of the general estate, & that the income of the whole, or so much of the income as should be required, should be applied in the maintenance of testator's wife & family & the education of the children:—*Held*: on the widow by misconduct becoming unfit to maintain & educate the children, she was not entitled to the surplus profits after setting apart sufficient for their maintenance & education, but could only claim maintenance for herself.—*CASTLE v. CASTLE* (1857), 1 De G. & J. 352; 29 L. T. O. S. 243; 3 Jur. N. S. 723; 5 W. R. 643; 44 E. R. 759, L. C. & L. JJ.

Annotation:—*Fold. Re G.*, [1899] 1 Ch. 719.

1019. — Administration of fund by court.]—*Re G. (INFANTS)*, No. 1203, *post*.

1020. Failure of donee to exercise sound discretion—Power of court—To transfer trust.]—Where a fund was by will given to trustees for infants, & the trustees were desired to pay the income to the mother to be by her applied for their benefit at her discretion:—*Held*: the ct. had power, where the mother had not exercised a sound discretion, to order the income to be paid to the father for the maintenance of the infants.—*Re ROPER'S TRUSTS* (1879), 11 Ch. D. 272; 40 L. T. 97; 27 W. R. 408.

Annotation:—*Refd. Re Lofthouse* (1885), 29 Ch. D. 921.

1021. — — — To order donee to account.]—*MACRAE v. HARNESS*, No. 525, *ante*.

M. Cesser of Maintenance.

1022. General rule—Period prescribed by instrument.]—Testator directed the interest of his residue to be paid to his wife, for the maintenance of herself & her children, until the death of her father, when it was to cease, & to be accumulated for the children (testator having understood that his wife's father had made ample provision, by his will, for testator's wife & children), & testator directed his residue & the accumulations to be transferred to his children when the youngest

tions.—*PUBLIC TRUSTEE v. STEWART*, [1916] N. Z. L. R. 1149.—N.Z.

PART X. SECT. 1, SUB-SECT. 2.—M.

1022 i. General rule—Period prescribed by instrument.]—*RYAN v. COOLEY* (1887), 14 O. R. 13; 15 A. R. 379.—CAN.

1022 ii. — — —.]—Where a settlor directed maintenance for his children to be paid to their mother for their support up to fourteen years of age out of yearly income, & from fourteen to twenty-one to be allowed by trustees "out of the share" of each child in a certain fund of £8,000 to which each would be entitled on attaining the latter age, & there was no direction for the payment of interest on that fund from fourteen to twenty-one:—*Held*:

Sect. 1.—Maintenance: Sub-sect. 2, M.]

attained twenty-one, with benefit of survivorship on their dying under twenty-one, & without issue, but if having issue, then the issue to take the deceased parent's share, with a bequest over in case all the children died under twenty-one, & without issue. Testator died in the lifetime of his wife's father, who died shortly afterwards, without having made any provision for the wife or children. The ct. refused to allow maintenance out of the residue to testator's infant children, although the legatees over consented to the application.—*KIME v. WELFITT* (1830), 3 Sim. 533; 57 E. R. 1098.

Annotation:—*N.F. Martin v. Martin* (1866), L. R. 1 Eq. 369.

1023. Exception to rule—Presumed intention against leaving infant destitute.]—Testator directed maintenance for his sons during minority & for his daughter till twenty-one or marriage: & gave her a legacy in case she should attain twenty-one; payable at, & to carry interest from, that time. Having married at eighteen, she was allowed maintenance for the interval, until twenty-one.

Testator having expressly provided for maintenance up to a certain period, leaving a chasm unprovided for, & having given interest, as interest, from the period of majority to the time, when the legacy was to be paid, the ct. may infer that he did not mean that this child should have nothing in that interval (*LORD ELDON, C.*).—*CHAMBERS v. GOLDWIN* (1805), 11 Ves. 1; 32 E. R. 987, L. C.

Annotations:—*Apld. Martin v. Martin* (1866), L. R. 1 Eq. 369. *Expld. Re Breed* (1875), 24 W. R. 200; *Re Cotton* (1875), 1 Ch. D. 232. *Consd. Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685. *Refd. Cusack v. Jellico* (1873), 22 W. R. 344; *Re George* (1877), 5 Ch. D. 837.

1024. ———.]—Testator bequeathed to his infant son a legacy of £6,000, contingently on his attaining twenty-one. He also bequeathed his residuary real & personal estate on trust till his said son should attain, or if living would have attained, fifteen, for the maintenance & education of all his children, & subject thereto for accumulation at compound interest; the aggregate fund to be in trust for all his children contingently on their attaining twenty-one:—*Held*: (1) the infant was entitled to maintenance during the interval between his attaining fifteen & twenty-one; (2) the ct. selecting that mode of giving maintenance which was most for the benefit of the infant, interest was declared to be payable on the £6,000 legacy.—*MARTIN v. MARTIN* (1866), L. R. 1 Eq. 369; 35 L. J. Ch. 281; 14 L. T. 129; 14 W. R. 421.

Annotations:—*As to* (1) *Refd. Cusack v. Jellico* (1873), 22 W. R. 344. *As to* (2) *Consd. Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685. *Refd. Re Breed* (1875), 24 W. R. 200.

1025. Attainment of full age.]—The Earl of B. by his will gave all his estate to trustees, in trust for deft., N., & the heirs of his body, & to pay such sums out of the rents & profits for his maintenance, as Lord B. should, by any writing, appoint. By a codicil he directs the trustees, during N.'s minority, to pay the rents to pltf., so much as she pleases to be applied for his maintenance, & the residue to her own use; by another codicil directs the trustees shall not settle the estate on N., & the heirs of his body, till twenty-six, & till then such maintenance as the trustees & pltf. shall think fit. Mrs. S. insisted she was entitled to receive the rents & profits till N. attained the age of twenty-six, but the Master of the Rolls was of

opinion they vested in N. at twenty-one, & the time of receiving prolonged only till twenty-six, & decreed the trustees should account for the rents, etc., from his age of twenty-one to twenty-six, to the committee of his estate, N. being found a lunatic.

It is insisted by Mrs. S. that she is entitled to the rents & profits of all the real estates devised under the will of the late Earl of B. till N.'s age of twenty-one, & that testator having by his third codicil, prolonged the time till his age of twenty-six, it will follow, as a natural consequence, that testator intended she should receive the rents & profits till that time (*FORTESCUE, M.R.*).—*SMITH v. NEWPORT* (1742), 2 Atk. 344; 26 E. R. 609.

1026. ——— Grant "for support of" infant.]—*ALEXANDER v. M'CULLOCK* (1787), 1 Cox, Eq. Cas. 391; cited in 2 Ves. at pp. 192, 197; 29 E. R. 1216, L. C.

Annotations:—*Refd. Ball v. Montgomery* (1793), 2 Ves. 191; *Thorp v. Owen* (1843), 2 Hare, 607.

1027. ———.]—Maintenance allowed to a legatee after she had attained the age of twenty-one.—*M'DERMOTT v. KEALY* (1826), 3 Russ. 264, n.; 4 L. J. O. S. Ch. 102; 38 E. R. 575.

1028. ——— Duration expressly prescribed.]—Testatrix devised lands to trustees, in trust, in the first place, at their discretion, to pay an annuity to her son A., & next to apply the rents to the maintenance, education, & bringing up of the three children of A. during A.'s life; the sole survivor of the three children attained twenty-one in the lifetime of A.:—*Held*: the interest of such surviving child in the surplus rents & profits did not cease on his attaining twenty-one, but that he continued entitled to them during the life of his father.—*BADHAM v. MEE* (1830), 1 Russ. & M. 631; 39 E. R. 242; *subsequent proceedings* (1831), 7 Bing. 695; (1832), 1 My. & K. 32.

Annotations:—*Consd. Soames v. Martin* (1839), 10 Sim. 287; *Frewen v. Hamilton* (1877), 47 L. J. Ch. 391. *Refd. Gardiner v. Barber* (1854), 2 Eq. Rep. 888; *Wilkins v. Jodrell* (1879), 13 Ch. D. 564.

1029. ———.]—Testator made a certain provision for the infant son of his relation W., until the age of sixteen, & then left the infant to the care of his trustees to provide for him in some business or profession, & his future maintenance, out of testator's funded property:—*Held*: the infant, on attaining sixteen, was entitled to receive, out of testator's funded property, a sum sufficient to provide for him in some business or profession, & to an annual allowance for his future maintenance during his life; & it was referred to the master, to inquire & state what sums were proper to be allowed for those purposes.

Testator has imposed it, as a duty, on the trustees, to take care of the infant, & to provide for him in some business or profession, & his future maintenance; & the question is whether the ct., when it sees that testator has done so, & has pointed out the fund out of which the provision is to be made, does not take upon itself the exercise of the discretion which testator has reposed in the trustees (*SHADWELL, V.-C.*).—*KILVINGTON v. GRAY* (1839), 10 Sim. 293; 59 E. R. 627.

Annotations:—*Consd. Ewan v. Morgan* (1858), 32 L. T. O. S. 19. *Refd. Batt v. Anns* (1841), 11 L. J. Ch. 52; *Thorp v. Owen* (1843), 2 Hare, 607; *Gardiner v. Barber* (1854), 2 Eq. Rep. 888.

1030. Maintenance out of interest—No disposition of principal.]—Testator directed the interest of a sum of money to be applied for the maintenance & education of his infant nephew,

the maintenance for each child from fourteen to twenty-one must come | wholly out of the capital of the share | *CUSACK v. JELICO* (1873), 22 W. R. 344.—*IR.*

but made no disposition of the principal:—*Held*: the nephew was entitled to the interest, during his life.—*SOAMES v. MARTIN* (1839), 10 Sim. 287; 59 E. R. 624; *sub nom.* *SOMES v. MARTIN*, 8 L. J. Ch. 367; 3 Jur. 1144.

Annotations:—*Consd.* *Frewen v. Hamilton* (1877), 47 L. J. Ch. 391. *Foll.* *Wilkins v. Jodrell* (1879), 13 Ch. D. 564. *Refd.* *Thorp v. Owen* (1843), 2 Hare, 607; *Gardiner v. Barber* (1854), 2 Eq. Rep. 888; *Williams v. Papworth*, [1900] A. C. 563.

1031. —.]—*LONGMORE v. ELCUM*, No. 1051, *post*.

1032. —.]—A party, whose interest in a fund had not vested was held under the terms of a power in a will, entitled to maintenance, even after attaining twenty-one.

Testator devised his freeholds to pay certain annuities, & accumulate the surplus rents so as to become part of his personal estate; & subject to the charges, to the use of the first & other sons of his son A. in tail, with remainder to his daughter B. for life, with remainder to her first & other sons in tail, etc.; & he directed that no person should, under the limitations, become entitled in possession while any antecedent limitation remained in contingency. He gave his personal estate to the children of A. & B., "except the eldest son," to be transferred to all his younger grandchildren, equally to be divided between them as & when the sons attained twenty-one, & the daughters attained that age or married, it being his will that each of their several shares & interests should become vested at that age, or the previous marriage of daughters, though such shares should not become payable or transmissible till after the demise of both his son & daughter; but, in the meantime, he empowered his trustees, though the parents of his grandchildren should be living, to apply the interest of each grandchild's "presumptive share, even including an eldest son's share, in their maintenance & education;" & the surplus was to accumulate & be payable along with their respective original shares when the same became vested & transmissible, & the payments were to be allowed to the trustees, though such grandchildren should not gain a vested interest. & testator declared, that after the death of A. & B., as well as during their lives, his trustees should in the meantime & until the share or shares of all his grandchildren of & in the trust funds should become vested & assignable, transferable, or payable, apply the dividends of the trust funds towards the maintenance & education of every such child & children respectively, including even the eldest. A. & B. were still living; A. had no children, but B. had an eldest son & other children: *Held*: (1) the eldest son of B. had not a vested interest in the personal estate; (2) the other children took vested interests, subject to be divested partially by the birth of other children; (3) all the children of B., including the eldest son, who had attained twenty-one, were entitled to have maintenance.—*ELLIS v. MAXWELL* (1841), 3 Beav. 587; 10 L. J. Ch. 266; 49 E. R. 231; *subsequent proceedings* (1849), 12 Beav. 104.

Annotations:—*As to* (3) *Refd.* *Bryan v. Collins* (1852), 16 Beav. 14; *Re* *Cattell*, *Cattell v. Cattell*, *Re* *Cattell*, *Cattell v. Dodd*, [1914] 1 Ch. 177. *Generally, Mntd.* *Edwards v. Tuck* (1853), 3 De G. M. & G. 40; *Tench v. Cheese* (1854), 19 Beav. 3; *Hogg v. Jones* (1863), 32 L. J. Ch. 361; *Weatherall v. Thornburgh* (1878), 8 Ch. D. 261.

1033. —.]—*BATEMAN v. FOSTER*, No. 866, *ante*.

1034. —.]—Limitation of the time of "maintenance & education."

Where trusts are created for the "maintenance & education," of a party, they are confined to minority.—*GARDINER v. BARBER* (1854), 2 Eq.

Rep. 888; 23 L. T. O. S. 128; 18 Jur. 508; 2 W. R. 407.

Annotations:—*Dbtd.* *Frewen v. Hamilton* (1877), 47 L. J. Ch. 391. *N.F.* *Wilkins v. Jodrell* (1879), 13 Ch. D. 564.

1035. — Vesting contingent on attaining twenty-five.]—Testator gave the residue of his estate & effects to his four children equally to be divided between them, share & share alike, with a gift over to the survivors or survivor in the event of any dying under twenty-five years of age. He appointed guardians during their respective "minorities" with a power to apply accumulations of the income of each child's share, during minority, in maintenance, education, etc.:—*Held*: the children were entitled, for maintenance, etc., to the income of their respective shares between the age of twenty-one & twenty-five.—*FRASER v. FRASER* (1863), 1 New Rep. 430; 8 L. T. 20.

1036. — Bequest of maintenance of testator's widow & child.]—Bequest by a man to his wife, to be applied for the maintenance, etc., of herself & their children:—*Held*: the right of an unmarried daughter to maintenance, etc., did not cease on her attaining twenty-one.—*CARR v. LIVING* (No. 2) (1864), 33 Beav. 474; 55 E. R. 452.

1037. —.]—*SCOTT v. KEY*, No. 1002, *ante*.

1038. — During life-time of parent—Parent entitled to surplus.]—By a marriage settlement property was vested in trustees upon trust, after the death of the wife, to pay the rents & profits to the husband for life, or until he married again, & in case he married again & there was issue of the intended marriage, then to pay him one-half of the rents & profits, & out of the other half to levy & raise for the maintenance & education of one child one-fourth, of two or three children one-third, & of four or more children the whole income of such other half, & subject thereto to pay the whole income thereof to the husband for his life, & if there should be no issue, then to pay the whole of the rents & profits to the husband. The husband married again, & at the date of the decree there were four children of the first marriage, two daughters & one son, who had attained twenty-one, one son under age, & a child of a deceased daughter:—*Held*: (1) the trust for maintenance & education did not cease upon the children attaining twenty-one, but the four children were entitled equally to one-half of the rents & profits during the life of their father; (2) the daughters were equally entitled in the event of their marrying; (3) the word "issue" was restricted to the first generation, & therefore, the child of the deceased daughter took no interest.—*FREWEN v. HAMILTON* (1877), 47 L. J. Ch. 391.

1039. —.]—Testator gave the income of his estate to his wife & daughters for their respective lives, with a survivorship clause amongst them for their respective lives in case of the death of his wife or of any of his daughters, leaving no issue. In the event of a daughter dying & leaving issue, the trustees were empowered to apply all or any part of the "trust moneys or annual produce & premises" to which such daughter, if living, would be entitled, in the maintenance, education, & advancement of such her issue. After the death of his wife & all his daughters, the principal was to be divided amongst the issue then living of his daughters:—*Held*: the trustees had power to make allowances for the maintenance of deceased daughters' children after they had attained their majority.—*HILL v. RAWLINSON* (1866), 15 W. R. 148.

1040. —.]—Testator by his will gave to a woman an annuity of £100, & directed as follows:

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"In the event of her death the annuity is to be continued to her children for their maintenance, & education, & I have to request" G. "to see it carried into execution." The woman survived testator & received the annuity up to her death, at which time all her six children had attained twenty-one:—*Held*: (1) the words "in the event of her death" could not be construed as only providing against a lapse of the annuity, & the annuity took effect in favour of the children; (2) the annuity was not confined to the minorities of the children, but was payable to them during their joint lives & to the survivors & survivor of them during their & his life, & children for the time being entitled as joint tenants.—*WILKINS v. JODRELL* (1879), 13 Ch. D. 564; 49 L. J. Ch. 26; 41 L. T. 649; 28 W. R. 224.

Annotations:—*As to* (1) *Reid*. *Williams v. Papworth*, [1900] A. C. 563. *As to* (2) *Apld. Re Booth, Booth v. Booth*, [1894] 2 Ch. 282.

1041. —.—.]—*Re BOOTH, BOOTH v. BOOTH*, No. 1011, *ante*.

1042. —.—.]—Where a rentcharge or annuity is held by trustees to be applied by them for the maintenance & education of children or the survivor:—*Held*: the children take a joint interest therein, but the shares of the minors are to be applied as directed.—*WILLIAMS v. PAPWORTH*, [1900] A. C. 563; 69 L. J. P. C. 129; 83 L. T. 184, P. C.

1043. Death of infant.—Testator devised estates to trustees, in trust to pay £300 a year for the maintenance, clothing & education of his son's children during the life of their father. The son had three children, all of whom attained twenty-one, & then one of them died:—*Held*: the personal representative of the deceased child was entitled to one-third of the £300 a year during the father's life.—*LEWES v. LEWES* (1848), 16 Sim. 266; 17 L. J. Ch. 425; 60 E. R. 876.

Annotations:—*Reid*. *Presant & Presant v. Goodwin* (1860), 1 Sw. & Tr. 544; *Williams v. Papworth*, [1900] A. C. 563.

1044. —.—.]—Testatrix bequeathed her personal estate to trustees, in trust, amongst other things, to pay & apply £800 in & upon the education of her godson, who was an infant:—*Held*: the whole of the £800 was payable at once, with interest from the end of the first year after the death of testatrix.—*NOEL v. JONES* (1848), 16 Sim. 309; 17 L. J. Ch. 470; 12 Jur. 906; 60 E. R. 893.

Annotation:—*Reid*. *Presant & Presant v. Goodwin* (1860), 1 Sw. & Tr. 544.

1045. —.—.]—Bequest for "maintenance" of a child, held not to cease on his death, but to pass to his representative.

Bequest of leaseholds, in trust to pay half of the rents to A. for life, & the other half to B. for life, & in case of the death of either, his share of the rents "to be paid & applied for the maintenance of his children," until the decease of the survivor of A. & B., & then to sell & divide equally between the children of A. & B. After the death of A., one of his children died:—*Held*: his representative was entitled to a share in the rents until the death of B.—*BAYNE v. CROWTHER* (1855), 20 Beav. 400; 52 E. R. 657; *sub nom.* *MAIN v. CROWTHER*, 3 W. R. 395.

Annotation:—*Apld.* *Attwood v. Alford* (1866), L. R. 2 Eq. 479.

1048. On marriage—During infancy.—*CHAMBERS v. GOLDWIN*, No. 1023, *ante*.

1047. —.—.]—**Payment to husband.**—Maintenance for an infant allowed to the infant's husband.—*SHARMAN v. HEATH* (1834), 3 L. J. Ch. 240.

1048.

—.]—Testator gave his residuary estate real & personal to his exor. & trustee, upon trust to sell & invest the proceeds in 3 per cent. consols & to accumulate same for the benefit of such child or children as his two nephews & niece should leave at their respective deceases, the same to be divided into three equal parts; but in case of death without children then one-third part to go to children of the others, with gift over in case of all dying without leaving issue. Trustee was empowered to apply part for maintenance during minority of the children & for their advancement in life. Trustee sold a considerable part of the estate & invested proceeds on mtge. instead of 3 per cent. consols:—*Held*: trustee was liable to purchase so much 3 per cent. consols as might have been purchased at the fair market price with the sum advanced on the security, at the date of such security, & also to make good the amount of the accumulated fund which would have arisen, if the dividends had been from time to time duly invested; (2) certain sums which had been paid by the trustee for the maintenance of two daughters of testator's niece, after their marriage, but during minority, were proper, & ought to be allowed by the ct.; but the contrary was held as to the sums paid for maintenance by the trustee, after the daughters of the niece had attained their majority.

(3) On the construction of a power of advancement, it was held not to be restricted to their minority, & did not cease by the expiration of the twenty-one years from the date of testator's death, when the power of accumulation ceased.—*PRIDE v. FOOKS* (1840), 2 Beav. 430; 9 L. J. Ch. 234; 4 Jur. 213; 48 E. R. 1248.

Annotations:—*As to* (2) *Reid*. *Conolly v. Farrell, Conolly v. Butcher* (1845), 8 Beav. 347. *As to* (3) *Reid*. *Thorp v. Owen* (1843), 2 Hare, 607; *Conolly v. Farrell, Conolly v. Butcher* (1845), 8 Beav. 347; *Gardiner v. Barber* (1854), 2 Eq. Rep. 888.

1049. —.—.]—Testator directed maintenance for his granddaughter during minority, out of such part as the trustees should deem adequate for the purpose, of the rents, profits, & interest of certain real & personal estate which he devised & bequeathed to her at twenty-one, for her separate use for life, remainder to her children in manner therein mentioned. The granddaughter, having survived testator, & afterwards married at nineteen, was allowed maintenance for the interval until twenty-one.—*COLEMAN v. RACKHAM* (1844), 8 Jur. 556.

1050. —.—.]—Testator bequeathed a house, etc., to his wife, for the use of herself & his daughter, subject to the following trust, "that his wife & daughter should live together, & that his wife should take charge & see to the maintenance & support of his daughter, during her minority, with the instructions of C." He also gave £100 to his wife, in addition to the house, etc., for the further support of herself & his daughter:—*Held*: the widow took absolutely, subject to a trust for the maintenance & support of the daughter, during minority, & which did not cease upon her marriage under age.—*CONOLLY v. FARRELL, CONOLLY v. BUTCHER* (1845), 8 Beav. 347; 14 L. J. Ch. 189; 9 Jur. 242; 50 E. R. 136; *sub nom.* *CONNOLLY v. BUTCHER*, 5 L. T. O. S. 34.

—.]—Testator made a bequest to his exors. of real & personal property, upon trust, to permit & suffer his wife to receive, take, & retain the rents, issues, & profits thereof for her own use & benefit, for the maintenance & education of his children, so long as his said wife should continue his widow & unmarried:—*Held*: a trust was created for the benefit of the children, & this trust was not limited by any particular age or

state of life, but continued during the life or widowhood of the widow. *Qu.*: whether, in this case, a child leaving his mother's establishment is entitled to the benefit of the trust.—LONGMORE v. ELCUM (1843), 2 Y. & C. Ch. Cas. 363; 12 L. J. Ch. 469; 1 L. T. O. S. 311; 63 E. R. 160.

(1845), 4 Hare, 392.

1052. ———.]—*Re* BOOTH, BOOTH v. BOOTH, No. 1011, *ante*.

1053. On leaving maternal home.]—LONGMORE v. ELCUM, No. 1051, *ante*.

1054. ———.]—Gift to a widow, she maintaining & educating testator's son & two daughters thereout, until the son attained twenty-one:—*Held*: the son, who had married & ceased to reside with his mother, but was still a minor, was not entitled to maintenance.—STANILAND v. STANILAND (1865), 34 Beav. 536; 55 E. R. 742.

1055. ———.]—Where the widow of testator is to have the administration of a fund for the maintenance of children, it is reasonable to suppose that testator intended the children to be maintained, so long only as they continued part of the establishment of which their mother was to be the head. If the children become *foris familiati*, & cease to reside with the mother, they can no longer claim to be supported by her out of the fund which she is to administer as head of the family.—MASSEY v. MASSEY (1867), 17 L. T. 233, L. C.

N. Exclusion of Statutory Powers.

See, now, Trustee Act, 1925 (c. 19), s. 31.

1056. Expression of contrary intention—What constitutes—Direction for accumulation of income until contingency.]—The fact that a will contains an express direction to accumulate, & no power of maintenance, will not be a ground for charging the trustee with sums properly paid for maintenance.

A legatee, on coming of age, signed a receipt for principal, & an acknowledgment & discharge for the dividends, as having been paid to her father for her maintenance. Six months afterwards she was paid her share of her father's estate, & executed a formal release to the trustee:—*Held*: she was concluded, & could not maintain a suit against the trustee for the dividends so paid to the father.

Pltf.'s case rests entirely on the direction to accumulate the dividends. Deft., M., in 1846 became the sole surviving trustee. . . . From that time the dividends, instead of being accumulated, were received by the father & applied by him for the maintenance of the children. If he was not of ability to maintain the children, the dividends were properly applied for their maintenance, notwithstanding the trust for accumulation. . . . (TURNER, L.J.).—AVALINE v. MELHUSH (1864), 2 De G. J. & Sm. 286; 10 L. T. 830; 10 Jur. N. S. 788; 12 W. R. 1020; 46 E. R. 386, L. J.J.

Annotations:—*Consd.* *Re* Allan, Havelock v. Havelock (1881), 17 Ch. D. 807. *Reid.* Culbertson v. Wood (1870), 19 W. R. 260.

1057. ———.]—Testator gave a fund to trustees, on trust for all the children of A. equally, who being sons should attain twenty-one, or being daughters should attain twenty-one, or marry, with benefit of survivorship amongst them, & he directed his trustees to accumulate the income of the shares of the children, & to pay the same to them as & when their presumptive shares should become payable under the previous trust:—*Held*: the will did not express a "contrary intent" within the meaning of Conveyancing Act, 1881

(c. 41), s. 43, & the children being infants & unmarried, the trustees might at their discretion apply the income of the trust fund in or towards the maintenance & education of the infants.—*Re* THATCHER'S TRUSTS (1884), 26 Ch. D. 426; 53 L. J. Ch. 1050; 32 W. R. 679.

Annotation:—*Folld.* *Re* Cooper, Cooper v. Cooper, [1913] 1 Ch. 350.

1058. ———.]—Testator by his will, after giving certain annuities to his daughters & a granddaughter, directed his trustees to accumulate the surplus income after providing for these annuities until the death of all his daughters, when the period of distribution was fixed; & after other provisions, the will contained a power of maintenance which was unlimited in duration of time, & expressed to be exercisable during the lifetime of the daughters. Superadded to the power of maintenance was another trust for accumulation of surplus income not applied in maintenance. Upon an application to the ct. by the trustees for directions whether the income of testator's estate was applicable for the maintenance & education of testator's grandchildren:—*Held*: (1) the power of maintenance was unlimited; (2) there was not sufficient evidence upon the face of the will of an intention to cut down the terms of the power of maintenance, which operated as well during the continuance as after the expiration of the trust for accumulation; (3) the grandchildren were therefore entitled to have the income of testator's estate applied towards their maintenance & education.—*Re* SMED, ARCHER v. PRALL (1886), 54 L. T. 929; 2 T. L. R. 535.

1059. ———.]—Gift of residue to include income.]—This will, as I have already pointed out, has given the income during the infancy of the legatee to the residuary legatee, & it has given it not by implication but by express words, because there is an express gift of the residue, & that residue includes the income of the legacy. Therefore the contention on the part of the infant is one as to which a contrary intention has been expressed by testator. It appears to me, therefore, that sub-sect. 3 [of Conveyancing & Law of Property Act, 1881 (c. 41), s. 43], furnishes a complete answer to this appeal (FRY, L.J.).—*Re* DICKSON, HILL v. GRANT (1885), 29 Ch. D. 331; 54 L. J. Ch. 510; 52 L. T. 707; 33 W. R. 511; 1 T. L. R. 331, C. A.

Annotations:—*Consd.* *Re* Jeffery, Burt v. Arnold, [1891] 1 Ch. 671. *Appld.* *Re* Humphreys, Humphreys v. Levett, [1893] 3 Ch. 1; *Re* Clements, Clements v. Pearsall, [1894] 1 Ch. 665. *Consd.* *Re* Holford, Holford v. Holford, [1894] 3 Ch. 30; *Re* Bowlby, Bowlby v. Bowlby, [1904] 2 Ch. 685; *Re* Boulter, Capital & Counties Bank v. Boulter, [1918] 2 Ch. 40. *Reid.* *Re* Medlock, Ruffe v. Medlock (1886), 55 L. J. Ch. 738; *Re* Burton's Will, Banks v. Heaven, [1892] 2 Ch. 38; *Re* Inman, Inman v. Rolls, [1893] 3 Ch. 518; *Re* Eyre, Johnson v. Williams, [1917] 1 Ch. 351. *Mentd.* *Re* Scott, Scott v. Scott, [1902] 1 Ch. 918.

1060. ———.]—Direction to apply accumulations to maintenance.]—Testator, who died in 1909, directed his trustees to appropriate a share of his estate in favour of one of his daughters, & to hold the same & the accumulations, if any, of income made during her minority & coverture upon trust from the time she attained the age of twenty-one years or previously married, to pay the income to her during her life & after her death to hold the capital & income or so much thereof respectively as should not have been paid or applied under any trust or power affecting the same in trust for her issue as therein mentioned with a gift over in default of issue; & testator declared that if at his decease any child or grandchild entitled in expectancy for life or absolutely to a share or the income thereof under his will should

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be under the age of twenty-one years, or being a female should be unmarried, the trustees might apply the whole or any part of the income of such expectant share of such minor for or towards his or her maintenance, & should invest the residue, if any, of the said income & the resulting income thereof at compound interest, to the intent that such accumulations should be added to the principal share from which the same should have arisen & follow the destination thereof, with power for the trustees to resort to the accumulations of any preceding year & apply the same for or towards the maintenance of any person for the time being presumptively entitled thereto. The daughter attained the age of twenty-one years on Oct. 1, 1912, having previously married on June 12, 1912. The share consisted largely of property in Australia, the income of which did not reach the hands of the trustees in this country for many months after it had accrued due. The trustees had applied income for the maintenance of the daughter down to the date of her marriage, when they ceased to do so. On a summons raising the question whether the trustees had power to apply income accruing down to the date of her marriage for the maintenance of the daughter after that date:—*Held*: the maintenance clause in the will did not show a "contrary intention" so as to exclude sect. 43 of Conveyancing & Law of Property Act, 1881 (c. 41), & under that sect. the trustees had power to apply income accruing down to the date of the marriage for the maintenance of the daughter between the date of her marriage & the date of her attaining the age of twenty-one years, but not for any further period.—*Re COOPER, COOPER v. COOPER*, [1913] 1 Ch. 350; 82 L. J. Ch. 222; 108 L. T. 293; 57 Sol. Jo. 389.

Annotation:—*Reid. Re Boulter, Capital & Counties Bank v. Boulter*, [1918] 2 Ch. 40.

1061. ——— Immediate life interest—Destination of accumulations.]—By a will which contained no maintenance or accumulation clauses applicable to residue, testator gave to his granddaughter A. an immediate vested life interest in a share of his residuary estate, with remainder to her children. At the time of testator's death in 1883, A. was an infant, & under the powers of the Conveyancing Act, 1881 (c. 41), s. 43, the trustees applied part of the income of her share for her maintenance & accumulated the remainder. A. married in 1887, & subsequently attained twenty-one, & there was issue of the marriage. It was contended on behalf of her infant child that the accumulations between the death of testator & the marriage of A. must, under Conveyancing Act, 1881 (c. 41), s. 43 (2), be treated, not as income payable to A., but as capital to be invested for the benefit of herself for life, & afterwards for her children as the persons who ultimately became entitled to the property from which such accumulations arose:—*Held*: the gift of an immediate vested life interest to A. was an expression of a "contrary intention" within sub-sect. 3 of sect. 43, so as to exclude the operation of sub-sect. 2, & A. was absolutely entitled to the accumulations.—*Re HUMPHREYS, HUMPHREYS v. LEVETT*, [1893] 3 Ch. 1; 62 L. J. Ch. 498; 68 L. T. 729; 41 W. R. 519; 9 T. L. R. 417; 37 Sol. Jo. 439; 2 R. 436, C. A.

Annotations:—*Expld. Re Woolf, Public Trustee v. Lazarus*, [1920] 1 Ch. 184. *Reid. Re Scott, Scott v. Scott*, [1902] 1 Ch. 918; *Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 686. *Mentd. Re Holford, Holford v. Holford*, [1894] 3 Ch. 30.

1062. ——— Direction against maintenance while living with father.]—Under a voluntary settlement an infant was entitled to a share of £10,000 stock after the death of his mother, a daughter of the settlor, & also to further parts of settled stock contingently on his attaining twenty-one. The trustees of the settlement were empowered by clause 6 at their discretion to apply any part of the income of the £10,000, not exceeding £500 a year, for the maintenance, education, & advancement or otherwise for the benefit of the infant, but by clause 9 no part of the income was to be applied for the maintenance, education or otherwise for the benefit of the infant whilst he should be "in the custody or control" of his father, or his father should "have anything to do with his education or bringing up." The father had no income beyond his captain's pay in the Army & did not wish to give up the custody or control of the infant & his education. Nothing was alleged against his fitness to have the custody of the child.

Upon an application by the infant to obtain an allowance for maintenance:—*Held*: the condition affecting the father of the infant was not repugnant to the interest given by the settlement or contrary to public policy, & the trustees had therefore no discretionary powers of maintenance which they could exercise in the infant's favour.—*Re BORWICK'S SETTLEMENT, WOODMAN v. BORWICK, Re WOODMAN*, [1916] 2 Ch. 304; 85 L. J. Ch. 732; 115 L. T. 183; 32 T. L. R. 583; 60 Sol. Jo. 567.

Annotation:—*Reid. Re Boulter, Capital & Counties Bank v. Boulter*, [1922] 1 Ch. 75.

SECT. 2.—ADVANCEMENT.

SUB-SECT. 1.—IN GENERAL.

See, generally, Trustee Act, 1925 (c. 19), s. 32.

1063. Meaning of "advancement."]—(1) Testator directed his trustees to invest the proceeds of sale of his residuary estate, & to pay the income to his eight sons & daughters in equal shares. The will then contained the following clause: " & I give a power of advancement to my trustees." After the death of the survivor of the children, the corpus of the estate was directed to be paid to testator's grandchildren. The will contained a special power of advancement out of corpus in the case of grandchildren, & a clause of forfeiture in case of a child or other object of the trusts should attempt to anticipate his share:—*Held*: the trustees had no power to make advances out of corpus to the children.

In the absence of express words authorising the payment by way of advancement of part of the corpus of an estate to a person who, under the trust instrument, can never become absolutely entitled to a share of corpus, the ct. will not infer a power to the trustees to advance a sum out of corpus from the mere fact that the instrument contains a power of advancement *simpliciter*.

It [advancement] is a payment to persons who are presumably entitled to, & have a vested or contingent interest in, an estate or a legacy before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled (COTTON, L.J.).—*Re ALDRIDGE, ABRAM v. ALDRIDGE* (1886), 55 L. T. 554, C. A.

Annotation:—*Consd. Re Sparkes, Kemp-Welch v. Kemp-Welch* (1911), 56 Sol. Jo. 90.

1064. ——— Applicable to early life.]—A power in a will for trustees to apply a certain proportion of a fund settled for the separate use of

a married woman, for life, with remainder for her advancement or benefit:—*Held*: under special circumstances, to authorise an advance to her husband, on his personal security, for the purpose of setting him up in trade.

The words of this power are very large; the trustees may apply any part not exceeding half the share at any period of the daughter's life for her advancement—that is a word appropriate to an early period of life—or otherwise for her benefit (*MALINS, V.-C.*).—*Re KERSHAW'S TRUSTS* (1868), L. R. 6 Eq. 322; 37 L. J. Ch. 751; 18 L. T. 899; 16 W. R. 963.

Annotation:—*Reid. Molyneux v. Fletcher*, [1898] 1 Q. B. 648.

1065. Distinguished from "maintenance."—*WALKER v. WETHERELL*, No. 892, *ante*.

1066. —.]—Testator bequeathed a legacy to his infant son, to be paid to him at twenty-one. He also bequeathed a legacy to an infant daughter absolutely. He gave his residue upon trust for all his children equally, & declared that his trustees might raise & apply any part not exceeding one moiety of the expectant share of any child for his or her advancement, preferment, or benefit. The will contained no express provision for maintenance:—*Held*: (1) the clause providing for advancement, preferment, or benefit could not be regarded as a provision for maintenance; (2) Conveyancing & Law of Property Act, 1881 (c. 41), s. 43, must be taken as being incorporated in the will, but there was not, by reason thereof, any such provision for maintenance as to exclude the operation of the rule that legacies to infant children by parents or persons *in loco parentis* carry interest from the death of testator, & therefore, the legacies to the infant son & daughter respectively carried interest by way of maintenance from such date.—*Re MOODY, WOODROFFE v. MOODY*, [1895] 1 Ch. 101; 64 L. J. Ch. 174; 72 L. T. 190; 43 W. R. 462; 13 R. 13.

Annotations:—*As to* (2) *Appld. Re Abrahams, Abrahams v. Bendon*, [1911] 1 Ch. 108. *Generally, Reid. Re Bowlby, Bowlby v. Bowlby* (1904), 73 L. J. Ch. 810; *Re Stewart, Stewart v. Bosanquet* (1913), 57 Sol. Jo. 646.

1067. Whether confined to minority.]—*PRIDE v. FOOKS*, No. 1048, *ante*.

1068. — Express provision in instrument creating power.]—Under a will a mother was tenant for life of a fund, to her separate use, without power of anticipation. After her death the fund was to go to her children as she should appoint by deed or will, & in default of appointment, among her children equally, the shares of sons being vested at twenty-one, & the shares of daughters at twenty-one or marriage. The trustee had power to advance the whole or any part of the share to which each of the children "being a minor" was actually or presumptively entitled:—*Held*: there was no power, even with the consent of the mother, to make an advance to a son who had attained twenty-one.—*CLARKE v. HOGG* (1871), 19 W. R. 617, L. J.

1069. —.]—*Re BREEDS' WILL*, No. 812, *ante*.

1070. Out of very small fund—Father bankrupt —Under the special circumstance of a small fund belonging to the wife of a bkpt. for life, & after to her children, payment of portions ordered for their advancement, & the transfer allowed to be made by the mother only, under Trustee Act, 1852 (c. 55), s. 3.—*Ex p. MILLS* (1853), 21 L. T. O. S. 136; 1 W. R. 380.

1071. Tenant for life—Right of consent to advancement—Whether power of advancement destroyed by assignment of life interest.]—*Qu.*: whether a person having a life interest in a fund, with a right of consenting to the advancement of children out of the capital, destroys the power of advancement by assigning the life interest.—*WHITMARSH v. ROBERTSON* (1842), 1 Y. & C. Ch. Cas. 715; 11 L. J. Ch. 404; 6 Jur. 921; 49 E. R. 246.

1072. Failure of objects for which advancement made—Advance belongs to beneficiary absolutely—Advance for purchase of commission afterwards sold—Trustees not entitled to proceeds.]—*LAWRIE v. BANKES*, No. 320, *ante*.

Advances under Statute of Distributions.]—*See EQUITY*, Vol. XX., pp. 457 *et seq.*

Advances for purpose of hotchpot in wills.]—*See WILLS*.

SUB-SECT. 2.—WHAT IS AN ADVANCEMENT.

1073. Purchase of commission in army.]—Devise of real estate & personal to be laid out & settled with directions to the trustees, out of the rents or residue of his personal estate to raise & pay any money they should think proper & convenient, not exceeding £3,000 for the advancement of pltf. in any business, art or profession, or in any civil or military employment:—*Held*: to be a gift of the money.—*COPE v. WILMOT* (1772), Amb. 704; 1 Coll. 396, n.; 27 E. R. 457.

Annotations:—*Reid. Young v. Young* (1837), 1 Jur. 840; *Re Sanderson's Trust* (1857), 3 K. & J. 497; *Furley v. Hyder* (1872), 41 L. J. Ch. 583; *Re Wintle, Tucker v. Wintle*, [1896] 2 Ch. 711.

1074. Education.]—Gift of income of residuary personalty to nephews, the capital to be paid at twenty-five, with survivorship & a gift over, & direction to apply out of the personal estate, either before investment or afterwards, a sufficient sum, not exceeding the share of each nephew, for his maintenance, education, or establishing in any profession or trade:—*Held*: not to justify an application of capital for education.—*EVANS v. GEACH* (1838), 2 Jur. 758.

1075. Establishment in business.]—*NEWMAN v. CLUTTON* (1851), 17 L. T. O. S. 294.

1076. —.]—*Re HOUSEHOLD, HOUSEHOLD v. HOUSEHOLD*, No. 421, *ante*.

1077. —.]—Testatrix gave to trustees a sum of £10,000 in trust for her infant nephews & niece for life with remainder to their children; & as to the niece, for her separate use, without power of anticipation, with trusts for maintenance during

PART X. SECT. 2, SUB-SECT. 2.
t. Advance to infant daughter's husband.]—A father, before his daughter's marriage wrote a letter to her intended husband, saying he would give her £2,500 when she came of age, & one-fourth of his residuary estate at his death. Before she came of age, the father advanced money to the husband, for which he took his note; but which he charged in his ledger to the joint account of the husband & wife, & intended, if the same was not repaid, to set off the

amount against his daughter's share of his estate:—*Held*: in a suit by the wife in the husband's lifetime for the administration of the estate, the exors. had a right to set off the advance against the wife's share.—*TORRANCE v. CHEWETTI* (1866), 12 Gr. 407.—CAN.

a. Father's intention to advance—Not carried out.]—A father placed one of his sons in possession of certain wild land, & announced his intention of giving it to him by way of advancement. He died without carrying out this intention; but meanwhile the son

had taken possession, & by his improvements nearly doubled the value of the land:—*Held*: the son was entitled to a charge for his improvements, & to have the land allotted to him in the division of his father's estate, provided the present value of the land in its unimproved state would not exceed his share of the estate.—*BIEHN v. BIEHN* (1871), 18 Gr. 497.—CAN.

b. Purchase of land.]—Where money is advanced by a father for the purchase of land, the conveyance of

Sect. 2.—Advancement: Sub-sects. 2, 3 & 4.]

minority, & with power of advancement notwithstanding minority. The niece having attained her majority, & married, & having infant children, the ct. allowed a part of the fund to be advanced to the husband to assist in establishing him in business, upon his assuring his life for the amount, & giving a bond, not to be put in suit without leave of the ct., to secure payment of the premiums & repayment of the principal.—*PHILLIPS v. PHILLIPS* (1853), Kay, 40; 2 Eq. Rep. 362; 23 L. J. Ch. 7; 22 L. T. O. S. 236; 18 Jur. 69; 69 E. R. 18.

1078. —.]—By his will testator declared that the trustees thereof might at any time or times, if they should in their uncontrolled discretion think fit so to do, transfer or pay any part of the capital of the *aliquot* share given to testator's son A., or the investments representing the same, unto A., or to any other person or firm, for the purpose of "establishing" him in business or enabling him to become a partner in any business, whether previously "established" or not:—*Held*: the power of advancement was not limited to giving money to A. for the purpose of starting him in business as distinguished from strengthening & confirming him in a business in which he was already concerned; although whether such advancement should be made or not was altogether a matter for the trustees to exercise their discretion upon.—*Re MEAD, PUBLIC TRUSTEE v. MEAD* (1918), 88 L. J. Ch. 86; 119 L. T. 724, C. A.

1079. Payment to daughter on marriage.]—A power of advancement for putting or placing the issue of the marriage "to any profession, trade or business, or for their advancement in life":—*Held*: to authorise the payment of part of trust funds to a daughter on her marriage.—*LLOYD v. COCKER* (1860), 27 Beav. 645; 29 L. J. Ch. 513; 2 L. T. 9; 6 Jur. N. S. 336; 8 W. R. 252; 54 E. R. 256.

Annotation:—*Distd. Roper-Curzon v. Roper-Curzon* (1871), 24 L. T. 406.

1080. Apprenticeship fee.]—A legacy of £1,000 to be paid to a child at twenty-one, in the meantime to be applied in education, or placing out in business. The infant being seventeen, & the father not of sufficient ability, a portion of the legacy directed to be sold in order to apprentice him to a surgeon, on reference to the master.—*WILSON v. THOMAS* (1834), 4 L. J. Ch. 25.

1081. —.]—Under a power contained in a will, to apply for A.'s advancement in life a portion of his reversionary share, B., the trustee, raised money by mtge. of the share, in order to pay A.'s apprentice premium to an apothecary. It was intended to apprentice A. to X., but it being discovered that X. was not a licenced apothecary, it was arranged by the solr. acting in the matter that A. should be nominally apprenticed to Y., a

licenced apothecary, but actually serve his time with X.

The receipt for the whole amount was signed by Y.; but only half was paid, & that to X., the remaining half being handed over to A.'s father, who gave Y. his promissory note for the amount, but never discharged the obligation.

The purpose for which the money was raised having failed:—*Held*: B., although not shown to have been guilty of more than negligence, in following his solr.'s advice, was bound to bear the consequences of the mistake, & to replace the money borrowed on security of A.'s reversionary share.—*SIMPSON v. BROWN* (1864), 11 L. T. 593; 13 W. R. 312.

1082. To assist emigration.]—Trustees having a power of advancement for the benefit of children, were authorised by the ct. to make an advancement for the passage & outfit of the children with their parents to New Zealand, for the sake of their health, each child's share contributing equally to the passage & outfit of the parents.—*Re LONG'S SETTLEMENT* (1868), 38 L. J. Ch. 125; 19 L. T. 672; 17 W. R. 218.

1083. Payment to trustees of a post-nuptial settlement.]—A power in a marriage settlement to advance to a son of the marriage part of the trust funds for placing or establishing him in any business, profession, or employment, or otherwise for his advancement or preferment in the world:—*Held*: to authorise the payment of part of the trust fund to the trustees of a post-nuptial settlement made by a son in favour of himself & his wife & the issue of their marriage, neither the son nor his wife being entitled to any property producing an immediate income & the son being engaged in study, preparatory to entering the legal profession.

I cannot sanction the advance as the matter now stands: you are simply going to give the son a sum of money which he may put in his pocket; but I am disposed to think that, if he executed a settlement, I might then do it (*ROMILLY, M.R.*).—*ROPER-CURZON v. ROPER-CURZON* (1871), L. R. 11 Eq. 452; 24 L. T. 406; 19 W. R. 519.

SUB-SECT. 3.—EXPRESS POWERS.

1084. Power for particular purpose—Impossibility of exercising power.]—By a deed of settlement a sum of money was settled upon trust for A. for life, & after death for B. for life, or until alienation, & afterwards in trust for B.'s children, & it was declared that the trustees might in their absolute discretion, but with the consent of the first tenant for life, if living, advance any sum not exceeding £2,000 for the promotion in the army of B. The purchase of commissions in the army having been abolished:—*Held*: inasmuch as the

which is taken in the name of his son, the presumption is, that the transaction is by way of advancement to the son. In such a case, there is no resulting trust in favour of the father.—*KNOX v. TRAVER* (1877), 24 Gr. 477.—*CAN.*

c. Question of fact.]—Where a mother makes a purchase in the name of her child, there is no presumption that an advance was intended. In such a case, it is a question of evidence whether there was an intention to advance.—*MOORE v. MOORE* (1895), 1 N. B. Eq. Rep. 204.—*CAN.*

d. Conveyance of land—Accepted by son as advancement.]—A son, in consideration of his father conveying to him certain land, accepted it as an

advancement, in lieu of & in full of all claims & demands against his father's estate:—*Held*: the conveyance by the father to the son was an "advancement."—*Re LEWIS' ESTATE* (1898), 29 O. R. 609.—*CAN.*

e. Children & mother interested in trust settlement—Advances to mother—Not advances to children.]—A testator by his trust-settlement directed his trustees to set apart & secure to each of his daughters in life & their children respectively in fee, the sum of £1,500, it being declared that whatever sums might have already been paid by him to any of his children, & vouched by receipt or other written document, should be accounted as so much of the provision falling to such

child under his settlement. Several years before, testator had, on the occasion of the marriage of one of his daughters, conveyed to her a house, & received from her an acknowledgment, declaring that the conveyance was to be equivalent to £1,000 to account of her patrimony:—*Held*: according to the terms of the settlement, the fee of the provision of £1,500 must be taken to infer a distinct & several estate in the children of his daughter, as of their own right, independent of their mother, & therefore the advance of £1,000 made by testator to his daughter, was not to be deducted from their provision of £1,500.—*HUTCHESON v. ANDERSON'S TRUSTEES* (1853), 15 Durl. (Ct. of Sess.) 570; 25 Sc. Jur. 346; 2 Stuart, 323.—*SCOT.*

power of applying the fund for the promotion in the army of B. could not now be exercised, the trustees could not raise & pay the money to him.—*Re WARD'S TRUSTS* (1872), 7 Ch. App. 727; 42 L. J. Ch. 4; 27 L. T. 668; 20 W. R. 1024, L. JJ.

Annotation:—*Mentd. Re Bowes, Strathmore v. Vane*, [1896] 1 Ch. 507.

1085. ———.]—*Re DE CRESPIGNY, DE CRESPIGNY v. DE CRESPIGNY*, [1886] W. N. 24, C. A.

1086. **Whether applicable to appointed as well as unappointed shares.**—By a marriage settlement made in 1865 the income of the wife's fortune was settled upon trust, as to part thereof for the wife for life, & as to the other part thereof for the husband for life or until bkpcy. or alienation or his doing some act whereby the same or some part thereof would become vested in or payable to some other person. Subject to the trusts aforesaid the husband's & wife's fortunes were settled upon trust (in the events which happened) for their children in such shares " & with such provisions for their respective maintenance, education, & advancement " as the husband & wife should by deed jointly appoint, & in default of such appointment for the children equally at twenty-one or marriage. Then followed the usual advancement clause. In 1896, the husband & wife by deed appointed one equal ninth share of the trust funds to a son on his marriage & the appointed share was settled, & in 1897 they by deed appointed another equal ninth share to another son on his marriage & the appointed share was settled. Neither of these appointments contained an advancement clause. Subsequently the trustees of the 1865 settlement in exercise of their power of advancement raised £4,000 out of their trust funds in respect of each appointed share & paid the same to each of the son's marriage settlement trustees, & the husband & wife released their respective life interests in each of the sums so advanced:—*Held*: the appointments must be read into the original settlement & the advancement clause applied to appointed as well as to unappointed shares.—*Re HODGSON, WESTON v. HODGSON*, [1913] 1 Ch. 34; 82 L. J. Ch. 31; 107 L. T. 607; 57 Sol. Jo. 112.

Annotation:—*Expld. Re Winch's Settlement, Winch v. Winch*, [1917] 1 Ch. 633.

1087. **In whose favour exercisable—Persons next presumptively entitled.**—A special power in favour of issue contained in a marriage settlement was exercised in favour of the infant pltf., the only child of the marriage, in manner following:—The income of the settled fund, after her father's death, to pltf. for life; after her death the capital to her children living on a day named or who should before such day attain twenty-one, or being female marry; but such trust for her children was not to take effect if pltf. was living & under fifty-two years of age on the day named, in which event she was to take the whole fund absolutely; the appointment, however, was not to take effect unless & until pltf. attained twenty-one.

There was a power of advancement in the usual

form in the settlement to the extent of one half of " the expectant or presumptive or vested share " of any child, or " the appointed share " of any child or grandchild of the marriage. The appointment contained a power of advancement in respect of " the expectant or presumptive or vested share " of any child of pltf., but no provision for her advancement:—*Held*: reading the appointment into the settlement, the advancement clause in the settlement was only exercisable in favour of the persons who next under the provisions of the settlement were or would be entitled to an expectant, presumptive, or vested share of the corpus, & did not apply to a person who might become entitled to the corpus upon failure of the prior trusts; & the power of advancement in the settlement was not available for the purpose of providing funds out of capital for the benefit of pltf.—*Re WINCH'S SETTLEMENT, WINCH v. WINCH*, [1917] 1 Ch. 633; 86 L. J. Ch. 403; 116 L. T. 589; 33 T. L. R. 213.

SUB-SECT. 4.—WHERE NO POWERS IN INSTRUMENT.

1088. **General rule—Trustee not liable if court would have approved.**—If an exor. without application to the ct. does what the ct. would have approved, it shall stand.—*LEE v. BROWN* (1798), 4 Ves. 362; 31 E. R. 184.

Annotation:—*Reid. Cory v. Gertcken* (1816), 2 Madd. 40.

1089. **Payment by mother—Duty to provide.**—Legacy to a son not to be paid him till he is of age, no deduction shall be allowed to his mother for his maintenance, etc.—*SMEE v. MARTIN & SPAKEMAN* (1723), Bunb. 136; 145 E. R. 623.

1090. **Payment by father—Duty to provide.**—A bill was brought by pltf. for two legacies of £50 left to himself & his sister under their grandfather's will, & for the interest made of them; deft., who was exor. to pltf.'s father, insisted on being allowed £105 for putting out pltf. apprentice, & £50 for the maintenance & clothing the sister.

A father cannot apply a legacy left by a relation to a child in the maintenance of such child, nor can he put him out an apprentice with the money arising from the legacy.—*DARLEY v. DARLEY* (1746), 3 Atk. 399; 26 E. R. 1029, L. C.

Annotations:—*Reid. Austin v. Austin, Austin v. Boyce* (1876), 46 L. J. Ch. 92. *Mentd. Lee v. Prieaux* (1791), 3 Bro. C. C. 381.

1091. **Power to charge real estate.**—*Re SWANSTON* (1887), 31 Sol. Jo. 427, C. A.

Annotation:—*Reid. Re De Teissier's S E., Re De Teissier's Trusts, De Teissier v. De Teissier*, [1893] 1 Ch. 153.

1092. **For what purposes allowed—Apprenticeship fee.**—Deft. married pltf.'s mother, who was extrix. to her former husband, the father of pltf.s., who devised the sum of £250 amongst pltf.s., three of his children, who being bred up by deft. now sued for those legacies. Deft. alleged that he had maintained them for several years, & given them good education, which cost him much more than the interest; & that he had bound one of them

PART X. SECT. 2, SUB-SECT. 4.

1088 i. **General rule—Trustee not liable if court would have approved.**—Whenever the act done by the exor. or his own authority in breaking in upon the capital of infant's fortune for advancement is such as the ct. would have authorised it will be sustained.—*CARMICHAEL v. WILSON* (1830), 3 Mol. 79, 80, 83.—IR.

1092 i. **For what purposes allowed—Apprenticeship fee.**—Pltf. as administrator *de bonis non* of the estate of the

father of an infant had in his hands as assets the sum of £2,013, to one-third share of which the infant was entitled. Pltf. issued an originating summons under Ord. 55, r. 4, asking for a declaration that he was at liberty to advance £315 out of the infant's share in order to pay an apprenticeship fee to a chartered accountant in order to enable him to learn that business:—*Held*: the ct. had power to sanction the proposed advancement & would do so in the circumstances of the case.—*CURTIS v. CURTIS*, [1901] 1 I. R. 374.—IR.

1. — **Provision of house—For infant's mother & brothers.**—The Ct. of Ch. will sanction an agreement between a minor who has nearly attained his majority & his mother, who had been appointed the guardian of him & of other minors, his brothers & sisters, that the former should join with the latter in bearing the expense of furnishing a house for the joint benefit of the guardian & all the minors, & will direct a transfer of a portion of the trust funds for payment of such portion of the outlay & of costs.—

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apprentice, & given £70 with him; & for this he prayed, that what it stood him in more than the interest, might be allowed him out of the principal. But the ct. would not allow anything out of the principal towards their maintenance, but only the interest, by reason that deft. had married the mother, who was bound to maintain her own children, but for the £70 which was paid to put one of them apprentice, that was allowed out of the principal.—*SWINNOCK v. CRISP* (1681), Freem. Ch. 78; 22 E. R. 1069; *sub nom.* ANON., 2 Vent. 353.

1093. — — —.]—£100 devised to an infant payable at twenty-one, & if he dies before, then it is devised over, & the interest of the £100 is for the child's maintenance. The trustee lays out £20 of the £100 for placing out the child an apprentice, & the child died under twenty-one, this £20 shall be allowed.—FRANKLIN v. GREEN (1690), 2 Vern. 137; 23 E. R. 696.

Annotations:—Mentd. Harvey v. Aston (1740), 2 Com. 726; Hutchins v. Foy & Gover (1740), 2 Com. 716.

1094. — — —.]—MENDES DA COSTA v. DE PAZ (1752), 1 Dick. 168; 21 E. R. 233.

— — —.]—*See, further*, No. 1080, *ante*.

1095. — — — Purchase of commission.]—A fund bequeathed by will, was directed to accumulate till infants should attain twenty-one, deducting annually from the interest such portion as might be necessary for their education & other expenses; with benefit of survivorship in case of either dying under twenty-one; the shares to be vested at twenty-one: the ct., the parties to whom the fund was given over consenting, directed an advancement for the purchase of a commission for one of the infants, but with considerable hesitation.—EVANS v. MASSEY (1826), 1 Y. & J. 196; 148 E. R. 643.

— — — Who entitled to proceeds of commission subsequently sold.]—*See* No. 320, *ante*.

1096. — — — Expenses of emigration.]—Where a father has deserted his children, & is not of ability to maintain them, the ct. will make an order, referring it to the master to approve of a proper person to act in the nature of a guardian, & to inquire whether it will be for the benefit of the infants that a certain sum should be raised out of property to which they are absolutely entitled under a will [for their expenses to India]; & upon the master's report that it is for their benefit, & with the consent of the exors. of that will, the ct. will order the sum to be raised accordingly.—Re ENGLAND'S ESTATE (1830), 1 Russ. & M. 499; 39 E. R. 192.

1097. — — —.]—An infant's share of a residue, amounting to £125, ordered to be paid to his father, on account of the expenses, which the father had been forced to borrow money to defray, of the infant's outfit & passage to India.—CLAY v. PENNINGTON (1837), 8 Sim. 359; Donnelly, 217; 6 L. J. Ch. 183; 59 E. R. 142.

Annotation:—Mentd. Law v. Thorp (1858), 27 L. J. Ch.

PERRY v. PERRY (1870), 18 W. R. 482.—IR.

g. — — — Education.]—Testator left a heritable estate, the rental of which was £900 a year settled upon his only son in life & his children in fee of the income of the personal estate which was £4,600; the son received annually about £2,300 as an alimentary payment for the support of himself, his wife & children, the remaining £2,300 of income being accumulated by the trustees for the

children:—Held: the trustees could pay a sum equal to one-half of the cost of the education of the children in each year including board when from home & travelling expenses, the payment of the trustees not to exceed £500 in any one year.—*MUIR v. MUIR'S TRUSTEES* (1887), 15 R. (Ct. of Sess.) 170; 25 Sc. L. R. 119.—SCOT.

h. — — —.]—CLARK'S TRUSTEES (1895), 22 R. (Ct. of Sess.) 706; 32 Sc. L. R. 571; 3 S. L. T. 35.—SCOT.

k. Where no direction to accumu-

1098. — — —.]—Part of the principal in ct., to which infants were entitled, advanced towards enabling the infants to emigrate with their guardian.—Re CLARKE (1853), 17 Jur. 362.

— — —.]—*See, further*, No. 920, *ante*.

1099. — — — To purchase partnership in solicitor's firm.]—DODD v. WAKE (1852), 5 De G. & Sm. 226; 21 L. J. Ch. 356; 18 L. T. O. S. 345; 16 Jur. 776; 64 E. R. 1092.

1100. — — — Expenses in training as cadet.]—Re LANE, No. 904, *ante*.

1101. — — — Payment of debts.]—RAINES v. RAINES, [1880] W. N. 120.

SUB-SECT. 5.—INTERFERENCE BY COURT WITH DISCRETION OF TRUSTEES.

1102. Trustees refusing to exercise discretion—Reference to master to ascertain whether for infant's benefit.]—KILVINGTON v. GRAY, No. 1029, *ante*.

1103. — — —.]—A will contained an advancement clause of the usual character, giving the trustees a discretion to raise & apply a moiety of the vested share for the benefit of the child, a daughter, as they should think fit. It was arranged that the duty should be paid by instalments, but the child, by reason of the increased cost of living, became unable to pay the last two instalments, & applied to the trustees, who were the widow & the Public Trustee, for assistance. They took out a summons asking the ct. if it was within the discretion of the trustees under the power of advancement to pay the duty out of corpus, & the ct. held that it was. The Public Trustee was willing to exercise the discretion in favour of the daughter, but the widow absolutely refused to assist her daughter because she had married without her approval:—Held: under the circumstances the widow had not exercised a discretion at all, but had in fact refused to exercise any discretion, & the ct. would direct the trustees to raise the duty out of corpus.—*Re KLUG, KLUG v. KLUG*, [1918] 2 Ch. 67; 87 L. J. Ch. 569; 118 L. T. 696; 62 Sol. Jo. 471.

1104. Improper exercise — Extravagance.]—Where testator has given a discretionary power to trustees to apply the income of his estate for the maintenance of an infant, the ct. will not interfere unless the trustees have been guilty of extravagance.—DOUGLAS v. ANDREWS (1839), 3 Jur. 949.

Interference with exercise of powers as to maintenance.]—See Sect. 1, sub-sect. 2, G. 1, *ante*.

SUB-SECT. 6.—LIABILITY FOR EXCESSIVE ADVANCES.

1105. Trustees allowed advances made.]—If a guardian expends more in the maintenance of an infant than the sum allowed, the ct. will not make any reference as to such extra expenditure, unless

g.]—Held: advances made by testamentary trustees to minor beneficiaries out of the income of a fund which had vested in these beneficiaries, but which was not payable until their majority or marriage, & as to which there was no direction to accumulate, were properly made, although the settlement did not expressly confer any power upon the trustees to make advances.—*NORMAND'S TRUSTEES v. NORMAND* (1900), 2 F. (Ct. of Sess.) 726; 37 Sc. L. R. 517; 7 S. L. T. 430.—SCOT.

a special case is made for that purpose.—*RAINSFORD v. FREEMAN* (1787), 1 Cox, Eq. Cas. 417; 29 E. R. 1228, L. C.

1106. — *Though exceeding master's allowance.*—*BELL v. —* (1839), 3 Jur. 501.

1107. — *Although powers of maintenance ceased.*—A person who was tenant for life under a will of a property producing a net income of about £140, died insolvent in 1853, leaving a daughter not a year old, who thereupon became entitled to the property, & a widow. The father was the son of a retired tradesman in a small way of business. In Nov. 1853, the widow being wholly without means of support, an order was made directing the whole income to be applied for the maintenance of the infant, & directing the two persons who were trustees of the will to pay it to the widow for that purpose. One of the trustees died in 1861. In 1863 the widow married a gentleman of good position but small means. No fresh application to the ct. was made, but the surviving trustee went on paying the whole income to the mother till 1873, when the daughter came of age. The daughter then filed her bill, alleging that after her mother's second marriage the payment of the whole income to her was improper, & asking to have an account of the past income, & to have the balance of it paid to herself after deducting a proper allowance for her maintenance & education. It was shown that pltf. had been well educated, & had lived as a lady, that her social position had been much improved by her mother's marriage, & that the income so far as not expended on herself personally, had been applied towards the expenses of the stepfather's establishment, of which she had the benefit:—*Held*: the order for maintenance ceased to be operative on the death of one of the trustees, but the allowance of the whole income for maintenance would, under the circumstances, have been sanctioned by the ct. if applied to on the death of the trustee, & again on the mother's marriage, & the whole income ought, therefore, now to be treated as having been properly applied. On appeal, the decision that the income ought to be treated as properly applied was affirmed, but the ct. was of opinion that the order for maintenance had come to an end only on the marriage of the mother, & not on the death of the trustee.—*BROWN v. SMITH* (1878), 10 Ch. D. 377; 40 L. T. 374; 27 W. R. 588, C. A.

1108. — *Infants destitute.*—*PRINCE v. HINE*, No. 894, *ante*.

1109. — *Exercise before power came into operation—Great distress.*—A trustee *bond fide*

advanced a sum to apprentice an infant, in the life of the infant's father, who was in great pecuniary distress, & while the infant's interest in the trust fund was contingent, & before a power of advancement had come into operation:—*Held*: in taking the accounts as against the trustee, the amount ought to be allowed him.—*WORTHINGTON v. M'CRAER* (1856), 23 Beav. 81; 26 L. J. Ch. 286; 28 L. T. O. S. 154; 5 W. R. 124; 53 E. R. 32.

Annotation:—*Reid. Grove v. Price* (1858), 26 Beav. 103.

1110. *Advance in excess of estate—Trustee allowed balance of estate—After payment of costs.*—Testator authorised his exor. to advance any part, "not exceeding one-half of the presumptive share" of his children, towards their maintenance & advancement. The estate being very small, the exor. advanced more than the whole. The estate being insufficient to repay the amount to the exor., the ct., in a suit by a child for administration, gave priority to the costs of suit, but gave the surplus to the exor. in part payment of his advances.—*ROBISON v. KILLEY* (1862), 30 Beav. 520; 54 E. R. 991.

SECT. 3.—PRACTICE AS TO MAINTENANCE AND ADVANCEMENT.

See, now, R. S. C., Ord. 55, rr. 2 (12), 3, 4.

1111. *Mode of application—By action—If right to maintenance in doubt.*—*FAIRMAN v. GREEN* (1804), 10 Ves. 45; 32 E. R. 760.

Annotation:—*Reid. Ex p. Kebble* (1805), 11 Ves. 604.

1112. — — — — —.]—*Re COLGAN*, No. 829, *ante*.

1113. — — — — — *Or originating summons.*—*Re LOFTHOUSE*, No. 887, *ante*.

1114. — *How intitled.*—*Re LOFTHOUSE*, No. 887, *ante*.

1115. *By whom made.*—*BURBLE v. RUSSELL* (1840), 4 Jur. 859.

1116. *Costs—Raised out of corpus.*—Where infants are absolutely entitled to a trust fund, & the ct. has, on their petition, directed the whole income arising therefrom to be applied for their maintenance & education, the ct. will, the trustees consenting, order the costs of the petition to be raised out of the corpus of the trust fund.—*Ex p. BURNAND* (1844), 3 L. T. O. S. 138; 8 Jur. 458.

1117. — — — — —.]—*Re HOWARTH*, No. 911, *ante*.

Jurisdiction of county courts.—*See County Court Act*, 1888 (c. 43), s. 67 (6).

PART X. SECT. 3.

1. *Mode of application—Originating summons.*—*Held*: the application was regularly made by way of originating notice of motion, & equally so whether the guardians were assenting or dissenting—there being no question involved respecting the ct.'s powers, or the infant's right to the property in question.—*Re ADKINS INFANTS* (1915), 33 O. L. R. 110.—*CAN.*

m. — — — — —.]—There is jurisdiction upon an originating summons to make an order as to the guardian-

ship & care, maintenance or advancement of infants, & thereby to make them wards of ct.—*Re CUNNINGHAMS INFANTS*, [1915] 1 I. R. 380.—*IR.*

n. *Hotchpot.*—A child who has been advanced is bound to bring into hotchpot that wherewith he has been advanced only when it has been so expressed in writing either by the parent or the child so advanced.—*FILMAN v. FILMAN* (1869), 15 Gr. 643.—*CAN.*

o. — — — — —.]—A mother, having survived her first husband, made an advancement to a child, & died intes-

tate as to her own assets, leaving other children:—*Held*: the child advanced was not bound to bring the amount received into hotchpot.—*PRESTON v. GREENE*, [1909] 1 I. R. 172.—*IR.*

p. *Payment into court.*—Where infants are entitled to maintenance out of a fund in the hands of the exor. of their father's will, against whose character or solvency there is no imputation, it is nevertheless their right to have the fund brought into ct.—*Re HUMPHRIES, MORTIMER v. HUMPHRIES* (1899), 18 P. R. 289.—*CAN.*

Part XI.—Care and Custody.

SECT. 1.—JURISDICTION OF COURT.

See Judicature Act, 1925 (c. 49), s. 44 ; Guardianship of Infants Act, 1886 (c. 27) ; Guardianship of Infants Act, 1925 (c. 45).

Crown as parens patriæ.]—See Part II., ante.

1118. Over testamentary guardian—Wider than that over parent.]—(1) In a case of an infant ward of ct. above sixteen, & therefore not falling under Custody of Infants Act, 1873 (c. 12), the ct. has no jurisdiction to interfere with the discretion of the father as to the custody, education, or conduct of his infant child, except in a case where the father is seeking to withdraw the ward from the jurisdiction of the ct., or where the father has been guilty of gross immorality so as to disqualify him from being the guardian of any child, or is influenced by wicked, causeless caprice which must be detrimental to the child's interest. Nor does the fact that the father has himself made his infant child a ward of ct., & asked the intervention of the ct., derogate from his parental authority.

(2) Upon an application for a *habeas corpus*, the question for the consideration of the ct. is, whether the person brought up on *habeas corpus* is under illegal custody without that person's consent. Where, therefore, a child, having attained the age of discretion, fourteen in the case of a boy, sixteen in that of a girl, has been removed from, or has left, the custody of the father, the ct. will not, upon an application by the father for a *habeas corpus*, order the child to be restored to him when the child denies the existence of any illegal constraint & consents to remain where it then is. But an infant under the age of discretion being incapable of consenting, any custody other than that of the father, or the guardian appointed by him, is treated as an illegal custody, & the infant as being under duress & imprisonment ; & on

such an application by the father, that infant will be restored to his custody.

(3) The jurisdiction of the ct. over a testamentary guardian is wider & more readily exercised than over a father, the right of the former being a statutory trust in the discretionary exercise of which by him the ct. will interfere, when it will decline to review a father's discretion, the law recognising the natural rights of the father over his infant children because he has corresponding natural duties towards them.

A father having refused to allow his infant daughter, a ward of ct. over sixteen years of age, to spend a vacation with her mother while the lady in whose care he had placed her was abroad, or to see her mother more frequently than once a month, or to write to & receive letters from her mother without their being perused by him or some one appointed by him, the mother & daughter presented a petition headed in Custody of Infants Act, 1873 (c. 12), for the purpose of obtaining from the ct. the permission refused by the father :—*Held* : the child being over sixteen, & the case, therefore not falling within Custody of Infants Act, 1873 (c. 12), the ct. had no jurisdiction to interfere with the discretion, however unreasonable, of the father, the natural guardian of his infant child, in the absence of gross immorality or of wicked, causeless caprice on his part, & dismissed the petition with costs.

The father has the control over the person, education & conduct of his children until they are 21 years (BRETT, M.R.)—*Re AGAR-ELLIS, AGAR-ELLIS v. LASCELLES* (1883), 24 Ch. D. 317 ; 53 L. J. Ch. 10 ; 50 L. T. 161 ; 32 W. R. 1, C. A.

Annotations :—As to (1) *Expld. R. v. Gyngall*, [1893] 2 Q. B. 232. *Consd. Thomasset v. Thomasset*, [1894] P. 295 ; *Re Newton*, [1896] 1 Ch. 740. *Reid. Re Scanlan* (1888), 40 Ch. D. 200 ; *Re McGrath*, [1893] 1 Ch. 143. As to (2) *Reid. Re Mathieson* (1918), 87 L. J. Ch. 445.

PART XI. SECT. 1.

g. General rule.]—On a bill by a wife for alimony & the custody of children, who are under twelve years of age, the ct. has jurisdiction to grant the latter relief without petition.—*MUNRO v. MUNRO* (1868), 15 Gr. 431.—CAN.

r. —.]—On the application of a husband against his wife for a writ of *habeas corpus* in respect of their three children, two of them being above twelve years of age, & therefore not being within the discretion as to custody given by a local statute framed on the principle of Talfourd's Act, it appeared that the wife had twice left him, taking her children with her, on account of his habitual drunkenness ; that on each occasion he agreed that she should maintain & educate the children apart from him ; that after the second separation he publicly & falsely alleged on oath against his wife charges so injurious that she could not be expected ever to live with him again ; that the wife had ample means, while the husband had only a narrow income :—*Held* : the cts. below exercised a right discretion in discharging the writ & remanding the children to the custody of their mother. The father's legal power was controlled as to the youngest child by a statute which gave absolute authority to the ct. ; it was materially affected as regards the other two by breach of marital duty, by consideration with respect to their welfare, & the objection to separating them from each other.—*SMART v. SMART*, [1892] A. C. 425.—CAN.

t. —.]—In cts. of equity a discretionary power has always been exercised to control the father's or guardian's legal rights of custody.—*Re JOSH Y ASSAM* (1895), 1 L. R. 23 Cal. 290.—IND.

a. —.]—The children had no property whatever, but an undertaking to invest a sum for their benefit was given :—*Held* : the ct. had jurisdiction to direct who should have the custody of the children.—*Re O'MALLEYS (MINORS)* (1858), 8 I. C. L. R. 291 ; *Drury temp. Nap.* 358 ; 11 Ir. Jur. 192.—IR.

b. —.]—Although the ct. has jurisdiction to interfere with the authority of a father over his children, & will, in a proper case, exercise that jurisdiction, whether the children be possessed of property or not, such authority is of a very sacred nature, & ought not to be interfered with except in very extreme cases.—*Re MEADE (MINORS)* (1870), 19 W. R. 313.—IR.

c. —.]—The benefit of the infant is the foundation of the jurisdiction, & the test of its proper exercise. When conflicts of jurisdiction arise, they must be met by adopting that course which in the circumstances shall appear to be most for the benefit of the infant.—*STUART v. MOORE* (1861), 4 Macq. 1 ; 33 Sc. Jur. 445 ; *subsequent proceedings*, 23 Dunl. (Ct. of Sess.) 902.—SC.

d. Married female minor.]—Where it appeared doubtful whether a minor was under or over sixteen, & she had been married by licence with

her own consent, the ct. refused to restore her to the custody of appot. with whom she had been living as an adopted child for some time previous to her marriage, but who was neither her parent nor guardian.—*R. v. BELL* (1857), 15 U. C. R. 287.—CAN.

e. To order adjournment.]—Where the custody of a child was the point at issue between husband & wife, leave was given to postpone the trial of the action until a material witness returned from Europe.—*ARMSTRONG v. ARMSTRONG* (1913), 10 D. L. R. 856 ; 24 O. W. R. 633 ; 4 O. W. N. 1340.—CAN.

f. How altered by statute.]—The power of the Ct. of Ch. now vested in the Supreme Ct. of Ontario, to deal with the custody of infants, can be taken from that ct. only by an enactment couched in the clearest & most positive terms. The Ontario statute 8 Edw. VII. c. 59, respecting neglected children, falls far short of this & in fact recognises the jurisdiction of a judge of the Supreme Ct. to deal with the custody of an infant, notwithstanding that an order as to custody has already been made, under the statute, by a comr. for the trial of juvenile offenders.—*Re MAHER* (1913), 28 O. L. R. 419 ; 4 O. W. N. 1009 ; 12 D. L. R. 492.—CAN.

g. Equal Guardianship of Infants Act, 1917 (c. 27).]—Under sect. 13 of above Act, the ct. has jurisdiction to make an order as to the custody of an infant though the parents may not be "living apart voluntarily" as contemplated under sect. 11 of the Act.—

1119. County court jurisdiction—On apportionment of compensation—For death of father.]—A workman was killed by accident, & the employers paid £300 into ct., with an admission of liability. There were two dependants, the widow & an infant child. The county ct. judge did not apportion the compensation between them, but made an order for certain payments to the widow. An agreement was then entered into between the widow & the child's grandfather, whereby the latter should maintain & have the control & custody of the child, & the widow should pay towards maintenance. The widow broke the agreement & obtained the custody of the child, thereupon the grandfather applied to the county ct. judge to vary the order of Sept., on the basis of the agreement. The county ct. judge made an order that the child should be in the custody of the grandfather:—*Held*: the county ct. judge had no power to deal with the custody of the child, but could only apportion the compensation between the two dependants.—**FLEMING v. ROBURITE Co., LTD., Re FLEMING'S APPLICATION** (1917), 10 B. W. C. C. 176, C. A.

On writ of habeas corpus—To recover custody.]—See Sect. 7, sub-sect. 2, *post*.

In matrimonial causes.]—See HUSBAND & WIFE, Vol. XXVII., pp. 418–420, 533–537, Nos. 4232–4269, 5779–5827.

Wards of court.]—See Part XV., Sect. 2, *post*.

Infant lunatics.]—See LUNATICS

SECT. 2.—RIGHTS OF PARENTS AS TO CUSTODY.

SUB-SECT. 1.—EQUAL RIGHTS.

See, now, Guardianship of Infants Act, 1925 (c. 45), s. 1.

SUB-SECT. 2.—DURATION OF RIGHTS.

1120. Till infant twenty-one.]—Guardianship by the father continues till his son is twenty-one years old, as to his body but not to his lands.—**R. v. THORP** (1697), Carth. 384; 1 Com. 27;

BEFOLCHI v. BEFOLCHI, [1920] 1 W. W. R. 248.—CAN.

h. Judgment of foreign court.]—The ct. will give effect to the judgment of the ct. of a foreign state awarding the custody of an infant to one of the parents.—*Re AYERS*, [1921] 2 W. W. R. 171; *affd.* 16 Alta. L. R. 433.—CAN.

k. Residence.]—The first resp. instituted a suit against applt. in a district ct. by a plaint claiming a declaration that he was entitled to the guardianship & custody of his two minor sons, the added resps., & for an order that they should be handed over to him. The suit having been transferred to the High Ct. under Letters Patent, 1865, s. 13, that ct. declared that the minors should be wards of the ct., that the first resp. was guardian of their persons, & ordered applt. to hand them over to him. The minors were in England both when the suit was instituted & when the order was made; they were not made parties to the proceedings, nor were they represented before the ct.:—*Held*: the district ct. had no jurisdiction, since the minors were not ordinarily resident in the district.—**BESANT v. NARAYANIAH** (1914), L. R. 41 Ind. App. 314.—IND.

l. To order removal from jurisdiction.]—The ct. will not allow or order an infant to be removed out of

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the jurisdiction, at all events when the infant's present situation & maintenance within the jurisdiction is satisfactory to the ct. & to the infant.—*Re HARVEY* (1849), 3 Nfld. L. R. 143.—NFLD.

m. Under Guardianship of Infants Act, 1886.]—A widow who had 3 children by her first marriage, two girls & a boy, married a British subject who was engaged in business in Florence, & she & her husband thereafter permanently settled there. A petition at her instance to have her daughters who were in pupillarity delivered to her was resisted by their uncle their tutor nominate with whom they were at that time residing in Scotland. The ct., having regard to sect. 5 of above Act, granted the prayer of the petition.—**MAQUAY v. CAMPBELL** (1888), 15 R. (Ct. of Sess.) 606; 25 Sc. L. R. 399.—SCOT.

n. —.]—Circumstances in which the ct., on an application by a wife under above Act, made an interim order giving her the custody of her three daughters, all under seven years of age, & an infant son, without ordering inquiry into the facts.—**REID v. REID** (1901), 3 F. (Ct. of Sess.) 330.—SCOT.

o. —.]—The paramount right of a father at common law to the

5 Mod. Rep. 221; Comb. 456; 90 E. R. 824; *nom.* **THORPE'S CASE**, Holt, K. B. 333.

1121. —.]—**R. v. ROTHERFIELD GREYS (INHABITANTS)**, No. 1124, *post*.

1122. —.]—During minority, a person cannot be emancipated unless he marry, & thus become the head of a family, or contract some relation which is altogether inconsistent with, & wholly excludes the parental control. The enlisting in the army, & thus becoming subject to the Crown, is the contracting of such a relation; the authority of the parent being entirely superseded thereby.—**R. v. LYTCHET MATRAVERSE (INHABITANTS)** (1827), 7 B. & C. 226; 1 Man. & Ry. K. B. 25; 1 Man. & Ry. M. C. 55; 5 L. J. O. S. M. C. 156; 108 E. R. 707.

Annotations:—*Reid*. **R. v. Oulton** (1834), 5 B. & Ad. 958; **R. v. Selborne** (1859), 29 L. J. M. C. 11.

1123. Till age of discretion.]—*Re* **AGAR-ELLIS, AGAR-ELLIS v. LASCELLES**, No. 1118, *ante*.

SUB-SECT. 3.—SUSPENSION OF RIGHTS.

1124. General rule—Enlistment in service of Crown.]—A minor, having enlisted into the marines, was discharged from that service, & returned to his father's family before he attained the age of 21 years:—*Held*: he was not emancipated.

By the general policy of the Law of England the parental authority continues until the child attains the age of 21 years; but the same policy also requires that a minor shall be at liberty to contract an engagement to serve the state. When such an engagement is contracted it becomes inconsistent with the duty which he owes to the public that the parental authority should continue. The parental authority, however, is suspended but not destroyed. When the reason for its suspension ceases the parental authority returns (**BEST, J.**).—**R. v. ROTHERFIELD GREYS (INHABITANTS)** (1823), 1 B. & C. 345; 2 Dow. & Ry. K. B. 628; 1 Dow. & Ry. M. C. 294; 107 E. R. 128.

Annotations:—*Appld.* **R. v. Lytchet Matraverse** (1827), 7 B. & C. 226. *Consd.* **R. v. Selborne** (1859), 29 L. J. M. C. 11. *Reid*. **R. v. Scammanden** (1846), 10 Jur. 110.

custody of his children is not affected by Guardianship of Infants Act, 1886, except that the Act allows the ct. to modify or deprive him of the right in certain circumstances should the interest of the children so demand.—**CAMPBELL v. CAMPBELL**, [1920] S. C. 31; 57 Sc. L. R. 75.—SCOT.

PART XI. SECT. 2, SUB-SECT. 1.

p. General rule.]—Under Infants Act, 1914 (c. 153), the status of the mother is in some respects put upon the same plane as that of the father as regards the custody of the child, but where they are rival claimants the morality & fitness of the father not being in doubt, the paramount right of the father is as it was at common law. Where a husband has done no wrong & is able & willing to support his wife & child, the ct. will not take away from him the custody of the child merely because the wife prefers to live away from him.—*Re* **GARWOOD** (1923), 55 O. L. R. 43.—CAN.

PART XI. SECT. 2, SUB-SECT. 2.

q. Residence abroad.]—A father by residing abroad is not deprived of his right to regulate the residence & education of his pupil children in this country.—**PAGAN v. PAGAN** (1883), 10 R. (Ct. of Sess.), 1072; 20 Sc. L. R. 724.—SCOT.

Sect. 2.—Rights of parents as to custody: Sub-sects.

1125. —.]—*R. v. LYCHET MATRAVERSE* (INHABITANTS), No. 1122, *ante*.
See POOR LAW.

SUB-SECT. 4.—LOSS OF RIGHTS.

A. By Agreement or Waiver.

See Custody of Infants Act, 1873 (c. 12).

1126. Delegation to another—Whether revocable—Welfare of infant considered.]—*POTTS v. NORTON* (1792), 2 P. Wms. 109, n.; 24 E. R. 666.

1127. —.]—In consideration of £100 paid by pltf.'s father to A., the latter covenanted to maintain & apprentice the pltf., & that he should take a specified interest in all the real & personal estate which A. should possess at his death; the condition in life of pltf. not having been altered, & no expectation on his part having been defeated:—*Held*: this contract might be put an end to by agreement between pltf.'s father & A.

Semble: if there had been part performance of the agreement altering the condition in life of pltf., then the ct. would not have permitted the father to take him back to his prejudice, & would have compelled a complete performance in his favour.—*HILL v. GOMME* (1839), 5 My. & Cr. 250; 9 L. J. Ch. 54; 4 Jur. 165; 41 E. R. 366, L. C.

Annotation:—*Reid. Green v. Paterson* (1886), 32 Ch. D. 95.

1128. —.]—The father of an infant agreed to let it live with its uncle, who was to maintain & educate it until it was enabled to provide for itself, & the father promised not to take the child away from the uncle, & to pay a certain sum monthly for its support. The agreement was acted on for some months:—*Held*: notwithstanding the agreement, the father was at liberty to revoke his consent to the child's living with its uncle, & the ct., on the child being brought up on *habeas corpus*, was bound to deliver it to its father.—*R. v. SMITH, Re BOREHAM* (1853), Bail. Ct. Cas. 132; 22 L. J. Q. B. 116; 20 L. T. O. S. 212; 17 Jur. 24; 1 W. R. 130.

Annotation:—*Consd. Re Andrews* (1873), L. R. 8 Q. B. 153.

1129. —.]—In a ct. of common law the right of a father to the custody of a legitimate child is absolute & cannot be taken away by the fact that he may have agreed with his wife, the mother of the child, that the child shall be

brought up in a particular manner or taught a particular religion, & this right extends to testamentary guardians appointed by a father under 12 Car. 2, c. 24, s. 8. A person who has been duly appointed under 12 Car. 2, c. 24, s. 8, by the will of a father to be guardian of his child, stands *in loco parentis*, & having, therefore, a legal right to the custody of the infant, may, in order to obtain possession of such ward, claim a writ of *habeas corpus*, which a common law ct. has no discretion to refuse, if the appct. be a fit person & the child too young to choose for itself. Where, however, the validity of the testamentary appointment is disputed, the ct. will direct an issue to be tried by a jury in order to establish the same.

Notwithstanding the existence of an antenuptial agreement between husband & wife that the female issue of the marriage should be brought up in the religion of the wife & notwithstanding the fact that a female child has been for nine years brought up in such a religion, a ct. of common law has no discretion to refuse a writ of *habeas corpus* to compel the custody of the infant to be given to a person appointed guardian by the will of the father, with a direction to educate the child in a religion different from that of the mother.

If the infant be of an age to elect for itself, the ct. will merely interfere so far as to set it free from illegal restraint without handing it over to anybody. The right to such election . . . depends on age alone & not on mental capacity & it may be taken as settled that no such choice can be made, at all events by a female infant under the age of sixteen (*ARCHIBALD, J.*).—*Re ANDREWS* (1873), L. R. 8 Q. B. 153; 28 L. T. 355; 21 W. R. 480; *sub nom. Re EDWARDS (AN INFANT)*, 42 L. J. Q. B. 99; 37 J. P. 325; *subsequent proceedings, sub nom. ANDREWS v. SALT* (1873), 8 Ch. App. 622, L. JJ.

Annotation:—*Reid. Re Byrnes* (1873), 21 W. R. 622.

1130. —.]—By English law the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust & he cannot therefore during his lifetime substitute another person to be guardian in his place. If he affects to do so, the authority conferred upon the substituted guardian is revocable, & the question whether the father is entitled to revoke it depends on the infants' interests, welfare, parentage, & religion.—*BESANT v. NARAYANIAH* (1914), 30 T. L. R. 560, P. C.

1131. —.]—The father of three infant children, whose mother was dead, agreed with

PART XI. SECT. 2, SUB-SECT. 4.—A.

1126 i. Delegation to another—Whether revocable—Welfare of infant considered.]—A father on the death of his wife had, by force of circumstances, been forced to leave his child in an institution. The child, at a later date, was provided with a home by third persons under a verbal agreement with the father that he would not at any time afterwards claim her. Such an agreement is not binding on the father, but as the child was settled in a comfortable & happy home, & the only home offered by the father was one that was likely to prove of a temporary nature, & the ct. was of opinion that it would be hazardous to the child's welfare to remove her, an application by the father for the custody of the child was refused.—*Re WHITFIELD*, [1922] 3 W. W. R. 894; 70 D. L. R. 658; 31 B. C. R. 349.—CAN.

1126 ii. —.]—Parents & guardians cannot divest themselves of their right of guardianship by any

contract. A delegation of such right is revocable at any time, & the parent or guardian is bound to revoke it if it is used to the detriment of the children; & it is open to the ct. within whose jurisdiction the children are found to exercise the same power, if cause is shown for such interference.—*POLLARD v. ROUSE* (1910), 1 L. R. 33 Mad. 288.—IND.

1126 iii. —.]—The father of the infant, who was a farm labourer, died in 1890 leaving a widow & three children of whom H. was the youngest. The mother being in poor circumstances obtained employment as a domestic servant, & placed the children under the care of the Protestant Orphan Society. In Oct. 1897, the mother was in the service of M., a farmer possessed of a substantial farm, & on Oct. 5, 1897, an agreement in writing was entered into between the mother & M., that M. should adopt H., & the mother agreed to give the child to M. & to have no claim on her. Shortly afterwards the mother was

married again to a small farmer. There was no difference of religion between the parties. In the beginning of 1899 the mother demanded the child from M., who refused to give her back unless he was paid for her support & maintenance. On a motion for a writ of *habeas corpus* the judge saw & had a conversation with the child & was satisfied that she regarded with the strongest aversion the idea of returning to her mother, & held that having regard to the handing over of the child under the circumstances disposed to, the character of the mother's evidence, as given in her affidavits & the circumstances & present position of the child, the latter ought not, from the point of view of its own welfare, to be taken from the custody of M.:—*Held*: the mother had not deserted or abandoned her child within Custody of Children Act, 1891, s. 3, & she ought to be given into her mother's custody.—*Re O'HARA*, [1900] 2 L. R. 232.—IR.

1131 i. —.]—A father cannot, as a rule, by mere agreement, deprive

their maternal grandmother, that the children should reside in England for nine months every year, & that she should have the exclusive charge of them during the remaining three months:—*Held*: (1) the ct. could not specifically enforce the first stipulation; (2) the second was void on grounds of public policy.—KENNEDY v. MAY (1863), 1 New Rep. 427; 7 L. T. 819; 27 J. P. 308; 11 W. R. 358.

1132. Abandonment of rights—By deed.]—VILLAREAL v. MELLISH, No. 1219, *post*.

1133. — By assent to will.]—Grandfather cannot appoint guardians of his grandson; but give his estate to him on that condition, & the father submitting, is bound by it.

An infant whose relations were Papists put to school, & ordered that none but Protestants should have access to him. The mother, who was a Papist, to see & correspond with him, under restrictions.—BLAKE v. LEIGH (1756), Amb. 306; 27 E. R. 207, L. C.

1134. — By acquiescence in control by another.]—Jurisdiction of the Ct. of Ch. to control the authority of a father over his infant children. Application of a father, praying that his children might be delivered up to him by an aunt, who was guardian of their fortunes, with a discretionary trust for their maintenance, & with whom he had permitted them to reside for a long time, refused in the circumstances.

After hearing so much about religious principles, it is proper for me to say that I cannot act upon those principles unless they be such as are contrary to the law of the land. The only view in which they are material is, that a father may permit his children to be brought up by other persons of a particular persuasion, so as to make it difficult for the ct. not to see that the happiness of the children must be affected, if interrupted in their course of education in those principles, & that their father would be the author of that suffering to them. . . . The father has so far given his consent to this course of education as to preclude him from saying that he shall now be permitted to break in & introduce a new system of education which cannot be consistent with the system to which they have been habituated (LORD ELDON, C.).—LYONS v. BLENKIN (1821), Jac. 245; 37 E. R. 842.

Annotations:—Consd. *Re Curtis* (1859), 28 L. J. Ch. 458; *Re Newbery* (1865), 12 Jur. N. S. 20. *Appld. Andrews v. Salt* (1873), 8 Ch. App. 622. Consd. *Re Plomley, Vidler v. Collyer* (1882), 47 L. T. 283. *Reid. Knott v. Cotteo*

himself of his right to the custody of his child, or free himself from his parental obligations.—*Re HATFIELD (AN INFANT)* (1895), 1 N. B. Eq. Rep. 142.—CAN.

1131 ii. — — —.]—An agreement by a father to surrender his paternal rights will neither relieve nor bind him. Where a father, on the death of his wife, allowed his child to be given into the custody of other persons owing to his being then so situated that he could not properly care for it, & when able to do so, sought to have the child restored to him:—*Held*: there was nothing in the circumstances to justify the continuance of the separation between father & son.—*Re PORTER* (1910), 15 B. C. R. 454.—CAN.

r. — Welfare of infant considered.]—Where a father enters into a contract whereby he parts with the custody & control of his child, with the *bona fide* intention of advancing the welfare of the child, there is nothing in such a contract illegal or contrary to public policy.—ROBERTS v. HALL (1881), 1 O. R. 388.—CAN.

t. Abandonment of rights.]—The

(1847), 8 L. T. O. S. 462; *Re Preston* (1847), 17 L. J. Q. B. 21; *Re Meade* (1871), 19 W. R. 313; *Re Bosant* (1879), 11 Ch. D. 508; *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1883), 24 Ch. D. 317; *Re Scanlan* (1888), 40 Ch. D. 200; *Re McGrath*, [1892] 2 Ch. 496

1135. — By actual surrender.]—In exercising its jurisdiction over infants, the ct. will allow the interests of the child to prevail over the father's right of custody. Where, therefore, a father has actually surrendered the custody of his child to relatives, who have agreed to maintain & educate it at their own expense, & the ct. recognises that to allow the father to revoke that arrangement & to insist upon having the child returned to him would be injurious to the best interests of the child, the ct. is not under any obligation to make an order for the return of the child.

Pltf., the father of a female infant about ten years of age, brought an action against his half-brother & wife claiming a *mandamus* against them requiring the restoration of the custody of his child. The child came into the custody of defts. in the following circumstances. Defts. were childless. Pltf.'s child in question was one of seven living brothers & sisters. The family lived in a crowded district, & the child had been weakly & unhealthy during her infancy. When she was just under two years old she was taken by pltf. to defts.' house, which was situated in a healthy neighbourhood. She continued to live with defts. until she was brought back to her parents, with whom she stayed six weeks. In Aug. 1911, it was arranged between pltf. & defts., the latter having come to see the former with that express object, that the child should again be taken by defts. to live with them, to be brought up & adopted by them as their own child. Medical evidence was adduced to show the benefit that the child derived from her residence in defts.' home:—*Held*: the facts of the case showed that it would be detrimental to the best interests of the child that she should be removed from the care & custody of the relatives with whom the parents had placed her; & therefore no order ought to be made disturbing the present position in any way.—*Re MATHIESON* (1918), 87 L. J. Ch. 445; *sub nom. MATHIESON v. NAPIER*, 119 L. T. 18, C. A.

B. By Choice of Infant.

1136. General rule.]—On a question with whom infant should reside, infant's inclination of weight,

ought to separately examine the infant & adopt its wishes on the subject.—*R. v. REDNER* (1898), 6 B. C. R. 73.—CAN.

1136 iii. — — —.]—If a child of sixteen is minded to leave his father's house he cannot be reclaimed by *habeas corpus* or otherwise.—*TUXFORD v. TUXFORD* (1916), 10 W. W. R. 598; 34 W. L. R. 419.—CAN.

1136 iv. — — —.]—A male child above the age of 14 & a female child above the age of 16 years will not ordinarily be compelled to remain in custody to which he or she objects; & in the case of younger children who are still old enough to form an intelligent preference, their wishes will form one of the elements for consideration.—*POLLARD v. ROUSE* (1910), 1 L. L. R. 33 Mad. 288.—IND.

1136 v. — — —.]—If the infant is capable of forming intelligent opinions the ct. must take them into consideration. There is no hard & fast rule obtaining in England that the ct. has no option but to give effect to the wishes of an infant of over 14 if a boy, & over 16 if a girl, without reference to its mental

parents of a child were foreigners. They lived apart, & had brought cross-actions for divorce in the United States Cts., the husband complaining of adultery, & the wife of cruelty. The child was placed by the father in custody of a person in Canada. The wife had given a formal document to her husband renouncing all claim to the custody of the child:—*Held*: the mother, having voluntarily given up the custody of the child to the father, could not, under the present facts, have it redelivered to her.—*Re KINNEY* (1875), 6 P. R. 245.—CAN.

PART XI. SECT. 2, SUB-SECT. 4.—B.

1136 i. General rule.]—The order of the ct. commanding the wife to deliver the child to the husband is sufficiently complied with by her placing the child in charge of the husband. If the child return of her own will to the mother, & is not afterwards forcibly detained, the ct. will not further interfere.—*R. v. SHERRIFF* (1850), 7 U. C. R. 403.—CAN.

1136 ii. — — —.]—Where an infant has attained the age of sixteen the ct.

Sect. 2.—Rights of parents as to custody: Sub-sect. 4, B.; sub-sect. 5. Sects. 3 & 4: Sub-sect. 1.]

where no imputation.—ANON. (1751), 2 Ves. Sen. 374; 28 E. R. 240, L. C.

Annotation:—Refd. Thomasset v. Thomasset, [1894] P. 295.

—R. v. GREENHILL, No. 1179, *post*.

—Where a parent seeks to obtain the custody of his infant child of the age of twelve years, both parents being alive, but residing in separate establishments, the ct. will consult the wishes of the infant as to his parental residence, before it makes any order.—LANGSTON v. COZENS (1847), 10 L. T. O. S. 50.

1139. —.—*Re* AGAR-ELLIS, AGAR-ELLIS v. LASCELLES, No. 1118, *ante*.

1140. At what age entitled to choose—Not under fourteen.]—HYDE v. HYDE, No. 1356, *post*.

1141. —.—Female infant—Not under sixteen.]—R. v. HOWES, *Ex p.* BARFORD, No. 1236, *post*.

1142. —.—*Re* ANDREWS, No. 1129, *ante*.

1143. —.—Age thirteen.]—*Ex p.* HOPKINS (1732), 3 P. Wms. 152; 24 E. R. 1009, L. C.

Annotations:—Consd. Re Preston (1847), 17 L. J. Q. B. 21; R. v. Gynall, [1893] 2 Q. B. 232. Refd. Re Agar-Ellis, Agar-Ellis v. Lascelles (1883), 24 Ch. D. 317; Thomasset v. Thomasset, [1894] P. 295. Mentd. Re Spence (1847), 16 L. J. Ch. 309.

SUB-SECT. 5.—RIGHTS OVER BASTARDS.

See Part XIX., post.

SECT. 3.—RIGHTS OF GUARDIAN AS TO CUSTODY.

1144. Testamentary guardian.]—R. v. JOHNSON, No. 1237, *post*.

1145. —.—*Re* ISLEY, No. 1231, *post*.
Recommendation in will conflicting with guardian's rights—Effect.]—Words of re-

capacity. Even if such a rule prevails in England it is inapplicable to India.—SARASWATHI AMMAL v. DHANAKOTI AMMAL (1924), 1 L. R. 48 Mad. 299.—IND.

1140 i. At what age entitled to choose—Not under fourteen.]—Where a deaf & dumb boy more than fourteen years of age is brought up under a writ of *habeas corpus* sued out by his father to obtain the custody of his son, & for the purpose of removing him from what he alleged was a proselytising institution, the ct. will not deliver the boy into the father's custody, but will inform him that he is at liberty to go where he pleases, & that the ct. will protect him either in remaining or going, as he wishes; & where the boy can write, for the purpose of preventing any undue influence on the part of the master of the establishment where the boy was, one of the ct. will examine him in chambers, in the master's absence, for the purpose of ascertaining the boy's wish, which, being reported to the ct., they will make an order according to such choice.—*Re* SHANAHAN (1852), 20 L. T. O. S. 183.—IR.

1140 ii. —.—*Re* The parties to whom a writ of *habeas corpus* sued out by the father of a male infant was addressed returned that the infant at the time of the issue of the writ was over 14 years of age & under 16:—*Held*: the father's application must

be refused, inasmuch as at the age of 14 a male infant is at liberty to exercise a discretion as to his own place of abode.—*Re* CONNOR (1863), 16 L. C. L. R. 112.—IR.

1141 i. —.—Female infant—Not under sixteen.]—A girl aged thirteen years & ten months, who had lived with her aunt from her infancy, was allowed, on an application by her father for her custody, on allegations that she was ill-treated by her aunt, to elect whether she would remain with her aunt, or go to her father. *Semble*: if the child had recently left or been taken away from her father, she would be ordered to return to him without reference to her own choice, at all events up to the age of sixteen.—*Re* KINNE (1870), 5 P. R. 184.—CAN.

PART XI. SECT. 3.

1144 i. Testamentary guardian.]—A father domiciled & resident in Scotland left a trust disposition & settlement by which he directed his trustees on the death of his wife to expend so much of the income of the estate as they might think proper as his pupil son's maintenance & education, "declaring that any trustees shall have the fullest control in reference to the party or parties to whom the said annual proceeds or part thereof are to be paid." He did not nominate any guardian of his son. His widow died in Canada, leaving a will dated on the day of

commendation or desire in a will, will not raise a trust if such construction would conflict with other provisions of more definite & positive import in the same instrument; but the ct. will give such effect to them as may not be inconsistent with those provisions. A testamentary guardian will be directed to have unlimited access to his wards notwithstanding testator has pointed out other persons to have the care of the education of his infant children.

A father having by his will appointed a guardian to his children, with a recommendation that, in the event of their mother's death during their minorities, they should be placed under the care of two female relations, on a contest between those ladies & the testamentary guardian, in reference to the management of the children after the mother's death:—*Held*: the ct. was bound to give effect to the recommendation, but not further than might be consistent with preserving to the testamentary guardian the general superintendence & control over the children & their fortunes, which, by virtue of his office, it was his right & duty to exercise.—KNOTT v. COTTEE (1847), 2 Ph. 192; 8 L. T. O. S. 462; 41 E. R. 915, L. C.

Annotation:—Mentd. Ware v. Mallard (1851), 18 L. T. O. S. 194.

1147. —.—Stands in loco parentis.]—*Re* ANDREWS, No. 1129, *ante*.

1148. Deprivation of custody—Discretion of court.]—SHILLITO v. COLLETT, No. 1200, *post*.

1149. —.—If for child's benefit—Though no misconduct by guardian.]—R. v. GYNGALL, No. 25, *ante*.

1150. —.—Wishes of testator—For care by third person.]—Testator by his will & codicil having expressed his wish that his deceased wife's sister should take charge of his children, & the guardian of her children having objected to her doing so:—*Held*: unless a case were made against the propriety of the children remaining in charge of the party named in the will, the ct. would give effect to the directions of testator.—HARTLEY v. SMITH (1862), 6 L. T. 734; 10 W. R. 763, L. JJ.

—*Compare* Part XIII., Sect. 7, *post*.

her death by which she [*inter alia*] appointed a domiciled Canadian lady to be guardian to her son who was then resident with her, but whose domicile was in Scotland. The pupil having returned to Scotland, & the trustees having made arrangements for his maintenance & education there, the guardian under the mother's will presented a petition in which she prayed the ct. to find her entitled to the custody of the pupil & to ordain the trustees to deliver him to her. The trustees disputed the validity of petitioner's appointment on the ground that she was domiciled abroad, but stated that they were willing that she should have the custody of the child if she could satisfy them that that course was proper in its interests. The ct. refused the petition *in hoc statu*, holding petitioners had not made a sufficient disclosure of her circumstances to justify the ct. in giving her the custody of the child.—FENWICK v. HANNAH'S TRUSTEES (1893), 20 R. (Ct. of Sess.) 848; 30 Sc. L. R. 760; 1 S. L. T. 88.—SCOT.

a. Loss of right—Misconduct.]—A girl aged fourteen was taken by a refuge home from the custody of a person standing in loco parentis, who was proved to be leading a bigamous life:—*Held*: in *habeas corpus* proceedings such person had lost his right to the custody of the infant.—*Re* SOY KING (AN INFANT) (1900), 7 B. C. R. 291.—CAN.

SECT. 4.—GROUNDS FOR GRANTING, REFUSING OR REMOVING FROM CUSTODY.

SUB-SECT. 1.—SAFETY AND WELFARE OF INFANT.

See Guardianship of Infants Act, 1925 (c. 45), s. 1.

1151. Outweighs father's rights.] — R. v. GYNGALL, No. 25, *ante*.

1152. —.]—THOMASSET v. THOMASSET, No. 26, *ante*.

1153. —.]—Re MATHIESON, No. 1135, *ante*.

1154. Essential for safety & welfare.] — Re FYNN, No. 1160, *post*.

1155. —.]—Re GOLDSWORTHY, No. 24, *ante*.
1156. —.]—The jurisdiction of the ct. in these cases does not depend upon property. The ct. has to consider what is for the benefit of the infant in a case in which no suggestion is made against the character of the father. . . . It is very much better for this boy in this position of life that he should be with his father in Manitoba, learning from him the business which he is able to teach. . . . I have no hesitation in saying that the father's choice is the better choice, & that the proposed interference with the rights of the father is one which the ct. ought to discountenance. . . . The order will be that the father will be at liberty

PART XI. SECT. 4, SUB-SECT. 1.

1151 i. *Outweighs father's rights.*—The father of a child five months old, her mother being dead, gave her into the custody of her maternal grandparents, & left her in their custody until she was nine, & by certain acts the father in the opinion of the majority of the ct. indicated his intention to abandon his right to her custody in favour of the grandparents, but had not otherwise disentitled himself to his natural right of the custody of the child. The father having married again shortly after his first wife's death, had by his second wife four other children. The grandparents were desirable guardians, & the child was happy with them:—*Held*: in the circumstances, it would be injurious to the child's welfare to make such a change of custody, & therefore, the ct. should refuse to make an order for her to be handed over to her father.—*GOLDSMITH v. SANDS* (1907), 4 C. L. R. 1648.—AUS.

1151 ii. —.]—The question who should have the custody of a child, the dominant matter is the welfare of the child. A husband & wife had lived apart for over a year, & the only child of the marriage, a girl of three years of age, had always lived with her mother. There was no evidence to show that the mother was not a fit person to have the custody of the child. On a writ of *habeas corpus* issued by the father to obtain from his wife the custody of the child:—*Held*: it was for the child's welfare that she remain with her mother.—*MOULE v. MOULE* (1911), 13 C. L. R. 267.—AUS.

1151 iii. —.]—The Ct. of Ch. has not heretofore interfered, & cts. of common law will not interfere to deprive the father of his exclusive common law right to the custody of the children, except in cases where it is essential to their welfare & well-being, either physically, intellectually, or morally, that they should so interfere.—*Re CARSWELL* (1875), 6 P. R. 240.—CAN.

1151 iv. —.]—Upon an application by the father of two infants under the ages of five & three respectively, for a *habeas corpus* to obtain their custody from the mother, it appeared that appet. was a man of drunken habits & of evil conversation, that he had beaten his wife & so ill-treated her that she was justified in leaving him, while she was a moral & sober woman. It was also shown that the maternal grandmother of the infants was able & willing to give them a home with their mother, who lived with her, while the paternal grandmother was neither able nor willing to do so:—*Held*: having regard to the welfare of the infants & the conduct of the parents, the mother should have the custody for the present.—*Re DICKSON* (1888), 12 P. R. 659.—CAN.

1151 v. —.]—*Re ARMSTRONG* (1895), 1 N. B. Eq. Rep. 208.—CAN.

1151 vi. —.]—The *prima facie* common law right of the father to the custody of his infant may be disregarded upon evidence showing that

it is against the interests of the child to give him such custody.—*Re EVANS* (AN INFANT) (1913), 28 W. L. R. 203; 5 W. W. R. 919; 15 D. L. R. 218.—CAN.

1151 vii. —.]—*Re CAMERON* (1913), 10 D. L. R. 814; 24 O. W. R. 160; 4 O. W. N. 876.—CAN.

1151 viii. —.]—*TUXFORD v. TUXFORD* (1916), 10 W. W. R. 598; 34 W. L. R. 419.—CAN.

1151 ix. —.]—*Re O.*, [1920] 3 W. W. R. 394.—CAN.

1151 x. —.]—The ct. dismissed the application of a father to obtain the custody of a five-year-old child which since shortly after its birth had lived with its maternal grandparents, & was infected with tuberculosis, from which its mother had died a year after its birth, & was extremely nervous & likely to suffer from a present change of care, although another physician, who examined the child during the trial, testified that he found it quite healthy, & although the father had remarried a year after the death of his wife to a young widow who had had no children of her own, but stated that she had taken care of those of relatives, & his house, although not as large as that in which the grandparents & their four grown children lived, was, in the opinion of the ct., sufficient for the proper bringing up of a child.—*Re EMMONS*, [1922] 2 W. W. R. 249; 67 D. L. R. 218.—CAN.

1151 xi. —.]—Where a child was settled in a comfortable & happy home, & the only home offered by the father was one that was likely to prove of a temporary nature, & the ct. was of opinion that it would be hazardous to the child's welfare to remove her, an application by the father for the custody of the child was refused.—*Re WHITFIELD*, [1922] 3 W. W. R. 894; 70 D. L. R. 658.—CAN.

1151 xii. —.]—Generally speaking it is to the advantage of the child to be brought up, directed & disciplined by its parent or parents. To deprive a parent of the right to custody there must be something substantial & real, some definite & clear reason that makes it evident that his custody would be against the child's best interest.—*Re MACKAY*, [1923] 3 W. W. R. 369.—CAN.

1151 xiii. —.]—*Re STEACY* (1923), 52 O. L. R. 579.—CAN.

1151 xiv. —.]—If the custody of a child is in issue, the most important fact to be taken into account is the child's wellbeing.—*Re RICHARDSON*, [1924] 2 D. L. R. 593.—CAN.

1151 xv. —.]—*Re JOSHY ASSAM* (1895), 1 L. R. 23 Calc. 290.—IND.

1151 xvi. —.]—*POLLARD v. ROUSE* (1910), 1 L. R. 33 Mad. 288.—IND.

1151 xvii. —.]—*Re ELLIOTT* (AN INFANT) (1893), 32 L. R. Ir. 504.—IR.

1151 xviii. —.]—*Re MCGIRR* (1891), 7 Nfld. L. R. 560.—NFLD.

1151 xix. —.]—The common law rights of a father to the custody & control of his children have been en-

croached upon by statute, & the ct. may now, under Infants Act, 1908, grant the custody of the children to the mother. Where a father asks for a writ of *habeas corpus* to take a child out of the custody of its mother, the ct. is not confined to granting or refusing the writ, but can give effect to Infants Act, 1908, although no application under sect. 6 has been made by the mother. In considering the question of custody & access under sect. 6, the ct. has to have regard, first, to the welfare of the infant; secondly, to the conduct of the parents; & thirdly, to the wishes as well of the mother as of the father. The rights of the father are not to override the wishes of the mother.—*Re THOMSON* (1911), 30 N. Z. L. R. 168.—N.Z.

1154 i. *Essential for safety & welfare.*—The ct. must be satisfied not merely that it is better for the child, but essential to its safety or welfare in some very serious & important respect, before it will interfere with the father's rights.—*Re HATFIELD* (AN INFANT) (1895), 1 N. B. Eq. Rep. 142.—CAN.

1154 ii. —.]—While the welfare of the infant is in one sense paramount, the paternal right to custody & control is supreme, unless a very extreme case can be made out showing that it is imperative for the protection of the child that the ct. should interfere with that right.—*Re FAULDS* (1907), 12 O. L. R. 245; 7 O. W. R. 867.—CAN.

1154 iii. —.]—The ct. will not grant a writ of *habeas corpus* to a parent for the restitution of his child unless they are satisfied such parent is a fit person, having regard to all the circumstances of the case, & especially to the interests of the child, to have the control of the child.—*Re SKRFFINGTON* (1908), 43 I. L. T. 245.—IR.

b. *Welfare.*—There was a contest in the surrogate ct. between the stepfather & uncle for the guardianship of a child of ten or eleven years old; the child preferred her stepfather, & the surrogate ct. appointed him guardian; but the Ct. of Ch. on appeal, being satisfied that it was for the real interest of the child that the uncle should be guardian, reversed the order below.—*Re IRWIN* (AN INFANT) (1869), 16 Gr. 461.—CAN.

c. —.]—The mother of a child six years of age, whose father was dead, having remarried, delivered up the child to a cousin for nurture & adoption. No written agreement was made, & the parties differed as to the oral understanding:—*Held*: the ct. looking only to the best interests of the child, should refuse to direct its redelivery to the mother.—*Re SCOTT* (1879), 8 P. R. 58.—CAN.

d. —.]—The provision of R. S. O. 1897, c. 168, s. 1, with regard to the custody of infants, recognises the maternal as well as the paternal right, & requires equal regard to be paid to the wishes of the mother as to those of the father; & thus, where the wishes of the mother are opposed to those of the father, the principal matter to be considered is the welfare

Sect. 4.—Grounds for granting, refusing or removing from custody: Sub-sects. 1 & 2, A., B. & C.]

to take the son with him to Manitoba (KAY, J.).—*Re PLOMLEY, VIDLER v. COLLYER* (1888), 4 T. L. R. 256.

1157. Religious opinions.]—*Re CURTIS*, No. 1170, *post*.

—As ground for removal of guardian.]—*See Nos. 1490, 1491, post*.

Statutory jurisdiction to remove guardians—In case of divorce or judicial separation.]—*See Guardianship of Infants Act, 1886* (c. 27), ss. 6, 7; *HUSBAND & WIFE*, Vol. XXVII., p. 535, Nos. 5793–5796.

SUB-SECT. 2.—FATHER.

A. In General.

See, now, Guardianship of Infants Act, 1925 (c. 45).

1158. Custody detrimental to child.]—If [the father] abuse that right to the detriment of the child the ct. will protect the child (LORD ELLENBOROUGH, C.J.).

The father of a child is entitled to the custody of it, though an infant at the breast of its mother ;

of the children.—*Re YOUNG* (1898), 29 O. R. 665.—CAN.

e. —.]—A child being a female under sixteen, the age of consent or election as to her custody, her choice should not be considered, but her welfare & wellbeing only.—*Re QUAI SHING* (1898), 6 B. C. R. 86.—CAN.

f. —.]—*Re HUTCHINSON* (1913), 28 O. L. R. 114; 4 O. W. N. 777.—CAN.

g. —.]—The custody of four infant children was, upon application for a *habeas corpus*, awarded to the mother as against the father, *appet.*, upon the ground that it would be in the best interest of the children to remain in the custody of their mother.—*Re BAYLIS INFANTS* (1913), 25 W. L. R. 181; 13 D. L. R. 150; 7 Alta. L. R. 54.—CAN.

h. —.]—The common law rule which gave the custody of children to the father has been largely cut down. The wide discretion in such cases given to the ct. is now invariably exercised in the children's interests. Where the parents of the children were living apart & the judge at chambers decided in the interests of the children that it would be best to leave them in the custody of the guardian appointed by the father, the ct. declined to interfere, no case justifying such interference having been made out. Where it appears to be necessary, the ct. will make the granting of the order, respecting the guardianship of infant children, conditional upon the giving of an undertaking to keep them away from objectionable influences.—*Re CHISHOLM* (1913), 47 N. S. R. 250; 13 D. L. R. 811; 13 E. L. R. 182.—CAN.

k. —.]—Upon a contest between the father & mother of a child, a girl of 11 years, as to her custody:—*Held*: the mother was justified by the misconduct of her husband, the father, in leaving him, & having regard to the welfare of the child, the custody should be awarded to the mother.—*Re WILKITES* (1919), 45 O. L. R. 181; 15 O. W. N. 434.—CAN.

l. —.]—*BEFOLCHI v. BEFOLCHI*, [1920] 1 W. W. R. 248.—CAN.

m. —.]—*Re C.*, [1922] 1 W. W. R. 1196; 67 D. L. R. 630.—CAN.

n. —.]—The true principle deducible from the authorities by which the ct. should be guided in custody cases is that the ct. is to judge upon

circumstances of each particular case, & that the welfare of the infant, irrespective of its age, is the main feature to be regarded.—*Re SATHIRI, JAINOO v. ABRAMS* (1891), 1 L. R. 16 Bom. 307.—IND.

o. —.]—The discretionary power of the ct. as to the custody of children on a return to a writ of *habeas corpus* is exercised so as to secure the welfare of the children.—*Re STORY*, [1916] 2 I. R. 328; 50 I. L. T. 123.—IR.

p. —.]—The ct. being of opinion that it was for an infant's benefit to leave him in his present custody, refused the mother's application for a writ of *habeas corpus*.—*Re BOYD*, [1918] 2 I. R. 579.—IR.

q. —.]—*Held*: 1 & 2 Vict. c. 56, s. 53, imposed an obligation on the father to support & maintain his infant illegitimate son, which obligation the father had been willing to fulfil, & had fulfilled until prevented by an act of the mother, & therefore the father was *prima facie* entitled to the custody of the child; but even if the wishes of the mother were to be primarily considered, it was not for the benefit of the child to remove him from the custody of a person bound & willing to support him to the custody of a person unknown to the father & to the ct.—*Re GAVAGAN*, [1922] 1 I. R. 148.—IR.

r. —.]—*Re CRADDOCK, CRADDOCK v. CRADDOCK*, [1924] N. Z. L. R. 1148.—N.Z.

t. —.]—*MITCHELL v. WRIGHT* (1905), 7 F. (Ct. of Sess.) 568.—SCOT.

PART XI. SECT. 4, SUB-SECT. 2.—A.

a. General rule.]—The ct. will interfere with the paternal rights only in cases of very great misconduct.—*Re BLACK*, Cong. Dig. (1834–1889), pp. 646, 647.—CAN.

b. —.]—A father being in poor circumstances left his infant daughter, then aged seven years, with her uncle & aunt, upon the understanding that she should be considered as their child, & that they should support & educate her as such. She remained with her uncle & aunt until she was nearly fifteen years of age, & was educated by them, became much attached to them & was unwilling to leave them, her father contributing nothing toward her support, nor

if the ct. see no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the Kingdom; the father being at the time an alien enemy domiciled in this Kingdom & the mother being an Englishwoman, & apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such her apprehension.—*R. v. DE MANNEVILLE* (1804), 5 East, 221; 1 Smith, K. B. 358; 102 E. R. 1054.

Annotations:—*Appld. Ex p. Skinner* (1824), 9 Moore, C. P. 278. *Reid. R. v. Smith, Re Borcham* (1853), 22 L. J. Q. B. 116; *Ex p. Young* (1855), 26 L. T. O. S. 92; *R. v. Clarke* (1857), 7 E. & B. 186.

1159. —.]—*Re HALLIDAY'S ESTATE, Ex p. WOODWARD*, No. 1172, *post*.

1160. General bad character.]—(1) Before the jurisdiction of the ct. to deprive a father of the guardianship of his children can be called into action, the ct. must be satisfied that the father has so conducted himself, or placed himself in such a position, as to render it not merely better for the children, but essential to their safety or welfare, that the father's rights should be interfered with, except in the cases within 2 & 3 Vict. c. 54. Although the circumstance of the children being in the custody of the mother excludes the operation of 2 & 3 Vict. c. 54, the provisions of that Act are

interfering with her in any way during that time. On an application by the father for a *habeas corpus* to obtain the possession of the child:—*Held*: he had a legal right to assume the custody of her, there being no imputation against her father's character, or that she would not be properly cared for in his house.—*Re CORAM* (1886), 25 N. B. R. 404.—CAN.

c. —.]—The ct. refused to give the custody of children to their mother, who was able to provide for their moral & physical welfare, when she left her husband, without a valid reason & refused to return, & he was equally able to provide for them. The father has the legal right to the custody of his children, & the ct. will not deprive him of that right when he is guilty of no wrong, & is able to support them, even though it thinks that living with the father apart from the mother may be less beneficial to the infants than living with their mother, apart from the father.—*ST. THOMAS v. ST. THOMAS* (1921), 48 N. B. R. 132.—CAN.

d. —.]—The father, if a proper person, cannot be deprived of his legal right to the custody of his legitimate children of whatever age. 2 & 3 Vict. c. 39, which gives a discretionary power to a judge in England, has not been extended to this country; therefore the law applicable to cases which occurred in England previous to the passing of that statute is applicable here.—*Re HOLMES* (1862), 1 Hyde, 99.—IND.

aa. —.]—The ct. having ascertained as the result of an examination of the child by one of the members of the ct. that it was under no apprehension of ill-treatment by either of its parents, & regarded both with affection, found the father entitled to the custody.—*MARCHETTI v. MARCHETTI* (1901), 3 F. (Ct. of Sess.) 888; 38 Sc. L. R. 696; 9 S. L. T. 37.—SCOT.

1158 l. Custody detrimental to child.]—A husband who has had frequent quarrels with, & separations from, his wife is not a fit person, as there is nothing in the nature of permanency in his home.—*Re SKEFFINGTON* (1908), 43 I. L. T. 245.—IR.

1160 i. General bad character.]—To defeat the right of a father to the custody of his child, as against its maternal grandmother, his habits &

proper to be regarded in considering an application by her to retain such custody, & to restrain the father from interfering with it.

Conduct showing the father to be a person to whose guardianship it would be very objectionable to intrust children:—*Held*: sufficient ground for depriving him of their custody, & for providing otherwise for their care, maintenance & education, where such a provision can, by an actual appropriation of property or otherwise, be effectually secured.

(2) But where the only security proposed was a deed of covenant of the infants' grandmother to provide for the maintenance & education of the children for her life:—*Held*: such conduct was not sufficient to enable the ct. to interfere.—*Re Fynn* (1848), 2 De G. & Sm. 457; 12 L. T. O. S. 143; 1 Jur. 713; 64 E. R. 205.

Annotations:—As to (1) *Appl. Re Curtis* (1859), 28 L. J. Ch. 458; *Re Goldsworthy* (1876), 2 Q. B. D. 75. *Consd. Re McGrath*, [1892] 2 Ch. 496; *Smart v. Smart*, [1892] A. C. 425; *R. v. Gyngall*, [1893] 2 Q. B. 232. *Reid. Ryder v. Ryder* (1861), 30 L. J. P. M. & A. 44; *Brown v. Collins* (1883), 25 Ch. D. 56; *Re Elderton* (1883), 53 L. J. Ch. 258; *Re A. B.* (1885), 1 T. L. R. 657.

1161. —.]—But on the other hand, a different & controlling equity arose where the father had shown himself utterly incompetent to perform those duties, & where he had so ill-behaved himself that the interposition of this ct. was necessary for the protection of his children (*ROMILLY, M.R.*).—*HAMILTON v. HECTOR* (1872), L. R. 13 Eq. 511; 36 J. P. 676.

B. Conviction and Imprisonment.

1162. Imprisonment.]—*Ex p. WARNER* (1792), 4 Bro. C. C. 101; 29 E. R. 799.

Annotations:—*Reid. De Manneville v. De Manneville* (1804), 10 Ves. 52; *R. v. Gyngall*, [1893] 2 Q. B. 232.

1163. —.]—The Ct. of Ch., representing the King as *parens patriæ*, has jurisdiction to control the right of a father to the possession of his child, but the ct. has not any of that delegated authority.

Where, therefore, a father & his infant child, six years of age, were brought up under a writ of *habeas corpus*, in order that the child might be placed under the care of its mother, the ct. refused to interfere; although the husband & wife had separated in consequence of his cruelty towards her, & the father, at the time of the application, was confined in gaol, & cohabiting there with another woman, who took the child

to him daily.—*Ex p. SKINNER* (1824), 9 Moore, C. P. 278.

Annotations:—*Consd. Re Hakewill* (1852), 12 C. B. 223; *R. v. Smith* (1853), 17 Jur. 24. *Reid. Ex p. McClellan* (1831), 1 Dowl. 81; *Re Andrews* (1873), L. R. 8 Q. B. 153; *Re Taylor* (1887), 3 T. L. R. 718.

1164. Conviction for felony.]—Where the father has been convicted of felony, the ct. will grant a *habeas corpus*, in order to give the mother the custody of an infant.—*Ex p. BAILEY* (1838), 6 Dowl. 311; 2 Jur. 326.

C. Cruelty and Ill-Treatment.

1165. Power of court to refuse custody.]—*WHITFIELD v. HALES*, No. 876, *ante*.

1166. —.]—A father claiming from his wife the custody of their legitimate child on *habeas corpus*, the ct., on a representation by the wife of his profligacy & cruelty, referred it to a barrister to determine as to the proper custody for the child, the wife, who was in contempt for disobeying the writ, & the husband, consenting to abide by such determination.—*R. v. DOBBYN* (1818), 4 Ad. & El. 644, n.; 111 E. R. 929.

Occasional acts.]—The ct., out of respect to the privacy of families, will not interfere to deprive a parent of the custody of his children whenever, in the usual course of treatment & discipline, he does something that may to a third party appear an act of cruelty; therefore, notwithstanding there may have been certain improprieties, & occasionally violent outbreaks exhibited on the part of a father towards his children, the ct. will not take from him the custody of their persons, which is given him by the common law & the law of nature, especially where the alleged grievance has been suffered to exist for a considerable time without any application for the judicial interference of the ct. This does not, however, prevent the ct., in cases of excessive cruelty, from interposing its authority on behalf of children, by removing them from the father's custody & control.—*BLAKE v. WALLSCOURT (LORD)* (1846), 7 L. T. O. S. 545.

1168. —.]—Course of proceeding with regard to infants under Custody of Infants Act, 1839 (c. 54), where husband & wife live apart.

On a petition under Custody of Infants Act, 1839 (c. 54), praying that the wife might have access to four of her children above seven years of age, & the custody of a boy & a girl under that

character must be open to the gravest objections.—*Re HATFIELD (AN INFANT)* (1895), 1 N. B. Eq. Rep. 142.—CAN.

i. Incompatibility.]—That the conduct of a husband is such that his wife cannot live happily with him is not a sufficient cause for interfering with his right to the custody of the children.—*Re FOULDS* (1893), 9 Man. L. R. 23.—CAN.

g. Sufficient grounds for refusing—*Order under Children's Protection Act.*]—*Re PHILP* (1910), 15 W. L. R. 685.—CAN.

h. Onus of proving father unfit.]—At common law, it is *prima facie* the right of a father to have the custody of his infant children; & the onus of proving him unfit for such a charge rests upon the person who seeks to take the children away or to keep them away from him.—*Re TOMLINSON* (1911), 20 W. L. R. 522; 21 Man. L. R. 786.—CAN.

k. Drunkenness.]—Father of a girl, aged 14 years, applied by way of *habeas corpus* for an order for the custody of his daughter, from her maternal aunt, who had cared for the girl since the death of her mother

8 years before:—*Held*: having regard to the father's habits of intoxication & the welfare of the child, the application should be refused with costs.—*Re HART* (1912), 22 O. W. R. 200; 3 O. W. N. 1287; 4 D. L. R. 293.—CAN.

l. Alienating affections from mother.]—When children are remitted to their father's custody in preference to that of their mother, on the ground that his stronger disposition would be a better safeguard for their proper upbringing, attempts made by him to destroy their love for their mother would be ground for rescinding the order.—*Re CRUX INFANTS* (1916), 33 W. L. R. 932.—CAN.

m. Irregular habits.]—Where upon petition of the maternal aunt of the minors it appeared that their mother was dead & that their father was still living but was a man of irregular habits & had lately intermarried with a person who had been formerly his servant, the ct. granted the prayer of the petition.—*Re CORMICKS (MINORS)* (1840), 2 I. Eq. R. 264.—IR.

PART XI. SECT. 4, SUB-SECT. 2.—B.
1162i. Imprisonment.]—In a petition

by a husband against his wife, who was living apart from him, for the custody of their child, a girl of one year & nine months old:—*Held*: it was not a ground for refusing to give the father the custody of the child that he had a year before been convicted of theft & sentenced to four months' imprisonment.—*A. C. v. B. C.* (1902), 5 F. (Ct. of Sess.) 108.—SCOT.

PART XI. SECT. 4, SUB-SECT. 2.—C.

1165i. Power of court to refuse custody.]—Where a wife had left her husband & gone to reside with her father, taking with her her infant child of about seven years old, & the husband obtained writs of *habeas corpus* to his wife's father to bring up her body, & to his wife to bring up the child, the ct. refused, on the return of the father & daughter to the respective writs that the husband had ill-treated his wife & child, to make any order that they should be delivered to him, but informed the wife that she was at liberty to go wherever she pleased, & to take the child with her.—*R. v. BAXTER, R. v. SNOOKS* (1846), 2 U. C. R. 370.—CAN.

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age, the fact of one act of violence by the husband having been sworn to, & not denied, & there being no imputation on the character of the wife, the ct. ordered the youngest child, a girl of very tender age, to be delivered up to the wife, but refused to make a similar order as to the youngest boy, & made an order, with special directions as to the access of the mother to the children remaining with the husband, & for access of the husband to the youngest child.

I am of opinion that the wife ought to have custody of the youngest daughter until the age of seven years, or further order, & access, under proper regulations, to the other children, the mother undertaking for the proper care, maintenance, & education of the child; & that she shall not be removed without the leave of the ct. The husband must be allowed access to the child at convenient seasons, & in such manner as may be fixed upon; & the wife must also be allowed access to the children who remain with the father, in such a manner as may be fixed upon (KNIGHT BRUCE, V.-C.).—*Re BARTLETT, Ex p. BARTLETT* (1846), 2 Coll. 661; 15 L. J. Ch. 418; 7 L. T. O. S. 488; 10 Jur. 768; 63 E. R. 906.

1169. —.]—The object of Custody of Infants Amendment Act, 1839 (c. 54), was to enable married women, who should be ill-treated by their husbands, to assert their rights as wives, without being restrained by the fear of being separated from their children; for which purpose the Ct. of Ch. is invested by the Act with a discretionary power, which, by its inherent jurisdiction, it did not possess, of interfering with the common law right of a father to the custody of his children, such power varying in extent according as the children are under or above seven years of age.

Where, upon an application by a wife who had obtained a sentence of divorce against her husband for the custody of her children, the conduct of her husband appeared to be such as clearly to render it improper that he should have the custody of the eldest child, a girl of eleven years old, the ct. made an order for the delivery of all the children, two of whom were under seven years of age, to the mother, holding it unnecessary to consider whether it would have made the same order with respect to the second child, who was a boy of nine years old, if his case had stood alone, as the effect of the children being brought up in different custodies would be likely to create factions in the family.—*WARDE v. WARDE* (1849), 2 Ph. 786; 12 L. T. O. S. 549; 41 E. R. 1147, L. C.

Annotations:—Consd. Re Winscom (1865), 2 Hem. & M. 540; *Re Taylor* (1876), 4 Ch. D. 157; *Smart v. Smart*, [1892] A. C. 425. *Reid. Re Woodward* (1852), 1 W. R. 59; *Re Halliday's Estate, Ex p. Woodward* (1853), 21 L. T. O. S. 17; *R. v. Gynghall*, [1893] 2 Q. B. 232.

1170. — **Acts of harshness or severity.]—**(1) This ct. has no jurisdiction to remove a child from the custody of the father or mother merely because it would be for the benefit of the child.

(2) The peculiar religious opinions or the poverty of the father form no ground for removing a child from his custody.

(3) Mere acts of harshness or severity by a

father, not such as would be injurious to the health of the children, or the fact of a somewhat passionate temper, will not form grounds for removing the children from his custody.—*Re CURTIS* (1859), 28 L. J. Ch. 458; 23 J. P. 708; 7 W. R. 474; *sub nom. CURTIS v. CURTIS*, 34 L. T. O. S. 10; 5 Jur. N. S. 1147.

Annotations:—As to (1) *Reid. R. v. Gynghall*, [1893] 2 Q. B. 232. *Generally, Reid. Re Agar-Ellis, Agar-Ellis v. Lascelles* (1883), 24 Ch. D. 317; *F. v. F.*, [1902] 1 Ch. 688.

1171. — **Allegations of cruelty in pending matrimonial cause.]—**GIBBS (OR STEVENSON) *v. STEVENSON*, [1894] W. N. 104, H. L.

D. Desertion.

1172. **Power of court to refuse custody.]—**Where a labouring man had deserted his wife, for which offence he was committed to prison, but on regaining his liberty, surreptitiously obtained possession of their only child, an infant of four years old, the ct., on petition under 2 & 3 Vict. c. 54, ordered the infant to be delivered over to the mother.

Two considerations are introduced by 2 & 3 Vict. c. 54, to control the exclusive right of a father to the custody of his infant child, namely, the marital duty to the wife, & the interests of the child; & his right will not be interfered with unless it be inconsistent with these considerations that he should retain the custody.—*Re HALLIDAY'S ESTATE, Ex p. WOODWARD* (1852), 21 L. T. O. S. 17; 17 Jur. 56; *sub nom. Re WOODWARD*, 1 W. R. 59.

Annotations:—Appld. Re Elderton (1883), 25 Ch. D. 220. *Consd. Smart v. Smart*, [1892] A. C. 425. *Reid. Re Taylor* (1876), 4 Ch. D. 157.

1173. —.]—Consideration of the principles by which the ct. is guided in taking a child from the custody of its father.

Where the father of a boy of three years abandoned his home, & ceased to support his wife for several months, & became a co-resp. in a divorce case, the ct., on the petition of the mother, made an order for the immediate delivery of the child to its mother; but gave free liberty of access by the father & paternal grandparents at all reasonable times, & leave to apply when the child should have attained the age of seven years for a scheme of maintenance & education.—*Re TAYLOR* (1876), 4 Ch. D. 157; 46 L. J. Ch. 399; 36 L. T. 169; 25 W. R. 69.

Annotations:—Distd. Re Agar-Ellis, Agar-Ellis v. Lascelles (1878), 10 Ch. D. 49. *Appld. Re Elderton* (1883), 25 Ch. D. 220; *Smart v. Smart*, [1892] A. C. 425. *Mentd. Hines v. Hines & Burdett*, [1918] P. 364; *Bebb v. Bebb & Ross* (1920), 123 L. T. 93; *Chiverton v. Ede*, [1921] 2 K. B. 30.

E. Immorality.

1174. **Power of court to refuse custody—Father professing immoral religious views.]—**A father's authority over his children controlled on the ground of his professing & acting on irreligious & immoral principles.—*SHELLEY v. WESTBROOKE* (1817), Jac. 266; 37 E. R. 850.

Annotations:—Reid. Anon. (1821), Jac. 264, n.; *Knott v. Cottee* (1847), 8 L. T. O. S. 462; *Warde v. Warde* (1849), 2 Ph. 786; *Gurney v. Gurney* (1863), 32 L. J. Ch. 456; *Re Meade* (1871), 19 W. R. 313; *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 10 Ch. D. 49.

1175. —.]—In July, 1845, one of the followers of a dissenting preacher, who styled

PART XI. SECT. 4, SUB-SECT. 2.—D.

1172i. **Power of court to refuse custody.]—**The law of this province knows nothing of adoption; & an agreement by parents to deprive themselves of the custody of their child is not legally binding upon them. By R. S. O. 1897, c. 259, s. 12, where the parent of any child applies to the ct.

for an order for the production of the child, & the ct. is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the ct. should refuse to enforce his right to the custody of the child, the ct. may, in its discretion, decline to make the order:—*Held: "abandoned" & "deserted" involve a wilful omission to take charge*

of the child, or some mode of dealing with it calculated to leave it without proper care; & leaving a child with those who had contracted to take proper care of it could not be called "abandonment" or "desertion," nor could the subsequent act of giving up all claim to the child.—*Re DAVIS* (1909), 18 O. L. R. 384; 13 O. W. R. 939.—CAN.

himself the Servant of the Lord, having no property of his own, married another of the sect, who had a fortune of about £5,000, under circumstances leading to the inference that the marriage was brought about entirely by the influence of the preacher. In Feb. 1846, the wife, having manifested insubordination to the chief of the sect, was deserted by her husband, who, with the chief & others of his followers, went to reside together at an establishment which they formed, & called "Agapemone." They there professed & acted upon the doctrines that the day of grace had passed, & the day of judgment commenced; & that, by reason thereof, prayer was superfluous, & no longer necessary. They also professed & acted upon the doctrine that no day of the week ought to be set apart as one of peculiar holiness. Shortly after the desertion of the wife, she was delivered of a boy, who remained in the care of his mother & maternal grandmother, at the residence of the latter, who properly provided for his maintenance and education:—*Held*: a proper case for restraining the father from acquiring possession of the infant.—*THOMAS v. ROBERTS* (1850), 3 De G. & Sm. 758; 19 L. J. Ch. 506; 14 Jur. 639; 64 E. R. 693.

Annotation:—*Reid. Re Meade* (1871), 19 W. R. 313.

1176. — *Father living in adultery.*—*Ex p. SKINNER*, No. 1163, *ante*.

—*The ct. has no jurisdiction to deprive a father, though living in adultery, of the custody of his child, unless he brings the child in contact with the woman with whom he is so living; nor to order him to permit the mother to have access to the child, unless misconduct on his part is shown with reference to the management & education of the child.*—*BALL v. BALL* (1827), 2 Sim. 35; 57 E. R. 703.

Annotation:—*Reid. Re Meade* (1871), 19 W. R. 313.

1178. — ——.]—(1) The Ct. of Ch. has jurisdiction to appoint a guardian for infants, being wards of the ct., excluding the father; & upon evidence that the father was living in a state of adultery, & had encouraged his children in swearing, keeping low company, etc.:—*Held*: it was a fit case to exercise the power to exclude him from the guardianship.

For a hundred & fifty years the Ct. of Ch. has assumed an authority with respect to the care of infants . . . it [the jurisdiction] is a right which devolves to the Crown as *parens patriæ*, & it is the duty of the Crown to see that the child is properly taken care of (LORD REDESDALE).

(2) That the ct. has jurisdiction with respect to the maintenance is unquestionable; it is a jurisdiction with respect to the income of the property, to take care of it for the benefit of the children, to apply it for the benefit of the children, as far as it may be beneficial for them that it should be so applied, & to accumulate any surplus, if any surplus there should be (LORD REDESDALE).—*WELLESLEY v. WELLESLEY* (1828), 2 Bli. N. S. 124; 1 Dow. & Cl. 152; 4 E. R. 1078, H. L.; *affg. S. C. sub nom. WELLESLEY v. BEAUFORT* (DUKE) (1827), 2 Russ. 1, L. C.

Annotations:—*As to* (1) *Reid. Ex p. M'Clellan* (1831), 1

Dowl. 81; *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42; *Re Spence* (1847), 2 Ph. 247; *Warde v. Warde* (1849), 2 Ph. 786; *Re Hakewill* (1852), 12 C. B. 223; *Swift v. Swift* (1865), 34 Beav. 266; *Re Meade* (1871), 19 W. R. 313; *Re Goldsworthy* (1876), 2 Q. B. D. 75; *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 10 Ch. D. 49; *Re A. B.* (1885), 1 T. L. R. 657; *R. v. Barnardo, Jones's Case*, [1891] 1 Q. B. 194; *Smart v. Smart*, [1892] A. C. 425. *As to* (2) *Reid. Re Fynn* (1848), 2 De G. & Sm. 457.

1179. — ——.]—(1) A father is entitled to the custody of his children, to the exclusion of their mother, although they be within the age of nurture.

When the children are in the custody of the mother, the ct. will compel her to deliver them into the custody of the father, unless it appear to the ct. that the child will be improperly restrained, or its morals contaminated by being placed in the father's custody. The fact of the father's having formed an adulterous connection is not of itself sufficient to warrant the ct. in refusing to enforce his right to the custody of his children.

(2) When a child is of years of discretion, though under age, the ct. will not interfere to place him under the restraint of his father.

When an infant is brought before the ct. by *habeas corpus*, if he be of an age to exercise a choice the ct. leaves him to elect where he will go (LORD DENMAN, C.J.).—*R. v. GREENHILL* (1836), 4 Ad. & El. 624; 6 Nev. & M. K. B. 244; 111 E. R. 922.

Annotations:—*As to* (1) *Consd. Re Hakewill* (1852), 12 C. B. 222; *Re Andrews* (1873), L. R. 8 Q. B. 153. *Reid. Re Pulbrook* (1847), 11 Jur. 185; *R. v. Smith* (1853), 17 Jur. 24; *Thomasset v. Thomasset*, [1894] P. 295. *As to* (2) *Consd. R. v. Clarke* (1857), 7 E. & B. 186. *Reid. R. v. Prince* (1875), L. R. 2 C. C. R. 154; *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1883), 24 Ch. D. 317.

1180. — ——.]—*HYDE v. HYDE*, No. 1356, *post*.

1181. — ——.]—If, independently of 2 & 3 Vict. c. 54, the ct. can exercise jurisdiction upon the petition of a mother having the custody of her infant child for the continuance of such custody, it may do so, although the petition is intituled in the matter of that Act as well as in the matter of the infant.

Where the mother of an infant under seven years of age, & having custody of it, is living separate from the father, & has a good defence to a suit by him for restitution of conjugal rights, the ct. may make an order continuing to the mother the custody of the infant, such a case, although not within the letter, being within the equity of 2 & 3 Vict. c. 54.—*Re TOMLINSON* (1849), 3 De G. & Sm. 371; 64 E. R. 520.

1182. — *Gross profligacy of father.*—*WARDE v. WARDE*, No. 1169, *ante*.

1183. — ——.]—The ct. will refuse to give possession of children to their father if he has so conducted himself as that it will not be for the benefit of the infants, or if it will affect their happiness, or if they cannot associate with him without moral contamination or if, because they associate with him others will shun their society. If it be established to the satisfaction of the ct. that the father of children from ten to two years of age is to be considered as guilty of the perpetration of an unnatural crime, it is impossible

PART XI. SECT. 4, SUB-SECT. 2.—E.

1182 i. *Power of court to refuse custody—Gross profligacy of father.*—In order to constitute, in a ct. of law, a forfeiture of the right of a parent or guardian for nurture to the custody of the child, the immorality of such parent or guardian for nurture must be of so gross a character that the morals of the child would be seriously endangered by being allowed to live with such parent or guardian for nurture, or that such

parent or guardian for nurture has been guilty of cruelty & personal ill-usage towards the child.—*Re MOORE* (1859), 11 I. C. L. R. 1.—*IR.*

n. — *Adultery.*—The parents of a child seven years old, British subjects & married in this Province, where the child was born, removed to the United States, where the husband took out naturalization papers. In consequence of the husband's alleged intemperance & adultery, the wife left

him, & on the ground of such adultery, she applied to the ct. there & obtained a decree granting her a divorce, & the custody of the child. Shortly before the decree was pronounced, & with the object of escaping its effect, the husband returned to this Province, bringing the child with him. On an application by the wife for the custody of the child an order was made granting her such custody.—*Re DAVIS (AN INFANT)* (1894), 25 O. R. 579.—*CAN.*

Sect. 4.—Grounds for granting, refusing or removing from custody: Sub-sect. 2, E., F., G., H. & I.; sub-sect. 3, A. & B.]

to permit any sort of intercourse with his children even after he has escaped conviction. *Semble*: in such circumstances, if the children were with their father, it would be the duty of the ct. to remove them.

A father left his home where he was residing with his wife & children, infants, four daughters then ten, nine, eight & four years of age, & two sons aged six & three years. He was apprehended, committed & arraigned for the commission of an unnatural crime, but no witnesses appearing he was acquitted. He immediately left England & remained abroad eight months. Five years after the trial he petitioned this ct., praying that his wife might be ordered to deliver up the children, the daughters being fifteen, fourteen, thirteen & nine years old, & the sons eleven & eight years, & if necessary, that writs of *habeas corpus* might issue for that purpose. The petition was supported by the affidavit of petitioner, & was served on the wife only. Affidavits were filed on behalf of resp., & amongst them an affidavit of the solr. of the wife, who had been the solr. for petitioner, & in that capacity had interviews with him while in gaol awaiting his trial, offering to state conversations that took place between them, if authorised by petitioner so to do, & an affidavit by another witness referring as an exhibit to the depositions taken before the magistrates. Petitioner himself made two affidavits in reply, in one of which he denied the charge against him, & in the other sworn, three days later, he again denied the charge, & gave an explanation of the cause why he was at the place where, & in the company in which, he was when apprehended. The ct. being satisfied upon the materials before it that petitioner had so conducted himself as that he ought to be treated as if he were a guilty man dismissed the petition.—ANON. (1851), 2 Sim. N. S. 54; 61 E. R. 260.

1184. ———.]—*Re AGAR-ELLIS, AGAR-ELLIS v. LASCELLES*, No. 1118, *ante*.

F. Insanity.

1185. Power of court to ignore father's wishes.]—*Re RUSSELL* (1887), 83 L. T. Jo. 202.

G. Neglect and Misconduct.

1186. Misconduct—Neglect of marital duty.]—In determining whether the custody of an infant child ought to be given to or retained by the mother, the ct. will take into consideration three matters, the paternal right, the marital duty, & the interest of the child. For this purpose the marital duty includes, not only the duty which the husband & wife owe to each other, but the responsibility of each of them towards their children so to live that the children shall have the benefit of the joint care & affection of both father & mother. In a case where a father had committed

a breach of the marital duty as thus defined:—*Held*: for this among other reasons, the mother, in whose custody two children of the marriage of tender years were, ought to retain the custody until further order.—*Re ELDEBTON* (1883), 25 Ch. D. 220; 53 L. J. Ch. 258; 50 L. T. 26; 48 J. P. 341; 32 W. R. 227.

Annotation:—*Reid. Smart v. Smart*, [1892] A. C. 425.

1187. ——— *Abortive proceedings for bigamy.*]—The discretion of the ct. as to the custody of an infant is exercised in accordance with the rules of equity under Judicature Act, 1873 (c. 66), s. 25 (10). One of these rules is incorporated into 36 & 37 Vict. c. 12, s. 1, empowering the ct. to grant the custody of infants under sixteen to the mother. The ct. will look at all the circumstances of each case, & evidence that proceedings against the father for bigamy have failed will not necessarily compel the ct. to restore to the father his common law right to have the custody of his child.—*Re BROWN* (1884), 13 Q. B. D. 614; *sub nom. Re ROWE*, 51 L. T. 793; *sub nom. Re ROWE, ROWE v. ROWE*, 33 W. R. 79.

Annotation:—*Reid. R. v. Gyngall*, [1893] 2 Q. B. 232.

1188. ———.]—Where a mother applied by a petition to the ct. for the custody of her boy, aged ten years, on the ground of the misconduct of the father:—*Held*: under Guardianship of Infants Act, 1886 (c. 27), s. 5, the ct. had jurisdiction to make such order as it might think fit regarding the custody of such infant, & the right of access thereto of either parent, having regard to the welfare of the infant, & to the conduct of the parents, & to the wishes as well of the mother as of the father. The ct. has jurisdiction to order the delivery of the infant to the custody of its mother without fixing any limit of age.—*Re WITTEN (AN INFANT)* (1887), 57 L. T. 336; 3 T. L. R. 811.

1189. ———.]—(1) The right of a father to have the custody of his infant children may be lost by misconduct on his part.

(2) The right of a father to have his infant children educated in his own religious faith may be lost even in the father's lifetime if he allows the children to be brought up in another religion for such a time that it would, in the opinion of the ct., be contrary to the children's interests to alter their religious education.—*Re NEWTON (INFANTS)*, [1896] 1 Ch. 740; 65 L. J. Ch. 641; 73 L. T. 692; 44 W. R. 470; 12 T. L. R. 151; 40 Sol. Jo. 210, C. A.

1190. Neglect—Agreement that mother should have care & custody—Failure to see child for three years & a half.]—The words "custody or control," in Infants' Custody Act, 1873 (c. 12), s. 2, comprise all the rights which a father has over his children, including that of directing their religious education.

A motion was made by the mother of a female infant, eight years of age, for the exclusive control of the education, religious & otherwise, of the infant, & that the father's access might be limited to thirteen weeks of the year during the child's holidays. The father, who was a Roman Catholic, was married to the mother, a Protestant, in 1878.

—*Held*: the mother was justified by the misconduct of her husband, the father, in leaving him, & having regard to the welfare of the child, the custody should be awarded to the mother.—*Re WILKINS* (1919), 45 O. L. R. 181; 15 O. W. N. 434.—CAN.

o. Neglect.]—A father had allowed his child to be brought up by other persons for eight years & had contributed nothing towards her expenses during that time:—*Held*: he had been unmindful of his parental duties within Infants Act, 1920, c. 155,

PART XI. SECT. 4, SUB-SECT. 2.—G.

1188 i. *Misconduct.*]—The provision of Infants Act with regard to the custody of infants, now found in R. S. O., 1914, c. 153, s. 2 (1), originally 50 Vict. c. 21, s. 1 (1), is not, in so far as it expresses concern for the welfare of the infant, intended to exalt the interest of the infant into one of paramount importance. Other things, such as the parents' conduct, being equal, when it happens that the parents' wishes conflict, the ct. must determine which is to have the custody,

having regard, however, to the father's practically immemorial right to control, unless he has forfeited that right by misconduct. Where a husband has done no wrong & is able & willing to support his wife & child, the ct. will not take away from him the custody of the child merely because the wife prefers to live away from him.—*Re SCARTH* (1915), 9 O. W. N. 143, 365; 35 O. L. R. 312.—CAN.

1188 ii. ———.]—Upon a contest between the father & mother of a child, a girl of eleven years, as to her custody:

In July, 1881, a separation deed was executed, containing a declaration that the wife should have the absolute custody & control of the infant until the deed should be mutually put an end to & revoked by the parties, without any interference of or by the husband whatsoever. The father had not seen the child for three years & a half, & no reason for his not doing so was alleged.

An order had been made in an action to administer the trusts of the separation deed, the mother undertaking not to bring up the child in any manner at variance with the Roman Catholic faith. The father was without means to maintain the child:—*Held*: it was for the benefit of the infant to give effect to the agreement in the separation deed; & it should be enforced accordingly.—*CONDON v. VOLLUM* (1887), 57 L. T. 154; 3 T. L. R. 686.

H. Poverty.

1191. Insolvency of father.]—BLISSET'S CASE (1774), Lofft, 748; 98 E. R. 899.

Annotations:—*Reid. Ex p. Skinner* (1824), 9 Moore, C. P. 278; *Ex p. McClellan* (1831), 1 Dowl. 81.

1192. —.]—The father being insolvent, a person appointed to have the care of his infant son.—*WILCOX v. DRAKE* (1784), 2 Dick. 631; 21 E. R. 416, L. C.

Annotation:—*Reid. Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42.

1193. Poverty of father—Mother with means.]—ANON. (1821), Jac. 254, n., 264, n.; 37 E. R. 848, 849; *sub nom. JACKSON v. HANKEY*, cited in Chambers on Infancy at pp. 29, 38, 81, etc., L. C.

Annotations:—*Reid. Talbot v. Shrewsbury, Doyle v. Wright* (1840), 4 My. & Cr. 672; *Re Fynn* (1848), 2 De G. & Sm. 457.

1194. —.]—The ct. will interfere with paternal rights only in cases of very gross misconduct. Comparative destitution is not a sufficient ground.—*Ex p. PULBROOK* (1847), 11 J. P. Jo. 102; *sub nom. Re PULBROOK*, 11 Jur. 185.

1195. —.]—Re CURTIS, No. 1170, *ante*.

I. Residence Abroad.

1196. Whether father entitled to custody.]—WELLESLEY v. BEAUFORT (DUKE), No. 2098, *post*.

s. 7 (b); & because he was unable to satisfy the ct. that an order for the delivery of the custody of the child to him would be for its welfare, such an order was refused.—*BROWN v. PART- RIDGE*, [1924] 4 D. L. R. 461; 3 W. W. R. 371.—CAN.

PART XI. SECT. 4, SUB-SECT. 2.—H.

1194 i. Poverty of father.]—While the undoubted natural right of a father to the custody & guardianship of his child is undisputed, & while the law imputes ability & inclination to the parent to perform his duty to his child, the right is yet founded upon his actual capacity to discharge this duty, & his superior claim to the custody of his offspring may be suspended while the incapacity lasts.—*Re FERGUSON* (1881), 8 P. R. 556.—CAN.

1194 ii. —.]—Re MURDOCH (1881), 9 P. R. 132.—CAN.

PART XI. SECT. 4, SUB-SECT. 3.—A.

p. Mother remarried—& without private means.]—G., a Protestant, died intestate in 1900. Upon his death his widow, being in impoverished circumstances, entrusted the three infant daughters of the marriage to a Protestant orphanage. In Nov. 1901, she remarried with C. a Roman Catholic, & became a member of his church. It was admitted that if handed over to her the three infants, aged fifteen, seven, & four years, would be educated as Catholics. C.'s means consisted

only of a small farm of some 14 acres:—*Held*: the mother's application on *habeas corpus* for a transfer to her of the custody of the infants must be refused.—*Re GREY*, [1902] 2 I. R. 684.—IR.

q. Children in custody of father's agent.]—The father of the infant children, under twelve years of age, was a Protestant, & the mother a Roman Catholic. She left him, taking the children, alleging cruelty on his part, & they both made statements complaining of each other's conduct. The husband afterwards took the children from her, placed them in the care of a Presbyterian minister, resp., & left the country, it was said for a temporary purpose. On an application by the mother for the custody of the children:—*Held*: she could not succeed against the father of the children; & therefore could not get an order against resp., his custody being that of the father.—*Re ROSS* (1876), 6 P. R. 285.—CAN.

r. Religion differing from that of father.]—It does not follow that the ct. will not allow the mother the custody of the children simply because the religion of the mother differs from that of the father.—*Re THOMSON* (1911), 30 N. Z. L. R. 168.—N.Z.

PART XI. SECT. 4, SUB-SECT. 3.—B.

1201 i. Power of court—Habitual intemperance.]—The infant, a girl born in 1908, was, in Jan. 1916, left by her father with his sister, who

1197. Through guardian appointed by him.]—*Re THOMAS*, No. 1411, *post*.

1198. —.]—Re CROOKES, [1887] W. N. 29.

SUB-SECT. 3.—MOTHER.

A. In General.

Grounds for granting or refusing custody to father, *see* Sect. 4, sub-sect. 2, *ante*.

1199. Loss of maintenance from grandmother.]—*Re SHAW* (1840), cited 11 Sim. at p. 182; 59 E. R. 844.

1200. Mother remarried—& without present means.]—Although the ct. has an absolute discretion under 2 & 3 Vict. c. 54, to give the custody of children under seven years of age to the mother, as against the father or testamentary guardian, yet where the father had left three gentlemen testamentary guardians of his children, & the mother, from long residence in India, was unacquainted with domestic & economic habits, & had without the knowledge of the testamentary guardians, married a second time, & was without the means of personally contributing to the maintenance of the children, the ct. refused to take them from the custody of the testamentary guardians & place them in the care of the mother.—*SHILLITO v. COLLETT* (1860), 24 J. P. 660; 8 W. R. 696, L. JJ.

B. Misconduct.

1201. Power of court—Habitual intemperance.]—*Re TURNER, Ex p. TURNER*, No. 1243, *post*.

1202. — Marital misconduct.]—Under Guardianship of Infants Act, 1886 (c. 27), s. 5, the ct. has, after taking into account the various considerations mentioned in that sect., full jurisdiction to override entirely the common law rights of a father in relation to the custody of his infant children. In "having regard to . . . the conduct of the parents & the wishes as well as of the mother as of the father," the ct. will not treat the parents in an unequal manner or differently the one from the other, but will take the whole conduct & wishes of both parents into

continued to maintain & care for the child until the death of the father in 1917, & afterwards. Later in 1917, the child's mother, the father's widow, applied for an order for the custody of the child. The father was a Protestant, the mother a Roman Catholic. The child had been baptized in a Roman Catholic Church, so far as appeared, without objection from her father, but was being brought up as a Protestant by her aunt, without objection on the part of the mother, so far as appeared, until the application was made. There was evidence that the mother was addicted to the excessive use of intoxicants, & evidence in denial of that. The infant was the eldest of four children, & the other three were in the custody of the mother. The aunt had a comfortable home; while the mother had no house of her own & went out to work by the day, but had near relations who were able to help her to bring up & support the children:—*Held*: the mother was not a suitable person to have the custody of the child, & it was not in the child's interest to take her away from the care & custody of her aunt.—*Re TAGGART* (1917), 41 O. L. R. 85; 39 D. L. R. 559; 13 O. W. N. 189.—CAN.

t. — Ill-usage.]—M. was convicted of ill-using her infant children, & an order was made by the magistrate before whom she was convicted.—*Re MAHONEY'S CHILDREN* (1892), 24 N. S. R. (12 R. & G.) 86.—CAN.

a. — Desertion without valid

Sect. 4.—Grounds for granting, refusing or removing from custody: Sub-sect. 3, B. Sects. 5, 6 & 7: Sub-sects. 1 & 2, A.]

consideration. The ct. will in a proper case give a mother the custody of her infant children, notwithstanding that the mother may have been guilty of matrimonial misconduct.—*Re A. & B. (INFANTS)*, [1897] 1 Ch. 786; 66 L. J. Ch. 592, C. A. Annotation:—*Reid. B. v. B.*, [1924] P. 176.

1203. — Mother living in adultery.]—Under a trust to pay the income of testator's estate to his widow during widowhood, "she maintaining, educating, & bringing up" his children under twenty-one years of age, the widow as well as the children takes a beneficial interest. The widow does not fulfil the implied obligation thrown on her in such a case if she is bringing up the children in the home in which she is living in adultery, & the ct. will withdraw them from her custody, will apportion the income between the widow & children, & apply an apportioned part for the proper bringing up of the children elsewhere.—*Re G. (INFANTS)*, [1899] 1 Ch. 719; 68 L. J. Ch. 374; 80 L. T. 470; 47 W. R. 491.

SECT. 5.—RIGHT OF ACCESS.

1204. Grounds for granting or refusing—Desertion without reasonable cause.]—The ct. will not make the order where the wife has left her husband without sufficient cause.

The father of infants, before a petition was presented by their mother for access to them, etc., under 2 & 3 Vict. c. 54, went with them to reside abroad. The ct. ordered substituted service of the petition, but, at the hearing, declined to make the order, although the father had filed affidavits & appeared by counsel, because the father & infants were resident abroad, & because a suit by the mother for restitution of conjugal rights was pending, which, if successful, would have the same effect as the order prayed.—*Re TAYLOR* (1840), 11 Sim. 178; 9 L. J. Ch. 399; 4 Jur. 983; 59 E. R. 842.

1205. — Misconduct of mother.]—A husband having separated from his wife in circumstances of grave suspicion as to her conduct, took from her the custody of their daughter, an infant of about eight years old. He subsequently sued for a divorce, alleging adultery by her on two distinct occasions. The suit failed, as the first alleged act of adultery had been condoned, & nothing more was proved on the second charge than levity & indiscretion. The husband, however, continued to live separate from his wife, & went to India in

*reason.]—*The ct. refused to give the custody of children to their mother, who was able to provide for their moral & physical welfare, when she left her husband, without a valid reason & refused to return, & he was equally able to provide for them.—*ST. THOMAS v. ST. THOMAS* (1921), 48 N. B. R. 132.—CAN.

b. — Exceptional circumstances.]—To justify the ct. in giving the custody of children to a guilty wife very exceptional circumstances must be shown.—*VAN DER VEEN v. VAN DER VEEN*, [1923] N. Z. L. R. 794.—N.Z.

PART XI. SECT. 5.

a. Grounds for granting or refusing.]—*Re BAYLIS INFANTS* (1913), 25 W. L. R. 181; 13 D. L. R. 150; 7 Alta. L. R. 54.—CAN.

d. —.]—Where the custody of a child has been taken from its father,

its natural guardian, upon the ground that the father had forfeited by his conduct his natural rights, & the custody had been given to the mother, no right of access having been reserved to the father, the *onus* rests upon the father to satisfy the ct. that its original order should be varied by allowing the father any access to the child.—*Re MIKKELSEN, MIKKELSEN v. MIKKELSEN* (1915), 34 N. Z. L. R. 555.—N.Z.

1209 i. Form of order—Where parents living apart.]—*FITCHETT v. FITCHETT* (1913), 10 D. L. R. 367; 24 O. W. R. 109; 4 O. W. N. 844.—CAN.

e. Visits to school.]—A father having secreted two of his children, aged respectively eight & eleven years, from their mother to prevent their being brought up in the Roman Catholic religion, to which she belonged, upon the petition of the mother, praying for the custody of the children, the ct. ordered that the husband should disclose the whereabouts of the

performance of his military duties, having previously placed the child under the charge of his sister, refusing to allow access by the mother to it, on the ground that this was best for the child. His conduct had throughout been very indulgent to his wife, & free from blame. The views of the mother as to the training of the child were antagonistic to those of the sister, who was also determined, as the mother alleged, that it should grow up a total stranger to her. A petition for access to the child having been presented by the mother under 2 & 3 Vict. c. 54:—*Held*: the ct. would not in the circumstances, interfere with the father's arrangements for the training of the child, & the petition was dismissed.

Semble: where a child is resident in a foreign country, it does not follow that an order by the ct. under the Act for access to it by the mother cannot be carried into effect.—*Re WINSOM* (1865), 2 Hem. & M. 540; 13 L. T. 14; 29 J. P. 563; 11 Jur. N. S. 297; 13 W. R. 452; 71 E. R. 573.

1206. — Change of religion—Access granted upon terms.]—*Re FELL* (1870), 2 Seton's Judgments & Orders, 7th ed. p. 993.

Annotation:—*Reid. F. v. F.*, [1902] 1 Ch. 688.

1207. Conditions determined by master.]—Infant child in custody of the mother, brought up by *habeas corpus* at the father's instance. Ordered that the child remain with the mother; the father's access to be regulated by the master.—*R. v. WILSON* (1829), 4 Ad. & El. 645, n.; 111 E. R. 930.

1208. Visits of children during holidays.]—*POWELL v. POWELL* (1843), 1 L. T. O. S. 335.

1209. Form of order—Where parents living apart.]—*Re BARTLETT, Ex p. BARTLETT*, No. 1168, ante.

SECT. 6.—RIGHT OF PARENT TO CHASTISE CHILD.

Correction of children.]—See CRIMINAL LAW, Vol. XV., p. 792, Nos. 8547, 8554, 8556, 8557, 8558.

— **Delegation by parent to schoolmaster.]—**EDUCATION, Vol. XIX., pp. 598 *et seq.*

SECT. 7.—RECOVERY OF CUSTODY.

SUB-SECT. 1.—BY ATTACHMENT FOR CONTEMPT.

See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 6 *et seq.*

1210. Disobedience to order—Committing custody of child to mother—Time given for compliance.]

younger child, & that petitioner should be allowed access to him four times a year in the presence of the master of the school where he was being educated.—*Re KEITH, KEITH v. KEITH, KEITH v. LYNCH* (1877), 7 P. R. 138.—CAN.

1. At all times.]—An infant three years old was given to the custody of the mother, the father to have access to the child at all times.—*WOOD v. WOOD*, [1919] 3 W. W. R. 246.—CAN.

g. Expenses of wife in note for access.]—In a note for access to a pupil child at the instance of the mother, arising in a petition for custody at her instance, the ct. granted her an *interim* award of expenses.—*BONNAR v. BONNAR* (1913), 51 Sc. L. R. 54.—SCOT.

PART XI. SECT. 7, SUB-SECT. 1.

h. Disobedience of order—Committing custody of child to mother.]—A married woman living apart from

—An order made by the High Ct. of Justice (Probate, Divorce & Admlty. Div.) under R. S. C., Ord. 59, rr. 4A, 7, & Summary Jurisdiction (Married Women) Act, 1895 (c. 39), ss. 7, 11, that a wife be no longer bound to cohabit with her husband, on the ground of his desertion of her, & that the custody of the child whilst under the age of sixteen, be committed to his wife, may be enforced as to the custody of the child by motion for attachment.—*BROWN v. BROWN* (1898), 62 J. P. 568; 42 Sol. Jo. 739.

1211. — Removal of child from jurisdiction.]—By an order of ct. the custody of a child was given to the mother, the father being given liberty of access on certain days of the week. Both father & mother gave an undertaking not to remove the child out of the jurisdiction. The father, on one of the days on which he had access to the child, took her away & removed her out of the jurisdiction. The mother applied for & obtained a rule for *habeas corpus* & a rule *nisi* for attachment against the father, but as he had left the country personal service upon him of the orders was impossible:—*Held*: the rule for attachment should be made absolute, & a writ of sequestration should also issue notwithstanding the absence of personal service upon the father.—*R. v. WIGAND, Re WIGAND*, [1913] 2 K. B. 419; 82 L. J. K. B. 735; 109 L. T. 111; 29 T. L. R. 509, D. C.

Annotation:—*Mentd. Re Suarez, Suarez v. Suarez*, [1918] 1 Ch. 176.

1212. — Failure to produce child in court—Disobedience to writ of habeas corpus.]—To a writ of *habeas corpus* issued at the instance of the parent of a child, which had been wrongfully detained by deft., a return was made by deft. to the effect that, as he had, before the issuing of the writ, parted with the custody of the child so detained by him to another person who had taken her out of the jurisdiction, it was impossible for him to obey the writ:—*Held*: it was no excuse for non-compliance with the writ that deft. had wrongfully handed over the child to another person, & therefore, the return was bad, & an attachment must issue against the deft. for disobedience to the writ.—*R. v. BARNARDO* (1889),

her husband, petitioned for the custody of her children under the age of twelve. A deed of separation was also filed executed between them in 1852, which gave her the sole control of her children, then or thereafter to be born. An *ex p.* order was made upon the ground stated in the petition, verified by affidavits for the delivery of the children to petitioner, which order upon a subsequent application the judge refused to rescind. Numerous affidavits were filed on both sides. A writ of attachment for contempt in not obeying the original order was by order of the judge issued from the Ct. of Q. B., & the husband moved against it for irregularity. It was objected that while in contempt by not having surrendered himself under it, he could not be heard:—*Held*: he might nevertheless defend himself by objections to the process if irregular; an appeal would lie to the ct. from the judge's order; admitting the right to make an *ex p.* order in case of necessity no sufficient ground was shown for it here; the facts had not been properly stated in the first application, the real reason for applt. leaving her husband's house & the arrangement then made between them having been withheld; the subsequent hearing of both sides upon the merits, did not preclude him from taking advantage of these objections against the original order, which was therefore set aside.—*Re ALLEN, R. v. ALLEN* (1871), 31 U. C. R. 458; 5 P. R. 443.—CAN.

PART XI. SECT. 7, SUB-SECT. 2.—A.

1216 i. Jurisdiction of court—Application of rules of equity.]—In dealing with an application for a writ of *habeas corpus* by a guardian to recover custody of an infant, the main consideration for the ct. is the infant's welfare in its widest sense, moral, religious & physical. Due regard must be had to the ties of affection. The rules that guide the Ct. of Ch. in such matters are applicable to the cts. in this country also. If the infant is capable of forming intelligent opinions the ct. must take them into consideration.—*SARASWATHI AMMAL v. DHANAKOTI AMMAL* (1924), 1 L. R. 48 Mad. 299.—IND.

k. —.]—Father & mother separated, the mother taking their infant of the age of thirteen months. She kept the infant until it was twenty months old, when the father, seeing it on the street, seized it & retained its custody. The mother obtained a rule *nisi* for a writ of *habeas corpus*. Objection was taken that a ct. of common law & common law judges had no jurisdiction in such a case:—*Held*: 3rd R. S., c. 124, ss. 1–4, invest the Supreme Ct. with all Chancery powers, & under 3rd R. S., c. 153, the Supreme Ct. & its judges had ample jurisdiction to grant the writ of *habeas corpus* asked for.—*Re BLACK, Cong. Dig.* (1834–1889), pp. 646, 647.—CAN.

l. — Neither party entitled to custody.]—The ct. will not interfere by

23 Q. B. D. 305; 58 L. J. Q. B. 553; 61 L. T. 547; 54 J. P. 132; 37 W. R. 789; 5 T. L. R. 673, O. A.

Annotations:—*Dttd. Barnardo v. Ford, Gossage's Case*, [1892] A. C. 326. *Mentd. Cox v. Hakes* (1890), 15 App. Cas. 506; *O'Shea v. O'Shea & Parnell* (1890), 15 P. D. 59; *Re Evans, Evans v. Noton*, [1893] 1 Ch. 252; *Seaman v. Burley*, [1896] 2 Q. B. 344; *Re Foreign Tribunals Evidence Act, 1806, Eccles v. Louisville & Nashville Railroad Co.* (1911), 56 Sol. Jo. 74; *R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089.

1213. —.]—*LE CHAMPION v. LE CHAMPION* (1896), 40 Sol. Jo. 813.

SUB-SECT. 2.—BY HABEAS CORPUS.

A. In General.

See, generally, CROWN PRACTICE, Vol. XVI., pp. 248 et seq.

1214. Jurisdiction of court—Infant in Ireland.]—The ct. agreed, that 12 Car. 2, c. 24, s. 8, extends to Ireland, & that the guardian appointed by the will may have ravishment of ward, as the guardian by knight's service, or in socage at common law, yet *habeas corpus* granted; but after ordered by King & Council to the Lord O.—*ANGLESY (LORD) v. OSSORY (LORD)* (1675), 3 Keb. 528; 84 E. R. 860.

1215. — Child in mother's custody—Liability of wife's trustees.]—*Re SPENCE*, No. 1251, *post*.

1216. — Application of rules of equity.]—*Re GOLDSWORTHY*, No. 24, *ante*.

1217. —.]—*R. v. GYNGALL*, No. 25, *ante*.

1218. Dispute as to right to custody—Not decided on return to writ.]—The intent of a *habeas corpus* is to provide against a restraint of liberty. But the ct. will not decide the right of guardianship over a minor, upon a return to a *habeas corpus*.—*R. v. SMITH* (1736), *Ridg. temp. H.* 149; 7 Mod. Rep. 234; 2 Stra. 982; Cunn. 72; 27 E. R. 787.

Annotations:—*Reid. R. v. Delaval* (1763), 3 Burr. 1434; *Re Lloyd* (1841), 4 Scott, N. R. 200; *R. v. Clarke* (1857), 7 E. & B. 186.

1219. —.]—(1) V., the daughter & widow of a Jew, having agreed with her father,

habeas corpus to take an infant out of the custody of a person not lawfully entitled thereto, for the purpose of enabling a person equally unentitled to obtain possession of it.—*Re AH GWAY, Ex p. CHIN SU* (1893), 2 B. C. R. 343.—CAN.

m. — Decree of foreign court—Not binding.]—Applt. & resp. were married in Illinois, & had their domicile there. They came to Alberta, bringing with them two children, who had been born in Illinois. Another child was born in Alberta. Resp., the wife, left applt. & took the youngest child with her, but did not leave Alberta. The husband went to California, & from a ct. in that State obtained a decree of divorce, which also gave him the custody of the three children. He then applied in Alberta for a *habeas corpus* for the production of the youngest child with a view to obtaining custody:—*Held*: granting the validity of the California decree, the decision as to the custody of the youngest child, who was a British subject & was & always had been within the jurisdiction of the Alberta ct., was not binding on that ct.—*Re MOTT* (1912), 20 W. L. R. 369; 1 W. W. R. 833; 5 D. L. R. 406; 4 Alta. L. R. 193.—CAN.

n. —.]—*Re KENNA* (1913), 5 O. W. N. 392; 29 O. L. R. 590.—CAN.

o. — Infant out of jurisdiction.]—*Re HILKER* (1914), 16 D. L. R. 868;

Sect. 7.—Recovery of custody: Sub-sect. 2, A. & B. (a), (b) & (c).]

that he should have the care of the persons & estates of her two infant children, & in the event of their death during minority, should receive a moiety of their property, & having adjured Judaism & married a Christian, on the petition of the children the ct. ordered that they should be delivered to their mother, guardianship not being assignable, & the agreement not purporting to be an assignment, & the right of the mother to be guardian continuing notwithstanding her second marriage.

(2) Right of guardianship not decided on *habeas corpus*.

(3) It has been truly said that the right of guardianship of the mother differs from that of the father; she cannot devise as the father may by stat. Car. 2. The mother's right abstracted from socage which is not here the case, there being no lands, arises from nature. She has a right to the custody of the persons & care of the education & this in all countries where the laws do not break in. . . . It must be admitted likewise that the mother had no right to assign the guardianship—no guardianship assignable except in chivalry (LORD HARDWICKE, C.).—VILLAREAL v. MELLISH (1737), 2 Swan. 533; 36 E. R. 719; *sub nom.* DA COSTA VILLA REAL v. MELLISH, West temp. Hard. 299; *sub nom.* MELLISH v. DE COSTA, 2 Atk. 14, L. C.

Annotation:—As to (1) *Reid*. R. v. Clarke (1857), 7 E. & B. 186.

1220. Preliminary trial of issue.]—Re ANDREWS, No. 1129, ante.

1221. Infant to be freed from improper restraint—Ultimate custody in court's discretion.]—In cases of writs of *habeas corpus* directed to private persons, to bring up infants, the ct. is bound, *ex debito justitiæ*, to set the infant free from an improper restraint: but they are not bound to deliver them over to anybody nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear

before them (LORD MANSFIELD, C.J.).—R. v. DELAVAL (1763), 3 Burr. 1434; 1 Wm. Bl. 439; 97 E. R. 913.

Annotations:—*Reid*. R. v. Greenhill (1836), 4 Ad. & El. 624; *Re Lloyd* (1841), 3 Man. & G. 547; R. v. Clarke (1857), 7 E. & B. 186; *Re Andrews* (1873), L. R. 8 Q. B. 153; *Thomasset v. Thomasset*, [1894] P. 295. *Mentd.* R. v. Blake (1832), 4 B. & Ad. 355; R. v. Mears & Chalk (1851), 2 Den. 79; *St. Pancras Parish v. Clapham Parish* (1860), 24 J. P. 613.

1222. Whether detention must be forcible—Or improper.]—The ct. will remove a child of tender years from the custody of the mother to that of the father, although there is no suggestion that the child is subject to any improper confinement or restraint, nothing being shown to prove that the custody of the father is improper.—*Ex p.* M'CLELLAN (1831), 1 Dowl. 81.

Annotations:—*Reid*. R. v. Greenhill (1836), 4 Ad. & El. 624; *Re Taylor* (1887), 3 T. L. R. 718.

1223. .]—The ct. will not grant a writ of *habeas corpus* to bring up the body of an infant, unless it be shown on affidavit that the infant is kept against her will.—*Re CONNELL* (1852), 19 L. T. O. S. 63.

1224. Applicant must apply in person—Applicant out of jurisdiction—Warrant of attorney to apply.]—Re PRESTON, No. 1238, post.

1225. — Child not handed over to agent.]—On an application by *habeas corpus* by a father, a foreigner, for the custody of his children the ct. refused to hand over the children to the father's agent, no valid reason being shown why applicant did not personally attend to receive them.—R. v. SCHERSCHESKY (1892), 8 T. L. R. 571.

1226. Return to the writ—Sufficiency of.]—If a return, which on the face of it is ambiguous, is not fortified by affidavit, clearing up all doubt, it will be held evasive & bad.

A return to a writ of *habeas corpus*, that a child under fourteen "is not detained by, or in the custody, power or possession, or under the care or control of deft., or any person employed by him:—*Held*: insufficient.—R. v. ROBERTS (1860), 2 F. & F. 272.

26 O. W. R. 385; 6 O. W. N. 82.—CAN.

p. — Contradictory affidavits.]—M., by testamentary appointment, named as guardians of his children a Roman Catholic clergyman & a Roman Catholic layman. The affidavits were contradictory as to whether M. had been a Protestant or a Roman Catholic, & a *habeas corpus* was sought, directing the mother to surrender the children to the testamentary guardians:—*Held*: in such a case, the ct. would not act on contradictory affidavits.—*Re MARSON* (1869), 17 W. R. 794.—IR.

q. —.]—In an action against a third party at the instance of a father for the recovery of the custody of his child:—*Held*: Sheriff Courts (Scotland) Act, 1907, s. 5 (2), as amended by Sheriff Courts (Scotland) Act, 1913, s. 3, sets up jurisdiction in the Sheriff Ct. to deal with such an action subject to the power of the sheriff to remit to the Ct. of Session any action which he deems more appropriate to the jurisdiction of that ct.—*MURRAY v. FORSYTH*, [1917] S. C. 721; 2 S. L. T. 83; 54 Sc. L. R. 558.—SCOT.

r. Dispute as to right to custody.]—An infant duly committed to the care of the Children's Aid Society of Vancouver under Children's Protection Act of British Columbia was by such society placed with P. as a foster parent. Subsequently another society, upon notice to the Children's Aid Society of Vancouver, but without

notice to P., applied to the magistrate who made the order originally, & obtained an order for the surrender of the child, on the ground that it was of a different religion from the society with which it was first placed. Upon such application the fact was ascertained that the child had been placed in a foster home, but its whereabouts was not disclosed by the officer appearing for the society. Later the second society, on obtaining this information, procured an order for & served a writ of *habeas corpus* on P., directing him to produce the child. He appeared & moved to set aside the writ & the order: *Held*: although the first society was the legal guardian of the child when the second order was made, yet P. could not be deprived of his legal rights without notice & without an opportunity of being heard; the contract placing the child with P. divested the society of any authority to interfere with his rights unless the child's welfare demanded that it should be withdrawn from his care.—*Re PILKINGTON* (1910), 15 B. C. R. 456; 15 W. L. R. 144.—CAN.

1222 i. Whether detention must be forcible — Or improper.]—A writ of *habeas corpus* lies only in cases where persons are imprisoned or deprived of their liberty. It will not issue in the case of children old enough to choose for themselves the persons with whom they wish to live, who manifest a desire to remain with their grandmother where they have every liberty, & with whom they have been brought up.—

Re OSMAN (1918), Q. R. 27 K. B. 282.—CAN.

1226 i. Return to the writ—Sufficiency of.]—A return was made by the mother of the infants, in whose custody they were, to a writ of *habeas corpus* obtained by the father with the object of compelling the delivery of their custody to him. The return stated that they were all under twelve, the age mentioned in R. S. O. 1877, c. 130, s. 1:—*Held*: upon demurrer, the return must be considered in the light, not only of the common law, but of the statutory provisions with regard to the custody of infants, & the return was sufficient in law.—*Re SMART, INFANTS* (1886), 11 P. R. 482.—CAN.

t. Evidence.]—The provision in R. S. O. 1887, c. 70, s. 6, that the ct. or judge before whom any writ of *habeas corpus* is returnable, may proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation, is permissive only, & a judge has power in such a case to direct that the evidence shall be taken *vidæ voce* before him. In this matter it was directed that the evidence should be taken *vidæ voce*, & it was further ordered that a foreign commission should issue to take evidence abroad, & that the parties to the application should be at liberty to examine each other for discovery before the hearing.—*Re SMART, INFANTS* (1887), 12 P. R. 2.—CAN.

a. Costs.]—The ct., when granting an application for *habeas corpus* to compel resp. to give up the custody of

1227. Onus of proof—As to impropriety of existing custody.]—*Re* GOLDSWORTHY, No. 24, *ante*.

Disobedience to writ—Attachment.]—*See* No. 1212, *ante*.

B. Against Whom Writ Lies.

(a) *Mother.*

See, generally, CROWN PRACTICE, Vol. XVI., pp. 248 et seq.

1228. Against wife & wife's mother.]—*Ex p.* — (1848), 12 J. P. Jo. 474.

1229. Although no previous demand.]—The ct. granted a writ of *habeas corpus*, at the instance of the father of an infant between seven & eight years of age, commanding the mother, from whom appct. was divorced, & her father to bring the infant into ct., without any previous demand.—*Ex p.* WITTE (1853), 13 C. B. 680; 21 L. T. O. S. 76; 1 W. R. 289; 188 E. R. 1367.

1230. Deserting of husband by mother.]—*Ex p.* CALDWELL (1854), 22 L. T. O. S. 248; 18 J. P. Jo. 86.

(b) *Grandparents.*

1231. Child placed with grandparent by parent—Application by testamentary guardian.]—The ct. will enforce, under a writ of *habeas corpus*, the right of the testamentary guardian to the custody of the children, against the grandmother, although they were originally placed in her care by the father.

A father appointed two persons exors. of his will, & also guardians of the persons & estates of his children, & requested them, according to their discretion, to cause his children to be properly brought up & educated:—*Held*: this appointment gave the guardians the right to the custody of the children, & the ct. therefore took them out of the custody of the grandfather & grandmother, against whom there was no objection whatever, & who, at the desire of the father, had come over from America to take care of them, & directed that they should be given up to the guardians.—*R. v. ISLEY* (1836), 5 Ad. & El. 441; 2 Har. & W. 196; 6 Nev. & M. K. B. 730; 5 L. J. K. B. 253; 111 E. R. 1233.

*Annotation:—*Consd. *Re Andrews* (1873), L. R. 8 Q. B. 153.

1232. — Weekly payment for keep.]—ANON. (1853), 17 J. P. Jo. 310.

1233. Child placed with wife's father—Subsequent desertion of wife—Knowledge of grandparent.]—*Ex p.* RATCLIFFE (1844), 4 L. T. O. S. 140 A; 8 J. P. Jo. 804.

(c) *Strangers.*

See, generally, CROWN PRACTICE, Vol. XVI., pp. 248 et seq.

an infant, has jurisdiction to order payment by resp. of the costs of the application.—*Re PROCTOR*, [1903] 2 I. R. 117.—IR.

b. —.]—In *habeas corpus* proceedings brought by the mother of an infant to recover the custody of her child, the ct. ordered the persons against whom the proceedings were brought to pay to the mother her costs of the proceedings, including the expenses properly & necessarily incurred by her in attending at the K. B. Div. for the purpose of taking over the infant into her custody.—*Re O'BRIEN* (1913), 47 I. L. T. 252.—IR.

PART XI. SECT. 7, SUB-SECT. 2.—
B. (b).

c. *Child placed with grandparent by parent.]—*M., on the occasion of her second marriage, placed her infant daughter, E., then nine months old,

with her father & mother, J. & his wife, with whom the child remained until she was seven & a half years old, at which time M. applied that a conditional order for a writ of *habeas corpus* to cause J. & his wife to hand back her infant daughter to her should be made absolute:—*Held*: the handing over of her child on her second marriage to her father & mother by M. did not amount to "unmindfulness of her parental duties" within Custody of Children Act, 1891; the mother of the child was, in the circumstances, a "fit" person to have the custody of the child within the Act, & the conditional order for a writ of *habeas corpus* should be made absolute.—*Re BEIR*, [1908] 43 I. L. T. 35.—IR.

PART XI. SECT. 7, SUB-SECT. 2.—
B. (c).

1234 i. Writ will lie.]—Where a child has been traced to the actual or virtual custody of a person who has no legal

1234. Writ will lie.]—*Habeas corpus* for detaining a child under age from her father, & rule for information nisi.—*R. v. WARD* (1762), 1 Wm. Bl. 386; 96 E. R. 218.

1235. Infant absconding from father.]—The ct. will grant a *habeas corpus* in the first instance to bring up an infant, who had absconded from his father, & was detained by a third person without his consent.—*Re PEARSON* (1820), 4 Moore, C. P. 366.

1236. Infant consenting to detention.]—As a general rule, the father of a female child under the age of sixteen is legally entitled to her custody; & she is not of an age to exercise a discretion to withdraw herself therefrom. Persons detaining such a child from her father's protection, though with her consent, will therefore be ordered by this ct., on proceedings by *habeas corpus*, to give her up to her father.—*R. v. HOWES, Ex p. BARFORD* (1860), 3 E. & E. 332; 30 L. J. M. C. 47; 3 L. T. 467; 7 Jur. N. S. 22; 9 W. R. 99; 8 Cox, C. C. 405; 121 E. R. 467; *sub nom. R. v. HOWSE, Ex p. BARFORD*, 25 J. P. 23.

*Annotations:—*Consd. *Ryder v. Ryder* (1861), 30 L. J. P. M. & A. 44. *Apld. Mallinson v. Mallinson* (1866), L. R. 1 P. & D. 221; *Re Andrews* (1873), L. R. 8 Q. B. 153. *Consd. R. v. Prince* (1875), L. R. 2 C. C. R. 154; *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1883), 24 Ch. D. 317. *Refd. R. v. Burrell* (1863), 33 L. J. M. C. 54; *R. v. Gynwall*, [1893] 2 Q. B. 232; *Thomasset v. Thomasset*, [1894] P. 295.

1237. Guardian appointed by spiritual court—Application by testamentary guardian.]—A child of ten years old shall on a *habeas corpus* be taken out of the custody of a guardian appointed by the Spiritual Ct., & delivered to one appointed by her father's will.—*R. v. JOHNSON* (1724), 2 Ld. Raym. 1333; 8 Mod. Rep. 214; 1 Stra. 579; 92 E. R. 370.

*Annotations:—*Consd. *R. v. Smith* (1733), Cunn. 72; *R. v. Delaval* (1763), 3 Burr. 1434; *R. v. Clarke* (1857), 7 E. & B. 186. *Refd. Re Lloyd* (1841), 4 Scott, N. R. 200.

1238. Trustees.]—Upon an infant, a boy of the age of nine years, being brought up before the ct. by *habeas corpus*, it appeared that upon the occasion of her husband's death, the mother then residing in India, gave over the child into the care of her late husband's mother, who subsequently died, leaving all her property to this grandchild & his brother, & appointing two persons her trustees & exors., & the guardians of the child; these persons acted, & had continued to act, as guardians, & were recognised as such, & approved of by the mother, & their conduct as guardians was not impeached in any way; she, however, marrying again, & still residing in India, suddenly executed, conjointly with her husband, a warrant of attorney, authorising certain parties, therein

right to that custody, such person becomes responsible for the safe keeping of the child; & the ct. will issue a *habeas corpus*, at the instance of the person having the legal right to the custody, in order that the child may be brought into ct., or that it may be ascertained, by the return, how the child has been disposed of.—*Re MATTHEWS* (1860), 12 I. C. L. R. 233.—IR.

1234 ii. —.]—Where a board of guardians desire to exercise the powers of parental control over pauper children a resolution to the effect that they are of opinion the parent of the child is unfit is a condition precedent to the exercise of such power. Where guardians assumed parental control of children, without having passed such resolution, the ct., upon the application of the parent, granted a writ of *habeas corpus* directed against the guardians to release such children.—*Re M'GLYNN*, [1913] 2 I. R. 337.—IR.

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named, to demand & receive the custody of the child. This demand had been made upon & refused by the guardians, & in consequence of such refusal application was made, under this warrant of attorney, for the *habeas corpus*. In these circumstances, the ct. refused to disturb the custody of the child.

Semble: a party who is of right entitled to the custody of an infant cannot, by warrant of attorney, empower another person to apply to this ct. to change the custody.—*Re PRESTON* (1847), 5 Dow. & L. 233; 17 L. J. Q. B. 21; *sub nom. Ex p. PRESTON*, 10 L. T. O. S. 170; 11 Jur. 1039; *sub nom. Ex p. TEMPLER*, 11 J. P. Jo. 856.

Annotations:—*Consd. R. v. Clarke* (1857), 7 E. & B. 186. *Distd. Re Two Infant Children, Ex p. Nickells* (1891), 7 T. L. R. 498.

1239. *Nurse.*—*R. v. JACKSON, Ex p. CRINION* (1847), 11 J. P. Jo. 837.

1240. —.—*Re UPTON, Ex p. FORSTER* (1852), J. P. Jo. 436.

1241. *Schoolmaster—Claiming lien for fees.*—*Ex p. VIVIAN* (1854), 18 J. P. Jo. 343.

1242. *Charitable Institution.*—An infant of the age of ten years was brought up on *habeas corpus* upon the application of the mother, who was surviving parent, the father, who was a marine, having died without appointing a guardian. The object of the mother, who was a Roman Catholic, was to remove the infant from a school under the control of the Comrs. of the Royal Patriotic Fund, at which she had placed her in 1855, & to have her educated in a Roman Catholic school:—*Held*: (1) the mother, as guardian for nurture was entitled to the custody of the person of the child; (2) the ct. could not examine the infant as to her wishes or religious belief; (3) the mother was not bound to educate her in the Protestant faith, nor had she lost her right over her by committing her to the care of the Comrs. of the Royal Patriotic Fund; & the ct. was bound to order her to be delivered to her mother.—*R. v. CLARKE, Re RACE* (1857), 7 E. & B. 186; 26 L. J. Q. B. 169; 28 L. T. O. S. 250, 252; 3 Jur. N. S. 335; 5 W. R. 222; 21 J. P. Jo. 53; 119 E. R. 1217; *subsequent proceedings, sub nom. Re RACE*, 1 Hem. & M. 420, n.

Annotations:—*As to* (1) *Consd. Hyde v. Hyde* (1859), 29 L. J. P. M. & A. 150. *Apld. Re Turner, Ex p. Turner* (1872), 41 L. J. Q. B. 142. *Consd. Re Ullee, Nawab Nazim of Bengal's Infants* (1885), 53 L. T. 711; *Re Scanlan* (1888), 40 Ch. D. 200; *R. v. Gyngall*, [1893] 2 Q. B. 232. *Reid. R. v. Howes* (1860), 30 L. J. M. C. 47. *As to* (3) *Apld. R. v. Barnado, Jones's Case*, [1891] 1 Q. B. 194. *Reid. Re Scanlan* (1888), 40 Ch. D. 200. *Generally, Reid. Re Andrews* (1873), L. R. 8 Q. B. 153; *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1883), 24 Ch. D. 317; *Re Two Infant Children, Ex p. Nickells* (1891), 7 T. L. R. 498; *Thomasset v. Thomasset*, [1894] P. 295.

1243. —.—The mother of a child, between ten & eleven years of age, although a Roman Catholic, had consented to the child being placed in a Protestant school for destitute children. Being ill from consumption in a workhouse infirmary, she became, as she alleged, anxious that the child should be removed & placed in a home for poor children, so that she might be brought up in the mother's own faith & in that in which the child had been baptised. She had, before being in the infirmary, lived in lodging houses, had neglected the child & had lived a drunken & immoral life. The father of the child was dead, & the child herself desired to remain in the school:—*Held*: in these circumstances the ct. would not grant a *habeas corpus* to remove the child.—*Re TURNER*,

Ex p. TURNER (1872), 41 L. J. Q. B. 142; 25 L. T. 907; 36 J. P. 613.

1244. —.—Where a widow without means had voluntarily placed her son, who had been baptised as a Roman Catholic, in a Protestant charitable school, & after a time desired to remove him that he might be brought up as a Roman Catholic, but the authorities of the school refused to allow her to do so, alleging that it was not for his benefit either to be given up to her or to have the course of his religious education changed:—*Held*: the authorities had no right to detain the boy from the custody of his mother, who was his lawful guardian.—*R. v. WILLIAMS* (1888), 58 L. J. Q. B. 176; 5 T. L. R. 104, D. C.

1245. —.—The manager of a boys' home objected to return an infant to its mother, who had placed it there some years previously, on the ground that she would cause it to be brought up in the Roman Catholic religion. The infant had hitherto been educated as a Protestant. The father & mother were Protestants when they married. The father had deserted his family, & it was not known whether he were living or dead. The mother, who, it was alleged, had lately become a member of the Church of Rome, desired to have the infant restored to her, & a gentleman of wealth was prepared to provide for its maintenance, education, & advancement:—*Held*: the manager of the home had acquired no right of any kind over the child, & it must be given up to the mother.—*R. v. BARNARDO* (No. 2) (1889), 58 L. J. Q. B. 522, D. C.

SUB-SECT. 3.—BY FORCE.

1246. *Whether justified.*—*Ex p. HOPKINS* (1732), 3 P. Wms. 152; 24 E. R. 1009, L. C.

Annotations:—*Reid. Re Preston* (1847), 17 L. J. Q. B. 21; *Re Spence* (1847), 16 L. J. Ch. 309; *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1883), 24 Ch. D. 317; *R. v. Gyngall*, [1893] 2 Q. B. 232; *Thomasset v. Thomasset*, [1894] P. 295.

1247. —.—The guardians of a young lady directed her teacher not to permit her to visit a relation, who was a tavern keeper. The young lady went to his house to spend an evening at Christmas, when the guardians sent two police officers to bring her away. The tavern keeper refused to let her go, & brought an action of trespass against the officers. They pleaded the general issue, & a verdict was given for £20:—*Held*: the damages were excessive, & if the facts had been pleaded in justification, they thought that there would have been an answer to the action.—*FLEMING v. PRATT* (1823), 1 L. J. O. S. K. B. 194.

1248. —.—There is no general rule that a father who makes a settlement on his infant child has a right to have an order made for the delivery of the child to him.

A young woman, of the age of eighteen, the daughter of Jewish parents, & brought up in that faith, was induced by some persons of the Christian religion to leave her father's house. She embraced that religion & was baptised. She afterwards went to live with K., a widow lady, who was a Christian, & continued to reside there, being maintained by her. The father brought an action at law against the persons who had induced the girl to leave her home, & obtained a verdict with £50 damages. Soon afterwards he settled £100 on the infant, & this sum was paid to ct. A summons was then taken out in chambers in the name of the infant, by her brother as her

next friend, asking that he might be appointed her guardian. This application was sanctioned by the father. A cross-summons was taken out in the name of the infant by K., as her next friend, asking that she might be appointed guardian of the infant. K. did not propose to make any permanent provision for the infant, but stated her readiness to maintain her during her minority. There was some evidence to show that the father had attempted to regain possession of the infant, by force. The Vice-Chancellor saw the infant, & was told by her that she had been baptised into the Christian faith, & that she wished to continue in it. It appeared also that she was of a nervous temperament, & was in great dread of returning to her father's house. The Vice-Chancellor, under these circumstances, would not make any order for the appointment of a guardian to the infant, but upon an undertaking being given by K. to produce the infant upon the hearing of an application which might be made for a writ of *habeas corpus*, restrained the father from attempting to obtain possession of the infant otherwise than by legal process.—*Re LYONS* (1869), 22 L. T. 770; 18 W. R. 238, L. J.

Annotation:—*Refd. Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 10 Ch. D. 49.

1249. — Removal by testamentary guardian—From mother's custody.—Where two persons are appointed joint testamentary guardians of an infant under 12 Car. 2, c. 24, s. 8, trespass will lie by one of them against the other for the forcible removal of the infant from the lawful service of & against the consent of the other.

Qu.: whether a testamentary guardian has the right of removing the infant by force from the possession of the mother.—*GILBERT v. SCHWENCK* (1845), 14 M. & W. 488; 14 L. J. Ex. 317; 9 Jur. 693; 153 E. R. 567.

Annotation:—*Mentd. Alton v. Mid. Ry.* (1865), 19 C. B. N. S. 213.

1250. — Removal by co-guardian—From custody of other without consent—Trespass.—*GILBERT v. SCHWENCK*, No. 1249, *ante*.

SUB-SECT. 4.—BY PETITION.

1251. Jurisdiction of court to entertain—Petition by parent or guardian.—The cases in which this ct. interferes for the protection of infants are not confined to those in which there is property. The ct. has jurisdiction, on the petition of a parent or guardian, to order infants to be restored to the proper custody without a bill being filed.

A mother had removed her infant children, &

PART XI. SECT. 7, SUB-SECT. 4.

1251 i. Jurisdiction of court to entertain—Petition by parent or guardian.—*Re SMART, INFANTS* (1888), 12 P. R. 635.—CAN.

1251 ii. —.]—It may be proper in some cases to disregard the intention of the Infants Act that applications for the custody of children be made by petition & not by way of statement of claim; but if the question of the custody of children comes up as a corollary of a judgment in an action for alimony it should be dealt with as a distinct matter & only after the question of alimony or no alimony has been determined, otherwise there is danger of all the considerations with regard to the custody of children not being properly taken into account.—*O'LEARY v. O'LEARY*, [1923] 1 D. L. R. 949; 19 Alta. L. R. 224; [1923] 1 W. W. R. 501; *revg.* 69 D. L. R. 53.—CAN.

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1251 iii. —.]—*CAMPBELL v. CAMPBELL*, [1920] S. C. 31; 57 Sc. L. R. 75.—SCOT.

1251 iv. —.]—*Re LOW*, [1920] S. C. 351; 57 Sc. L. R. 295; 1 S. L. T. 215.—SCOT.

PART XI. SECT. 8, SUB-SECT. 3.

d. Order giving custody "until further order."—A father applied to a judge for a writ of *habeas corpus* directed to P., the custodian of his child. The application was dismissed, the order directing that the child should remain with P. until she attained the age of seven years. Before the child attained that age two similar applications were made by the father to another judge, the first of which was refused, the second granted. On appeal from this second judge:—*Held*: the decision of a judge on an application for *habeas corpus* is final, subject only to an appeal to the

was residing with them at some place which was not known to the husband; but the trustees of her marriage settlement were in communication with her, & remitted dividends to her. The husband obtained a writ of *habeas corpus* against the trustees for the delivery of the children. The trustees stated, that the children were not in their custody or under their control. The ct. refused to make any order against the trustees, although they were aware of the residence of the mother; nor would it control their right to transmit the dividends to her.—*Re SPENCE* (1847), 2 Ph. 247; 16 L. J. Ch. 309; 9 L. T. O. S. 241, 329; 11 Jur. 399; 41 E. R. 937, L. C.

Annotations:—*Refd. Hope v. Hope* (1854), 19 Beav. 237; *Brown v. Collins* (1883), 25 Ch. D. 56; *Rosenberg v. Lindo* (1883), 48 L. T. 478; *Re A. B.* (1885), 1 T. L. R. 657; *Barnardo v. McHugh*, [1891] A. C. 388; *Re McGrath*, [1893] 1 Ch. 143; *R. v. Gynghall*, [1893] 2 Q. B. 232; *Thomasset v. Thomasset*, [1894] P. 295.

1252. — Husband against wife.—A wife left her husband's home without any reasonable cause, taking with her their only child. The ct., on the petition of the husband, ordered the wife forthwith to deliver the child into the hands of petitioner, with liberty to either party to apply in chambers as to access to the child.

It may be that his conduct has disentitled him to what the law *prima facie* gives him, but it will require a very strong case to justify a wife taking the law into her own hands, instead of doing what the law enables her to do, namely, to apply to the ct. for an order that the custody of the child may either be entrusted to her or continue with her if she already has the child in her own custody (NORTH, J.).—*CONSTABLE v. CONSTABLE* 34 W. R. 649.

SECT. 8.—PROCEDURE AS TO CUSTODY.

SUB-SECT. 1.—ORDERS UNDER SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895.

See HUSBAND & WIFE, Vol. XXVII., p. 559, No. 6151.

SUB-SECT. 2.—RECOVERY OF CUSTODY.

See Sect. 7, sub-sects. 1, 2, 4, ante.

SUB-SECT. 3.—APPEALS FROM AND VARIATION OF ORDER.

1253. Order giving custody "until further order"—New facts subsequent to order—Motion to

Appellate Div., unless the facts are changed; the order of the first judge, which only disposed of the application until further order, was an answer to the application to the second judge, & as it was not shown that the first judge was unavailable to vary or set aside his own order no other judge had any jurisdiction to make any order for the custody of the child before she reached the age of seven years, because it could not be done without varying or setting aside the order of the first judge.—*Re DAVIES* (1915), 32 W. L. R. 716.—CAN.

e. Appeal.—An appeal lies to the ct. from a judge's order with regard to the custody of children under twelve years of age.—*Re ALLEN, R. v. ALLEN* (1871), 31 U. C. R. 458.—CAN.

f. — Effect of acquiescence in order.—The Div. Ct. varied an order of a judge ordering a father to take proceedings by petition instead of by

Sect. 8.—Procedure as to custody: Sub-sect. 3. Part XII. Sect. 1: Sub-sect. 1.]

vary to judge of first instance.]—When an order is made under Infants Custody Act, 1873 (c. 12), s. 1, on the petition of a mother, giving the custody of an infant child to her “until further order,” an application to vary the order by reason of some-

thing subsequent to its date should be made, not by way of appeal, but by motion before the judge of first instance. Such a motion can be made by resp. to the original petition. The provision of sect. 1 of the Act, that the application shall be made by the mother by her next friend, applies only to the original petition.—*Re Holt* (1880), 10 Ch. D. 115; 29 W. R. 341, C. A.

Part XII.—Religion and Education.

SECT. 1.—RELIGION.

SUB-SECT. 1.—DURING LIFETIME OF PARENT.

See, now, Guardianship of Infants Act, 1925 (c. 45).

1254. Welfare of child—Interference by court.—*TALBOT v. SHREWSBURY (EARL), DOYLE v. WRIGHT, TALBOT v. BERKELEY*, No. 1306, *post*.

1255. ———.]—Upon an application for the custody of infant children the wishes of the father upon the question of religion are to be considered, & if there is no other matter to be taken into account his wishes prevail. That rule, however, is subject to this condition, that the wishes of the father only prevail if they are not displaced by considerations relating to the welfare of the children themselves. It is the welfare of the children which forms the paramount consideration, though, of course, it is still true that a sufficient case must be made for going contrary to the father's wishes.—*WARD v. LAVERTY*, [1925] A. C. 101; 94 L. J. P. C. 17; 131 L. T. 614; 40 T. L. R. 600; 68 Sol. Jo. 629, H. L.

1256. Agreement by parents—Particular faith—Enforcement.—*Re ANDREWS*, No. 1129, *ante*.

1257. ———.]—An ante-nuptial agreement that the children shall be brought up in a different religion from that of the father is not binding at law or in equity; but such an agreement will have weight with the ct. in considering whether the father has abandoned his right to educate his children in his own religion. Where a father has not forfeited or abandoned his right to educate his children in his own religion, the ct. cannot refuse to order a child to be educated in that religion merely because it thinks that the child will be more happy & contented, or better provided for, if left with those who have the care of it. But, if a father has forfeited or abandoned his right to educate his children in his own religion, the ct. will consider only the happiness & benefit of the child, & will order it to remain in the care of those by whom it has been brought up, & to be

educated in their religion; although the child may not have so far imbibed the particular doctrines of that religion as to render it dangerous to change its religious training. The father of infant pltf. was a Roman Catholic & the mother a Protestant. Before the marriage they made a verbal agreement that the boys should be brought up as Roman Catholics & the girls as Protestants. Pltf., who was a girl, was baptised in the Church of England. At the time of her birth her father was absent, ill of consumption, but was informed by letter of the mother's intention as to the baptism. He replied, saying that a Roman Catholic priest would call on the mother. This was not done, & the child was baptised as a Protestant. The father died in Feb. 1863, when the child was nine months old, leaving no property for the support of his children. A few days before his death he made a will whereby he directed that his children should be brought up in the Roman Catholic faith, & appointed his brother, who was a Roman Catholic, their guardian. After his death pltf. was allowed by the guardian to remain with her mother & her mother's family, & to be brought up by them as a Protestant till she was nearly nine years old. The guardian then claimed that the child should be given up to him, & after long discussions applied for a writ of *habeas corpus* in the ct. of Q. B. The child was then made a ward of the Ct. of Chancery, being then nearly eleven years old, & the Lords Justices, having seen & conversed with her, were of opinion that she had not imbibed the distinctive principles of the Church of England to such an extent that it would be cruel or dangerous on that ground alone to have her educated in the Roman Catholic faith:—*Held*: notwithstanding, pltf. ought to be allowed to remain with her mother, & to be brought up in the Protestant religion.—*ANDREWS v. SALT* (1873), 8 Ch. App. 622; 28 L. T. 686; 37 J. P. 374; 21 W. R. 616, L.JJ.

Annotations:—*Consd. Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 10 Ch. D. 49; *Re Clarke* (1882), 21 Ch. D. 817.

habeas corpus for the custody of his children by making the *habeas corpus* to run concurrently with the petition:—*Held*: the father had waived his right to appeal from the order directing the filing of the petition by having complied with such order.—*Re SMART, INFANTS* (1888), 12 P. R. 635.—CAN.

g. ———.]—There is no appeal to the general sessions from an order for the custody & care of children under sect. 13 & subsequent sects. of 56 Vict. c. 45 (O.) made by two justices of the peace sitting under sect. 2 of 58 Vict. c. 52 (O.), amending the former Act.—*Re GRANGER & KINGSTON CHILDREN'S AID SOCIETY* (1897), 28 O. R. 555.—CAN.

h. ———.]—Upon an appeal against an order of the K. B. Div. on the return to a writ of *habeas corpus* issued at the instance of the father of an infant against the mother,

ordering that the infant should be placed temporarily in the custody of the mother with certain rights of access to the father:—*Held*: while *prima facie* the father was entitled to the custody of his child & the habits & character of the father must be open to the gravest objections to defeat this right, yet as the order appealed from was of a temporary nature & substantially an *interim* order, it should not now be interfered with, it being open to the father to present a petition to the Chancery Ct. for the permanent custody of the infant.—*Re DEAN* (1920), 47 N. B. R. 392.—CAN.

PART XII. SECT. 1, SUB-SECT. 1.

1254 i. Welfare of child—Interference by court.—While an infant is generally to be brought up in his father's religion, the rule should be departed

from where the departure is shown to be for the welfare of the infant, that being the ultimate guide.—*Re KENNA* (1913), 5 O. W. N. 392; 29 O. L. R. 590.—CAN.

1254 ii. ———.]—Where the special facts nullify or negative the application of any rule of law or practice compelling the ct. to yield to the wishes of a parent as to the religion of a child, the ct. is bound to pay regard solely to the welfare of the child.—*Re CONNOR*, [1919] 1 I. R. —IR.

1256 i. Agreement by parents—Particular faith—Enforcement.—A contract entered into before marriage that the children shall be brought up in a particular religion is not binding on the husband & cannot be enforced in a ct. of equity.—*Re BROWN* (1852), 2 I. Ch. R. 151.—IR.

Apld. Re Mevin, [1891] 2 Ch. 299. *Reid. Re Elderton* (1883), 25 Ch. D. 220; *Re Scanlan* (1888), 40 Ch. D. 200; *R. v. Barnardo, Jones' Case*, [1891] 1 Q. B. 194; *Re McGrath*, [1893] 1 Ch. 143.

1258. ——— Injunction.]—A Protestant on his marriage with a Roman Catholic lady promised that the children of the marriage should all be brought up as Roman Catholics. Soon after the birth of the first child he determined that they should be brought up as Protestants, to which determination he adhered. At the time of the proceedings there were three children, girls, aged respectively nine, eleven, & twelve. The mother, unknown to the father, & in spite of his express directions, had so indoctrinated them with Roman Catholic views that ultimately they refused to go with their father to a Protestant place of worship. The father thereupon commenced an action in their names by himself as next friend, he being a co-pltf., to have them made wards of ct., & took out a summons in the action for directions as to their education. The wife then presented a petition in the matter of the infants, & of Custody of Infants Act, 1873 (c. 12), with a view to their being brought up as Roman Catholics. The judge dismissed the petition, & made an order on the summons declaring that the children ought to be brought up as members of the Church of England, & ought not to be taken to Roman Catholic places of worship, & restraining the mother from taking them to confession or to Roman Catholic places of worship without the consent of the father:—*Held*: (1) the father had not forfeited his right to have the children brought up according to his own religious views, & the ct. would aid him in enforcing that right, & the injunction had been rightly granted; (2) the declaration ought to be omitted, leaving it to the father to do what he considered to be best for the temporal & spiritual welfare of the children.

(3) Where religious principles have been instilled into the minds of children of tender years, contrary to the wishes of the father, the ct. will not privately examine the children to see the extent of the impression which has been created upon their minds.

(4) The father has an absolute & uncontrolled right to direct the education of his children, unless he has forfeited such right by misconduct; or has abdicated it by such a course of conduct as would render the resumption of it injurious to the interests of the children.—*Re AGAR-ELLIS, AGAR-ELLIS v. LASCELLES* (1878), 10 Ch. D. 49; 48 L. J. Ch. 1; 39 L. T. 380; 43 J. P. 36; 27 W. R. 117, C. A.

Annotations:—As to (1) *Consd. Thomasset v. Thomasset*, [1894] P. 295. *Reid. Re Clarke* (1882), 21 Ch. D. 817. As to (4) *Apld. Re Scanlan* (1888), 40 Ch. D. 200; *Re Newton*, [1896] 1 Ch. 740. *Reid. Re McGrath*, [1893] 1 Ch. 143.

1259. ——— Judicial separation.]

D'ALTON v. D'ALTON, No. 1435, *post*.

1260. ——— Welfare of child.]—

Before the marriage of a Protestant with a Roman

Catholic wife, the husband & wife signed an undertaking that all the children of the marriage should be brought up Roman Catholics. There was only one child of the marriage, a girl, who with the father's consent was baptised as a Roman Catholic. When the child was about three years old, the father, who was in destitution, died at the house of M., a Protestant cousin of the wife, who was in good circumstances & had been kind to the family. The father, on his death-bed had commended his wife & child to her, & appointed no guardian. Soon after his death, the child, with the consent of her mother, who was statutory guardian, went to live with & was maintained by M., with whom she remained till she was seven years old, & there was a strong attachment between them. The mother then died, without appointing a guardian. After her death, her brother, who was a Roman Catholic, insisted that the child should be brought up a Roman Catholic, took her away from M. by force, & sent her to America, whence she was brought back under *habeas corpus* proceedings instituted by N., a Protestant brother of the father. Nothing had been said to M. by either father or mother as to the religious education of the child:—

Held: (1) as the child had no parent or guardian the ct. had only to consider what was for her welfare, having due regard to the wishes of the father as to religious education; (2) the ante-nuptial agreement was not binding on the father, & though he acted during his life on the view that the child was to be brought up as a Roman Catholic, he was at liberty to change his mind, & it could not be inferred that in the events which had happened he would have wished the child to be taken from M., in order that she might be brought up as a Roman Catholic, a course which, in the opinion of the Ct., would not be for her benefit.—*Re NEVIN (AN INFANT)*, [1891] 2 Ch. 299; 60 L. J. Ch. 542; 65 L. T. 35; 7 T. L. R. 470, C. A. *Annotation*:—As to (2) *Reid. Re McGrath*, [1893] 1 Ch. 143.

1261. Right of father to decide.]—*Re AGAR-ELLIS, AGAR-ELLIS v. LASCELLES*, No. 1258, *ante*.

1262. ——— Guardianship of Infants Act, 1886 (c. 27).]—The rule that the father in his lifetime has the absolute right to decide what religious education his children shall receive, & that after his death the guardians of the children are bound to see that they are brought up in the religious faith of their father is unaffected by above Act. Accordingly, although under that Act a mother who survives the father of her children is now by law their guardian, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by him, she has no greater powers as regards the religious education of the children than those which any guardian, appointed by will or otherwise, had at the passing of that Act; & unless under very special circumstances, she is bound to see that the children are brought up in the religious faith of the father, whatever

1261 i. Right of father to decide. Where a child is being brought up by Protestants in a religion different from that in which the father desires it to be brought up the father has a right to insist on his wishes being considered.—*Re KENNA* (1913), 5 O. W. N. 392; 29 O. L. R. 590.—CAN.

1261 ii. ———.]—In Dec. 1922, B. executed an instrument under seal, called a "transfer of guardianship," committing his four infant children to the care, guardianship, & control of a children's aid society, & constituting the society their guardian during minority. The instrument contained a clause by which B. pur-

ported to direct that the infants should be placed in a good & approved family home & brought up in the tenets of the Protestant faith. B. was a Roman Catholic, as had been his wife then deceased; but he was in poor circumstances, & was led to believe that he could not obtain the services of the society unless he agreed that the children should be brought up Protestants. An order of commitment followed & it also contained the Protestant clause. The society placed the children in Protestant homes. In 1923 B. applied for an order that the children be placed in Roman Catholic foster homes:—*Held*: this was the father's right at

common law, preserved by the Children's Protection Act of Ontario & the Infants Act.—*Re BIGRAS* (1923), 55 O. L. R. 57.—CAN.

1261 iii. ———.]—A father has a right to direct & regulate the religious faith in which his child shall be brought up.—*Re BROWNE* (1852), 2 L. Ch. R. 151.—IR.

1261 iv. ———.]—The father has a right to have his infant children brought up in the religion he professes, however languid & lukewarm his profession may be, even if he has allowed them to be christened in another church.—*Re THOMSON* (1911), 30 N. Z. L. R. 168.—N.Z.

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that faith may have been. Where the deceased father was a Protestant and the surviving mother a Roman Catholic, the ct. under the powers of sect. 2 of the Act, appointed two Protestants to act jointly with her as co-guardians of the infant children of the marriage, & directed that they should be brought up as members of the Church of England.—*Re SCANLAN (INFANTS)* (1888), 40 Ch. D. 200; 57 L. J. Ch. 718; 59 L. T. 599; 36 W. R. 842; 4 T. L. R. 611.

Annotations:—Consd. Re G—, [1892] 1 Ch. 292. *Apprvd. Re McGrath*, [1893] 1 Ch. 143. *Reid. Re Nevin*, [1891] 2 Ch. 299; *R. v. Gyngall*, [1893] 2 Q. B. 232; *Re Cole* (1900), 16 T. L. R. 500.

1263. — Welfare of child.] — WARD v. LAVERTY, No. 1255, *ante*.

1264. "Custody or control"—Includes religious education—Custody of Infants Act, 1873 (c. 12), s. 2.]—CONDON v. VOLLUM, No. 1190, *ante*.

Illegitimate children.]—See BASTARDY, Vol. III., pp. 383, 384, Nos. 225–227.

SUB-SECT. 2.—AFTER DEATH OF PARENT.

See Guardianship of Infants Act, 1925 (c. 45).

1265. General rule—Father's religion followed.]—STOURTON v. STOURTON, No. 1433, *post*.

1266. — — —.]—The general rule is that an infant is to be brought up in the religion of the father.

The mother of two infants, aged fifteen & eleven years respectively, became a member of the sect called "Plymouth Brethren," & endeavoured to bring the infants up in the tenets of that sect. The father of the children was at the time of his death a beneficed clergyman of the Established Church. Shortly before his death he professed some doubts, but died without any public renunciation of the doctrines of that church. By his will he appointed his widow & a clergyman guardians of his children. On the application of her co-guardian the ct. restrained the mother from educating the children in the doctrines & from taking them to the chapel of the "Plymouth Brethren." The ct. refused to examine the infants personally.—*Re NEWBERRY* (1866), 1 Ch. App. 263; 35 L. J. Ch. 330; 13 L. T. 781; 12 Jur. N. S. 154; 14 W. R. 360, L. JJ.

Annotations:—Reid. Re Meade (1871), 19 W. R. 313; *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 10 Ch. D. 49; *Re Scanlan* (1888), 40 Ch. D. 200; *Re McGrath*, [1892] 2 Ch. 496; *F. v. F.*, [1902] 1 Ch. 688.

1263 i. — Welfare of child.]—The right of the father to control the religious training of his child considered in relation to the custody & the welfare of the child.—Re STORY, [1916] 2 I. R. 328; 50 I. L. T. 123.—IR.

PART XII. SECT. 1, SUB-SECT. 2.

1265 i. General rule—Father's religion followed.]—Where the ct. has to deal with the question of bringing up an infant in a particular religion, it will regard that of the father more than that of the mother; but in the case of an adopted child it will not interfere with the discretion of the adopting father; & will respect his preference, when the funds for the infant's support come from him.—Re PENNINGTON (1875), 1 V. L. R. 97.—AUS.

1265 ii. — — —.]—A mother testamentary guardian has no right to bring up her child in a religion different from that in which the child's father died, being his fixed religion.—

HUNT (A MINOR) (1843), 2 Con. & Law. 373.—IR.

1265 iii. — — —.]—The religion of the father is to be imputed to his infant children.—Re M'CONWAY, R. v. BELFAST UNION GUARDIANS, [1908] 2 I. R. 343; 41 I. L. T. 86.—IR.

1265 iv. — — —.]—In the case of the father of a legitimate child, if he has not waived or forfeited his right by conduct, the cts. will allow his wishes to control the faith of the child, even after his death.—Re CONNOR, [1919] 1 I. R. 361.—IR.

1265 v. — — —.]—Pupil children of a Roman Catholic father & mother were brought up as Roman Catholics. The mother having died, the father married a second wife, a Protestant, but before marriage he took a declaration from her that she would not interfere with his full liberty "to fulfil all his duties as a Catholic." Being on the point of going abroad on military service he left the children to the care of his second wife, with the request that she

1267. — — —.]—HAWKSWORTH v. HAWKSWORTH, No. 1302, *post*.

1268. — — —.]—Re SCANLAN (INFANTS), No. 1262, *ante*.

1269. — — —.]—The ct. has jurisdiction to remove the legally appointed guardian of an infant, although the infant is not a ward of ct. & has no property. But its power is in such case limited to the removal of the guardian & the appointment of another who is willing to act; no directions as to education can be given when the ct. has no fund under its control out of which the education can be provided.

A Roman Catholic died leaving a widow & infant children. The widow, acting under the Guardianship of Infants Act, 1886 (c. 27), appointed S. guardian of the infants, who had them educated as Protestants. The father had left no directions as to the religious education of the infants, & was proved to have been indifferent on the subject. An elder son had in the lifetime & with the consent of the father been brought up as a Protestant; & the eldest of the infants, being of an age to judge for herself, preferred to remain a Protestant. The infants were not wards of ct., & had no property.—*Held*: there were special circumstances taking the case out of the general rule that infants are to be brought up in their father's religion; & the ct., being of opinion on the facts that it would not be for the children's welfare to interfere, refused to remove S. from the guardianship, or to appoint another guardian to act jointly with her.

In the present case it appeared that the father was indifferent to religion & that there were practically no wishes of his to rely on & the ct. was not bound to play battledore & shuttlecock, contrary to its own inferences from the facts of the case, with the religious education of the children, so as to interfere with the present guardian (LINDLEY, L.J.).—*Re McGRATH (INFANTS)*, [1893] 1 Ch. 143; 62 L. J. Ch. 208; 67 L. T. 636; 41 W. R. 97; 9 T. L. R. 65; 37 Sol. Jo. 45; 2 R. 137, C. A.

Annotations:—Consd. R. v. Gyngall, [1893] 2 Q. B. 232; *Re Cole* (1900), 16 T. L. R. 500. *Fold. Re Mathieson* (1918), 87 L. J. Ch. 445. *Reid. Thomasset v. Thomasset*, [1894] P. 295; *Re Newton*, [1896] 1 Ch. 740; *Re W., W. v. M.*, [1907] 2 Ch. 557; *Ward v. Laverty*, [1925] A. C. 101.

1270. — — —.]—Re COLE (INFANTS) (1900), 16 T. L. R. 500.

1271. Express testamentary guardian.] — A father, by will, directed that his son should be brought up by certain persons, whom he named

would "stick to the children." The father was killed on active service. The Protestant stepmother having manifested an intention to bring up the children as Protestants, the relatives of their father & mother presented a petition to the ct. craving that the children should be placed in the custody of their maternal grandmother in order that they might be brought up as Roman Catholics.—*Held*: other circumstances affecting the custody of the children being equal, the father's intention that they should be brought up in his religion must prevail; & in view of the attitude of the stepmother, petition granted.—*O'DONNELL v. O'DONNELL*, [1919] S. C. 14.—SCOT.

k. Express testamentary directions.]—Testamentary guardians appointed by the father have a right to direct the religious education of a child according to the father's wishes.—Re BROWNE (1852), 2 I. Ch. R. 151.—IR.

l. Where no testamentary directions—Desire of father.]—Orphan

guardians, in the Roman Catholic faith. The fortune left to the child by the father was very small, & he was maintained alternately by Roman Catholic & Protestant relations, without any interference on the part of the guardians, till he was about fifteen, when the Protestant relation with whom he lived died. It appeared that he had been brought up principally as a Protestant, & it was alleged that he preferred the Protestant faith. The ct., under the special circumstances of the case, undertook to see the infant before making an order as to the mode of his education & maintenance.—*WITTY v. MARSHALL* (1841), 1 Y. & C. Ch. Cas. 68; 5 Jur. 1079; 62 E. R. 794.

Annotations:—*Reid*. *Stourton v. Stourton* (1857), 29 L. T. O. S. 33; *Re Meade* (1871), 19 W. R. 313.

1272. — Not interfered with—Unless prejudicial to child.]—*DAVIS v. DAVIS*, No. 1284, *post*.

1273. Where no testamentary directions—Presumption of father's wish—For education in his own religion.]—(1) The petition, having been presented by the infants was ordered to be amended by the insertion of a next friend.

(2) Where the father has not left nor expressed any direction or instruction as to the religion in which his infant children are to be educated, the ct. will assume that his wishes were, that they should be educated in his own religion.—*Re NORTH* (1846), 8 L. T. O. S. 313; 11 Jur. 7.

Annotation:—*Consd. R. v. Clarke* (1857), 7 E. & B. 186.

1274. — — — — —.]—The ct., as a general rule, will assume, in the absence of any express wish to the contrary, that a father desires his children to be brought up in his own religious faith, & when filling his place after his death, will direct the education of his infant children accordingly. When the child is very young, directions will not be given as to its religious education; but its physical well-being will be principally considered.

A Roman Catholic died, leaving a daughter, who had been baptised into the Roman Catholic Church. His widow, who was a Protestant, was married again to a Protestant. The child was nearly three years old, & in delicate health:—*Held*: (1) the child, at such an age, ought not to be removed from the care of her mother, & the mother, with her second husband & a Protestant relative, ought to be appointed guardians of the child, until she was seven years old; (2) no directions as to the religious education of the child ought to be given at the present age of the child, but the guardians were ordered to apply respecting it when the child was seven years old; (3) the appointment of Protestant guardians, in such a case, being contrary to the general rule of the ct., a declaration ought to be inserted in the order, that the child ought to be brought up in the Roman Catholic faith.—*Re AUSTIN*, *AUSTIN v. AUSTIN* (1865), 4 De G. J. & Sm. 716; 6 New Rep. 189; 34 L. J. Ch. 499; 12 L. T. 440; 29 J. P. 691; 11 Jur. N. S. 536; 13 W. R. 761; 46 E. R. 1098, L. C.

Annotations:—*Folld. Hawksworth v. Hawksworth* (1871), 6 Ch. App. 539. *Reid. Re Meade* (1871), 19 W. R. 313; *Re Scanlan* (1888), 40 Ch. D. 200.

children having been clandestinely taken from the custody of their uncle, the testamentary guardian under the will of their father, who had predeceased his wife, by their aunt, a Roman Catholic, claiming guardianship under an invalid instrument in her favour, signed by the mother of the children, & it appearing that their father, a Protestant, had desired the children to be brought up in his own faith, an order was made for their delivery to the custody of their uncle as testamentary guardian.—*Re CHILLMAN*,

INFANTS (1894), 25 O. R. 268.—*CAN.*

m. — — — — —.]—The ct. will be guided by the intention of the father as to the faith in which his children shall be brought up.—*Re KELLERS* (1856), 5 I. Ch. R. 328.—*IR.*

PART XII. SECT. 1, SUB-SECT. 3.

1285 i. *Abandonment of rights—What constitutes—Delegation to mother.*]—A father, a professed Roman Catholic, had his children baptized by Roman Catholic priests, & their births entered

1275. — — — — —.]—*Re NEWBURY*, No. 1266, *ante*.

1276. — Discretion of guardian.]—*TALBOT v. SHREWSBURY* (EARL), *DOYLE v. WRIGHT*, *TALBOT v. BERKELEY*, No. 1306, *post*.

1277. Discretion of mother.]—*R. v. CLARKE*, *Re RACE*, No. 1242, *ante*.

1278. — Ante-nuptial agreement between parents.]—*Re NEVIN* (AN INFANT), No. 1260, *ante*.

SUB-SECT. 3.—LOSS OF RIGHTS BY FATHER.

1279. Profession of irreligion.]—*SHELLEY v. WESTBROOKE*, No. 1174, *ante*.

1280. — How far material.]—*LYONS v. BLENKIN*, No. 1134, *ante*.

1281. Foundation of religious sect—Not conforming with accepted beliefs.]—*THOMAS v. ROBERTS*, No. 1175, *ante*.

1282. Immorality.]—*SHELLEY v. WESTBROOKE*, No. 1174, *ante*.

1283. — What constitutes.]—*Re AGAR-ELLIS*, *AGAR-ELLIS v. LASCELLES*, No. 1118, *ante*.

1284. Abandonment of rights—What constitutes—Neglect of religious education.]—The ct. will attend to the express wishes of the father, as contained in his will, with regard to the religious education of his children, unless from neglect or otherwise, during the life of the father, the children have been allowed to grow up in a different faith, & great danger would arise to the moral & religious welfare of the children, if the ct. complied with the direction contained in the father's will.

There have been cases in which the guardians, in neglect of their duty, have brought up the child in a system of religious belief inconsistent with the father's wishes & in these cases the ct., having ascertained that the child has imbibed strong religious impressions, has felt itself bound to see that the sacred duty imposed upon the guardians is discharged with a due regard to the welfare of the child. So again the father may during his life have so neglected the religious education of his child as to leave to the ct. no option but to allow the child to be brought up in accordance with the religious belief, which the child has acquired, notwithstanding the strongly expressed wishes to the contrary contained in the will of the father (*WOOD, V.-C.*).—*DAVIS v. DAVIS* (1862), 26 J. P. 260; 10 W. R. 245.

Annotations:—*Reid. Hill v. Hill* (1862), 6 L. T. 99; *Re Meade* (1871), 19 W. R. 313; *Re Agar-Ellis*, *Agar-Ellis v. Lascelles* (1878), 10 Ch. D. 49.

1285. — Delegation to mother.]—Where a Roman Catholic father, who lived till his eldest child was seven years old, allowed the mother, who was a Protestant, to have the exclusive charge of the education of the children during his life, & they were with his full knowledge brought up in the Protestant faith, he was held to have abdicated his right to direct the religious education of his children; & the ct., in ordering a scheme to be settled for their education, disregarded a direction

in a Douay Bible; but they never during his life attended Roman Catholic worship, except on one occasion of great solemnity, to see Mass performed by way of spectacle. He had a Protestant governess for the younger, & placed the two elder children at a Protestant school, & they, with his sanction, attended worship at a Protestant church, & were generally brought up as Protestants. By will he appointed his wife, a Protestant, their testamentary guardians:—*Held*: the children, who were wards

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in his will that they should be brought up in the Roman Catholic faith.—*HILL v. HILL* (1862), 31 L. J. Ch. 505; 6 L. T. 99; 26 J. P. 420; 8 Jur. N. S. 609; 10 W. R. 400.

Annotations:—Folld. Andrews v. Salt (1873), 8 Ch. App. 622. *Consd. Re Andrews* (1873), L. R. 8 Q. B. 163; *Re Clarke* (1882), 21 Ch. D. 817; *Re Scanlan* (1888), 40 Ch. D. 200; *Re Nevin*, [1891] 2 Ch. 299. *Reid. Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 10 Ch. D. 49; *Re McGrath*, [1892] 2 Ch. 496.

1286. ————.]—An Englishman, who was a Protestant, in Oct. 1869, married in Germany a German lady who was a Roman Catholic. Previously to the marriage a written agreement was signed by them both, which provided that the children, if any, of the marriage should be educated in the Roman Catholic faith. After the marriage the husband & wife lived together in Germany. He never attended a Protestant place of worship, but often went to mass with his wife. There were three children of the marriage—a daughter born in 1871, a son born in 1873, & another daughter born, just after the death of the father, in Apr. 1876. The first two children were, with the father's knowledge, baptised as Roman Catholics, & in the case of the son, a Roman Catholic priest in England, whom the father knew, acted as godfather at the request of the father himself. The father allowed the mother to bring up the two children as Roman Catholics. He died intestate, & had not appointed any guardian to his children. His only property was some real estate in Lancashire, worth more than £2,000 a year, which passed to his infant son as his heir-at-law, subject to the life estate of the paternal grandfather, who died in 1881. The mother had no fortune of her own. She, as next friend of the infant son, in 1882 took out a summons for the appointment of a guardian & the settlement of a scheme for his maintenance & education. She desired that he should be educated in the Roman Catholic faith. The paternal relations, on the contrary, wished

of ct., should be brought up as Protestants.—*Re KELLERS* (1856), 5 I. Ch. R. 328.—IR.

1285 ii. ————.]—A Roman Catholic father, married to a Protestant, had all his children, eight in number, baptised by Roman Catholic clergymen, but permitted the children, when of sufficient age, to receive instruction & attend divine service as Protestants. They did not receive any religious instruction as Roman Catholics, nor attend the Catholic worship. The father died in the life of the mother, who afterwards was obliged to enter the workhouse, & there registered the children as Protestants. The mother died leaving the eldest child about twelve years of age, & the youngest about one. Her wish was that the children should be brought up as Protestants. The husband on his deathbed was attended by a Roman Catholic priest, & it was alleged that he had expressed a wish that the children should be brought up as Roman Catholics; but evidence was given that he had subsequently expressed a different wish:—*Held*: the children were to be brought up as Protestants.—*Re O'MALLEYS (MINORS)* (1858), 8 I. Ch. R. 291; *Drury temp. Nap.* 358; 11 Ir. Jur. 192.—IR.

1287 i. ————.]—An infant, M., whose father was a Roman Catholic, & whose mother was a Protestant, was with the father's consent, brought up in the religion of the mother until she was about twelve years of age, when, on the death of the mother, she was committed to the care of relatives of the mother, & attended & finally

became a member of the Presbyterian Church. The father then, for the first time, insisted upon the child returning to live with him, & receiving instruction with a view to becoming a member of the Roman Catholic Church. M., having been brought before a judge of the ct., in obedience to a writ of *habeas corpus*, the father applied for an order to have her returned to his custody & control. The judge saw M., as a mode of determining what would be for her welfare, & found her to be a young girl of much intelligence, thoroughly understanding her position, most pronounced in her religious views, & strongly opposed to returning to her father's house, even for a period. He was of the opinion that the father's conduct, from the first up to the time of his second marriage, was such as to bring about the conditions of which he complained, by permitting M. to be brought up in a faith different from his own, until she had reached an age when her feelings & convictions were settled & confirmed, & then, to gratify a caprice of his own, seeking to compel her to change the faith in which she had been educated. He refused the order applied for, on the ground that the ct. ought not to lend its assistance in such a case, & that the father must abide by the consequence of his own indifference at a time when his child's ideas were being formed & matured. On appeal:—*Held*: the judge was right in refusing the order applied for, & the ct. should not aid the father in regaining control of the person of his child, except upon his giving an undertaking that she should enjoy complete religious free-

that the infant should be brought up as a Protestant:—*Held*: (1) the father by his conduct had abandoned his right to have the child brought up in his own faith, & had indicated a wish that he should be brought up as a Roman Catholic; (2) under the circumstances it would be most for the benefit of the infant that he should be educated in the Roman Catholic faith; (3) an allowance of £800 *per annum* out of the infant's income was a proper allowance to be made to his mother by way of maintenance.—*Re OLARKE* (1882), 21 Ch. D. 817; 51 L. J. Ch. 762; 47 L. T. 84; 31 W. R. 37.

Annotation:—As to (1) *Reid. Re McGrath*, [1893] 1 Ch. 143.

1287. ————.]—*Re MCGRATH (INFANTS)*, No.

1269, *ante*.

1288. ————.]—*Re NEWTON (INFANTS)*, No.

1189, *ante*.

1289. Infant attaining majority.]—Re AGAR-ELLIS, AGAR-ELLIS v. LASCELLES, No. 1118, *ante*.

SUB-SECT. 4.—CONTROL OF THE COURT.

See Custody of Children Act, 1891 (c. 3), s. 4; Guardianship of Infants Act, 1925 (c. 45), s. 1.

1290. Jurisdiction of court—Infant out of jurisdiction.]—An order may be obtained at the instance of testamentary guardians resident within the jurisdiction declaring the religious faith in which infant wards of ct. ought to be brought up, although the infants are residing out of the jurisdiction of the ct. with their mother, who is their other testamentary guardian.—*Re MONTAGU, Re WROUGHTON, MONTAGU v. FESTING* (1884), 28 Ch. D. 82; 54 L. J. Ch. 397; 33 W. R. 322; 1 T. L. R. 11.

1291. Infant not ward of court.]—Re MCGRATH (INFANTS), No. 1269, *ante*.

1292. Application to court—Effect of delay.]—Re ANDREWS, No. 1129, *ante*.

dom, & she should not be removed out of the jurisdiction of the ct.—*Re MARSHALL* (1900), 33 N. S. R. 104.—CAN.

1287 ii. ————.]—*Re SHANAHAN* (1852), 20 L. T. O. S. 183.—IR

1287 iii. ————.]—The ct. will not interfere with the right of a father to direct & regulate the religious faith in which his child shall be brought up unless there is an abuse of parental authority. To insist on bringing up the child in his own religion, notwithstanding a verbal agreement to the contrary, entered into before marriage with his wife, is not an abuse of parental authority which will induce the ct. to interfere.—*Re BROWNE* (1852), 2 I. Ch. R. 151.—IR.

PART XII. SECT. 1, SUB-SECT. 4.

n. Jurisdiction of court.]—Re HOWARD (1909), 14 B. C. R. 307; 11 W. L. R. 367.—CAN.

o. ————.]—Sembly: the Ct. of Ch. alone controls the religious education of minors when testamentary guardians consent to act.—*Re MARSON* (1869), 17 W. R. 794.—IR.

*p. ————.]—*The ct. has jurisdiction to appoint a guardian to act with the mother after the father's death, in order to insure the infants being brought up in the religion of the father; & the fact that the infants have no property, & that the father was an alien, does not affect the jurisdiction.—*Re MAGNES (INFANTS)*, [1893] 31 L. R. Ir. 513.—

1293. Religious belief already formed.]—LYONS v. BLENKIN, No. 1134, *ante*.

1294. —.]—STOURTON v. STOURTON, No. 1433, *post*.

1295. —.]—DAVIS v. DAVIS, No. 1284, *ante*.

1296. —.]—ANDREWS v. SALT, No. 1257, *ante*.

1297. —.]—*Re* NEWTON (INFANTS), No. 1189, *ante*.

Compare No. 1302, *post*.

1298. Child of tender years.]—*Re* AUSTIN, AUSTIN v. AUSTIN, No. 1274, *ante*.

1299. Examination of infant by court—To ascertain state of belief.]—STOURTON v. STOURTON, No. 1433, *post*.

1300. — —.]—*Re* NEWBURY, No. 1266, *ante*.

1301. — —.]—*Re* LYONS, No. 1248, *ante*.

1302. — —.]—(1) The proper religion in which an infant should be brought up is that of its father.

(2) It is improper for the ct. to question a child of eight & a half years upon doctrinal points, so as to try to ascertain whether she has any predilection for one religion over another.—HAWKSWORTH v. HAWKSWORTH (1871), 6 Ch. App. 539; 40 L. J. Ch. 534; 25 L. T. 115; 35 J. P. 788; 19 W. R. 735, L. JJ.

Annotations:—As to (1) *Expld.* Andrews v. Salt (1873), 8 Ch. App. 622. *Consd.* *Re* Clarke (1882), 21 Ch. D. 817. *Expld.* *Re* Nevin, [1891] 2 Ch. 299. *Consd.* *Re* McGrath, [1893] 1 Ch. 143. *Refd.* *Re* Andrews (1873), L. R. 8 Q. B. 153; *Re* Agar-Ellis, Agar-Ellis v. Lascelles (1878), 10 Ch. D. 49; *Re* Scanlan (1888), 40 Ch. D. 200. As to (2) *Consd.* Andrews v. Salt (1873), 8 Ch. App. 627, n.; *Re* Agar-Ellis, Agar-Ellis v. Lascelles (1878), 10 Ch. D. 49. *Refd.* *Re* Nevin, [1891] 2 Ch. 299.

1303. — —.]—ANDREWS v. SALT, No. 1257, *ante*.

1304. — —.]—*Re* AGAR-ELLIS, AGAR-ELLIS v. LASCELLES, No. 1258, *ante*.

1305. — —.]—By an order of Apr. 1904, the son & daughter of a Jewish father, then aged respectively ten & eight years, were directed to be brought up in their father's religion, & both parents being dead, were placed in a Jewish house-

1293 i. Religious belief already formed.]—*Re* MARSHALL (1900), 20 C. L. T. 136; 33 N. S. R. 104.—CAN.

1293 ii. —.]—*Re* FALLON (undated), cited 5 I. Ch. R. 328.—IR.

1293 iii. —.]—The circumstances that the children have, for several years after the father's death, been brought up in a particular faith, is one which should have weight with the ct. as to those of the children who are of an age to have formed opinions on religious subjects.—*Re* KELLERS (1856), 5 I. Ch. R. 328.—IR.

1293 iv. —.]—The actual conscientious convictions of a minor who has arrived at the age of conscious responsibility are to be secured against pressure or coercive influence.—*Re* BROWNE (1858), 8 I. Ch. R. 172; Drury temp. Nap. 351.—IR.

1293 v. —.]—Although the ct. has jurisdiction to interfere with the authority of a father over his children, & will, in a proper case, exercise that jurisdiction, whether the children be possessed of property or not, such authority is of a very sacred nature, & ought not to be interfered with except in very extreme cases. When a father has voluntarily permitted his children to be instructed in the tenets of a particular religious body, & those tenets have become so rooted in the children's minds that they cannot be shaken without imminent risk of destroying all religious belief whatever, the ct. will not allow him afterwards to insist on a radical change of religious instruction; but when it appears that no such rooted belief has yet been

engendered, the ct. will not interfere merely on the ground that he had previously agreed not to disturb such belief.—*Re* MEADE (MINORS) (1870), 19 W. R. 313.—IR.

1293 vi. —.]—The Ct. of Ch. has jurisdiction to protect the conscientious convictions of a minor, although adverse to the religion or even to the declared wishes of a living father who has not forfeited his parental authority by any misconduct, but such jurisdiction is only to be exercised with extreme caution. If the case for interference under such circumstances be rested solely on the ground of the child's religious convictions, it must be established with reasonable certainty that they have some root, & are entertained by a mind of intelligence adequate to understand their importance, & with stability capable of adhering to them; & in order to inform itself on those points, the ct. may, by a personal interview, test the opinions & wishes of the child.—*Re* GRIMES (1877), 11 I. R. Eq. 465.—IR.

1298 i. Child of tender years.]—It was urged that the father had a right to have children brought up as Presbyterians, & that the mother & her mother were both members of the Salvation Army:—*Held*: this question was not a pressing one owing to the tender age of the infants: the father might raise it again; having regard to the wide discretion given by R. S. O. 1887, c. 137, s. 1, the judge was freed from any possible obligation to make, upon the application of the father, an order which would be reversed on the application of the mother.—*Re* DICK-

hold for this purpose. In Mar. 1907, the boy wrote to his guardian that he no longer wished to be educated as a Jew. This letter was sent to the judge, who, after interviews with the boy & further inquiries, came to the conclusion that the welfare of the boy demanded his sanction to a change in his religious education, & he accordingly made an order that both infants should be henceforth brought up in the Christian religion:—*Held*: it would be morally injurious to the welfare of the boy not to give effect to his wishes, but as there was no evidence to justify any order changing the religious education of the girl, this portion of the order must be varied.

In all orders relating to the religious education of a ward of ct. the words "until further order" must, from the nature of the case, be deemed to be inserted.—*Re* W., W. v. M., [1907] 2 Ch. 557; 77 L. J. Ch. 147, C. A.

Interference on ground of father's conduct—Court disregarding father's wishes.]—*See* Sub-sect. 3, *ante*.

1306. Benefit of infant—Pecuniary benefit.]—(1) Where a ward of ct. is in the custody of its mother, the ct. will exercise a discretion, whether it will order it to be delivered up to its testamentary guardian.

(2) Where the testamentary guardian, who was a Roman Catholic, allowed his ward, the child of a Roman Catholic father & Protestant mother, to reside with the paternal uncle of the ward, who was a Roman Catholic, the ct. declined to interfere with the religious education of the ward.

The circumstance that it will be more for the pecuniary interest of the child to be educated in one religious faith than in another will not induce the ct. to interfere with his religious education.

Semble: the ct. will not now, under any circumstances, interfere with the testamentary guardian, as regards the religious faith of his ward.

Great deference is always paid by the ct. to the wishes of the father, as to the religious faith

SON (1888), 12 P. R. 659.—CAN.

1298 ii. —.]—A child of tender years has no religion of its own, nor is the question of its religion a pressing one; it cannot properly be designated a Roman Catholic or a Protestant child.—*Re* KENNA (1913), 5 O. W. N. 302; 29 D. L. R. 590.—CAN.

1299 i. Examination of infant by court—To ascertain state of belief.]—The ct. will regard the feelings & views of an infant of fourteen as to her religious education, if such views are definitely formed, & will take steps to ascertain her own independent views, if possible, apart from any extraneous influence.—*Re* PENNINGTON (1875), 1 V. L. R. 97.—AUS.

1299 ii. —.]—*Re* MARSHALL (1900), 33 N. S. R. 104.—CAN.

1299 iii. —.]—A ward of ct., aged about nine years, who had been ordered to be brought up as a Roman Catholic, was, in disobedience to the orders of the ct., removed out of the jurisdiction of the ct. by one of her relatives, & educated in the doctrines of the Established Church. At the age of fifteen years she was brought back within the jurisdiction. The Lord Chancellor, having, in a personal interview with her, been convinced that she was herself attached to the religious opinions in which she had been brought up, ordered her future religious education to be conducted in conformity with them.—*Re* BROWNE (1858), 8 I. Ch. R. 172; Drury temp. Nap. 351.—IR.

1299 iv. —.]—*Re* GRIMES (1877), 11 I. R. Eq. 465.—IR.

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of his child, although the father has no power to prescribe a particular faith for the child.

In applications relative to the custody of wards, the ct. always takes into consideration their interests, as between themselves & their relations.

Now the first question is, whether any pecuniary benefit will induce the ct. to interfere with that course of education which the father has pointed out. . . . I am not so sure that it would be for his benefit to be brought up as a Protestant . . . I should in all probability, be doing the greatest possible injury to the worldly interest of the child by doing that which is now asked, namely, by taking him from the custody of his testamentary guardian & educating him in a religion which, looking to the usual feelings of human nature, would have the effect of alienating him from the person from whom he has the greatest expectations.

. . . It is proper that mothers of children thus circumstanced should know that they have no right, as such, to interfere with testamentary guardians, & if, under the peculiar circumstances, I think it proper now to leave the child in the custody of the mother, it is not in respect of right in that mother, but it is in consequence of that power which the ct. has of controlling the power of testamentary guardians (LORD COTTENHAM, C.).

—TALBOT v. SHREWSBURY (EARL), DOYLE v. WRIGHT, TALBOT v. BERKELEY (1840), 4 My. & Cr. 672; 9 L. J. Ch. 125; 4 Jur. 380; 41 E. R. 259, L. C.; *subsequent proceedings*, 4 Jur. 1030.

Annotations:—As to (1) Rejd. Re Agar-Ellis, Agar-Ellis v. Lascelles (1883), 53 L. J. Ch. 10; Re Scanlan (1888), 40 Ch. D. 200. As to (2) Rejd. Re North's Petn. (1846), 11 Jur. 7; R. v. Clarke (1857), 7 E. & B. 186; Hill v. Hill (1862), 31 L. J. Ch. 505; Re Meade (1871), 19 W. R. 313; Re Nevin, [1891] 2 Ch. 299.

1307. — Child of tender years.]—Re AUSTIN, AUSTIN v. AUSTIN, No. 1274, ante.

1308. —.]—Re CLARKE, No. 1286, ante.

1309. —.]—Re McGRATH (INFANTS), No. 1269, ante.

1310. —.]—WARD v. LAVERTY, No. 1255, ante.

See, now, Guardianship of Infants Act, 1925 (c. 45), s. 1.

1311. Education not in Christian religion—Mahomedan.]—A child born in India whose father was a European British subject & a Christian, must be presumed to have the father's religion, & his corresponding civil & social status, & it is the duty of a guardian to bring up his ward in his father's religion. An infant, the child of a Christian father & the issue of a Christian marriage, was left, by the death of her father, of very tender age & brought up by her mother as a Christian during her early youth. Her mother, after cohabiting with a man having a wife & professing

1308 i. Benefit of infant.]—It is the duty of the ct. to see that an infant is brought up in the faith of his or her father, but the mere fact that an infant was the child of parents belonging to the Presbyterian Church, & that she had been brought up in the discipline of that body, is not of itself sufficient to warrant the reversal of the master's ruling approving of her being placed & educated at a seminary, the proprietress of which was a member of the Church of England, it being shown that means were provided for the regular attendance of pupils of the Presbyterian persuasion at that church, & the location of the school being such that it enabled the infant, who was of a delicate constitution, to have much more frequent intercourse with her friends & rela-

tives, & there was the probability of a stricter personal supervision by the proprietress than at a public institution in another part of the country which was in connection with the Presbyterian Church in Canada.—MACNABB v. MCINNES (1877), 25 Gr. 144—CAN.

1308 ii. —.]—Re KELLERS (1856), 5 I. Ch. R. 328.—IR.

1308 iii. —.]—S., who was a Roman Catholic, married in the year 1903 in a Protestant church a woman who was a Protestant. He promised at the time of the marriage to adopt his wife's religion. There were two children of the marriage, & S. allowed them to be baptised & brought up as Protestants. From the year 1909 the children had lived with their

the Christian religion, became, with him, a Mahomedan, for the purpose, as it appeared, of giving legal effect to a Mahomedan marriage between them, but which alleged marriage was not proved to have been duly celebrated. The infant after attaining the age of fourteen years, & being with her mother, professed a desire to become a Mahomedan in religion, & adopted the Mahomedan mode of life. The cts. in India having been applied to, under the circumstances, by her relatives, to remove the infant from the custody of her mother, made an order under the provisions of the Acts, Nos. XL. of 1858, & IX. of 1861, & placed the infant under a Christian guardian.—SKINNER v. ORDE (1871), L. R. 4 P. C. 60; 8 Moo. P. C. C. N. S. 261; 14 Moo. Ind. App. 309; 17 E. R. 310; P. C.

Annotations:—Consd. Re Scanlan (1888), 40 Ch. D. 200. Rejd. Re Agar-Ellis, Agar-Ellis v. Lascelles (1878), 10 Ch. D. 49; Re Clarke (1882), 21 Ch. D. 817.

Compare No. 1485, post.

1312. — Jew.]—Re W., W. v. M., No. 1305, ante.

See, also, Nos. 1248, 1266, ante.

1313. Form of order—"Until further order."]—*Re W., W. v. M., No. 1305, ante.*

1314. Proselytising ward of court—Injunction.]—IREDELL v. IREDELL, No. 2092, *post.*

SECT. 2.—EDUCATION.

SUB-SECT. 1.—BY PARENT.

See, now, Guardianship of Infants Act, 1925 (c. 45).

Duty of parent—To provide education.]—See EDUCATION, Vol. XIX., p. 553, Nos. 1, 2.

— School attendance.]—See EDUCATION, Vol. XIX., pp. 564 et seq.

Religious education.]—See Sect. 1, ante.

1315. Right of mother—After death of father.]—(1) If guardians of wards appointed by will give the ct. occasion to suspect their behaviour, the ct. will interpose.

(2) A mother who is a widow allowed to see and visit her children whilst with their guardians. *Semble*: (3) she ought also to have some influence as to the mode of educating & bringing up her daughters whilst minors.—FERMOR v. POMFRET (1837), 1 Jur. 150.

— Illegitimate children.]—See BASTARDY, Vol. III., pp. 383, 384, Nos. 225–228.

1316. Right of father to direct education—When bankrupt.]—A father, a bkpt. & separated from his wife, & on bail to articles of the peace sworn against him by his wife, ordered not to remove the children from the schools at which they were placed, & not to interfere in their education.—

mother, & been supported & educated by her, S. contributing nothing to their support or education, & living, at first with his sister, & afterwards becoming an inmate of a workhouse. In Dec. 1915, the children being then aged about eleven & eight respectively, S., being desirous that they should be brought up as Roman Catholics, demanded them from his wife, & this demand being refused, he applied for a writ of *habeas corpus*. He was at this time still an inmate of the workhouse, but had arranged for the children to be maintained & educated in Roman Catholic charitable institutions.—*Held*: the writ should not be granted.—*Re STORY*, [1916] 2 I. R. 328.—IR.

1308 iv. —.]—Re EDDY (1914), 33 N. Z. L. R. 949.—N.Z.

SKINNER v. WARNER (1792), 2 Dick. 779; 21 E. R. 473.

1317. — Effect of misconduct.]—BALL v. BALL, No. 1177, *ante*.

1318. — —.]—Re FYNN, No. 1160, *ante*.

1319. — —.]—The ct. has no right to interfere with the course adopted for the education of an infant of tender years by a father who has not misconducted himself.

Accordingly, where a husband & wife had been separated through the misconduct of the wife only, her petition for access to her infant child was dismissed, the ct. being of opinion that such access would interfere with the course of education approved of by the father.—*Re W*— (1865), 5 New Rep. 363.

— — —.]—*See, also*, EDUCATION, Vol. XIX., p. 553, Nos. 3, 4.

1320. Right of father to choose school.]—Testator gave a legacy to an infant, with a direction for the application of the income for the maintenance of the infant, under the superintendence of B., who he expressed a wish should also have the control of the infant's education. The father & mother of the infant were residing abroad, & B. sent the infant to school. On the death of B. the father desired his brother to place the infant at another school:—*Held*: the opposition of the school-mistress to a petition presented by the brother, for the purpose of carrying the father's wish into effect, was improper; & a petition presented by her for a scheme for the future maintenance of the infant was dismissed, with costs.—*Re GRAY, GOLDING v. CASTLE* (1850), 14 Jur. 1080.

Contract by wife for children's education—Liability of father.]—See HUSBAND & WIFE, Vol. XXVII., p. 205, No. 1785.

SUB-SECT. 2.—BY GUARDIAN.

1321. Right to control—Choice of university.]—Being an infant, he went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge, & the ct. sent a messenger, to carry him from Oxford to Cambridge.—*TREMAIN'S CASE* (1719), 1 Stra. 167; 93 E. R. 452.

Annotation:—*Reid. Hall v. Hall* (1749), 3 Atk. 721.

1322. — — Compelled to attend.]—Pltfs., the infants, ordered to return to the University to pursue their studies.—MITCHEL v. MANCHESTER (DUKE) (1750), 1 Dick. 149; 21 E. R. 225.

1323. — Choice of school—Private tutor—

Compulsory return to school.]—The guardian is a proper judge at what school to place his ward, & the ct. will not indulge the infant in being put to a private tutor, or going to another school, & if he refuses to go will take a proper course to compel him.—*HALL v. HALL* (1749), 3 Atk. 721; 26 E. R. 1213, L. C.

Annotation:—*Reid. Thomasset v. Thomasset*, [1894] P. 295.

1324. — Out of jurisdiction—Security for return.]—An infant allowed to be placed at the University of Dublin under special circumstances.—*LETHEM v. HALL* (1834), 7 Sim. 141; 58 E. R. 790.

1325. — Child should be educated according to his expectations.]—There is no decided case that guardians can be appointed for a child by a stranger during the life of the parent, but the law will take care that the child shall be educated according to his expectations.—*POWEL v. CLEAVER* (1789), 2 Bro. C. C. 499; 29 E. R. 274, L. C.

Annotations:—*Consd. Lyons v. Blenkin* (1821), Jac. 245. *Reid. De Manneville v. De Manneville* (1804), 10 Ves. 52; *Jackson v. Hankey* (1821), Jac. 264, n.; *Wellesley v. Beaufort* (1827), 2 Russ. 1; *Andrews v. Salt* (1873), 8 Ch. App. 622; *R. v. Gyngall*, [1893] 2 Q. B. 232. *Mentd. Ex p. Pyc, Ex p. Dubost* (1811), 18 Ves. 140; *Bootle v. Blundell* (1815), 19 Ves. 494; *Powys v. Mansfield* (1836), 6 Sim. 528; *Pym v. Lockyer* (1841), 5 My. & Cr. 29; *Kirk v. Eddowes* (1844), 3 Hare, 509; *Mc Gregor v. Topham* (1850), 3 H. L. Cas. 132; *Re Blundell, Blundell v. Blundell*, [1906] 2 Ch. 222; *Re Dawson, Swainson v. Dawson*, [1919] 1 Ch. 102.

1326. — Father's wishes to be consulted.]—On devise of guardianship parol evidence of father's intent as to education admitted.—*ANON.* (1750), 2 Ves. Sen. 56; 28 E. R. 38, L. C.

1327. — — Effect of conditions attached to gift to infant—That father shall not control education.]—COLSTON v. MORRIS (1819), Jac. 257, n.; 6 Madd. 89; 37 E. R. 849.

Annotation:—*Reid. Lyons v. Blenkin* (1821), Jac. 245.

1328. — —.]—KNOTT v. COTTEE, No. 1146, *ante*.

1329. Scheme for education—Settlement by court.]—Upon a petition to the Vice-Chancellor of England by two of the guardians of an infant, praying for a reference to the master to settle a scheme for the infant's education, & the removal of another guardian, who had imprudently brought the infant's father, a lunatic, to reside in the same house with the infant:—*Held*: the part of the petition which asked a reference as to the system of education was good; but as to the lunacy, it belonged to the jurisdiction of the Lord Chancellor.—*DAVENPORT v. POWELL* (1848), 11 L. T. O. S. 490.

PART XII. SECT. 2, SUB-SECT. 1.

1320 i. Right of father to choose school.]—Paternal authority over a child as

to discipline & the choice of a school or institution in which to educate, or even temporarily confine it, is absolute, & the cts. will not interfere with it

by *habeas corpus*.—*MACDONALD v. MACDONALD* (1905), Q. R. 14 K. B. 330.—*CAN.*

Part XIII.—Guardianship.

SECT. 1.—NATURE AND ATTRIBUTES OF THE GUARDIAN'S OFFICE.

See, generally, Guardianship of Infants Act, 1886 (c. 27), & Guardianship of Infants Act, 1925 (c. 45).

1330. Office of trust.]—Guardians appointed by will according to the statute of 12 Car. 2, c. 24, have no more power than guardians in socage, & are but trustees, on whose misbehaviour, or giving occasion of suspicion, the Ct. of Ch. will interpose.

If any wrong steps had been taken which might not deserve punishment, yet if they were such as induced the least suspicion of the infant's being like to suffer by the conduct of the guardians, as they were in this case, or if the guardians chose to make use of methods that might turn to the prejudice of the infant, the ct. would interfere & order the contrary; & this was grounded upon the general power & jurisdiction which it had over all trusts, & a guardianship was most plainly a trust (LORD MACCLESFIELD, C.).—**BEAUFORT (DUKE) v. BERTY** (1721), 1 P. Wms. 703; 2 Dick. 791; 24 E. R. 579, L. C.

Annotations:—**Apld.** Reynolds v. Tenham (1723), 9 Mod. Rep. 40. **Consd.** Wellesley v. Beaufort (1827), 2 Russ. 1; Gilbert v. Schwenck (1845), 14 M. & W. 488. **Apld.** Mathew v. Brise (1851), 14 Beav. 341. **Refd.** Fernor v. Pomfret (1837), 1 Jur. 150; Johnstone v. Beattie (1843), 10 Cl. & Fin. 42. **Mentd.** Roe d. Parry v. Hodgson (1760), 2 Wils. 129.

1331. —.]—**REYNOLDS v. TENHAM (LADY)** (1723), 9 Mod. Rep. 40; 2 Eq. Cas. Abr. 486; 88 E. R. 302, H. L.

1332. —.]—A testamentary guardian is a trustee, & therefore the Stat. Limitations is inapplicable to accounts as between him & his ward.

The view I take of this case is, that the relation of guardian & ward is strictly that of trustee & *cestui que trust*. A guardian is not only a trustee of the property, as in the ordinary case of a trustee, but he is also guardian of the infant's person, with many duties to perform, such as to see to his education & maintenance. LORD MANSFIELD said "that guardians were but trustees, & that the jurisdiction of the ct. was grounded upon the general power & jurisdiction

which it had over all trusts & a guardianship is plainly a trust." This shows that the important & principal part of the relation is not confined to the property, but extends beyond it. I consider that it is not confined to that relation, & that of all the property which he gets into his possession in the character of guardian he is a trustee for the benefit of the infant ward (ROMILLY, M.R.).—**MATHEW v. BRISE** (1851), 14 Beav. 341; 17 L. T. O. S. 249; 51 E. R. 317.

Annotations:—**Apld.** Sleeman v. Wilson (1871), L. R. 13 Eq. 36. **Refd.** Wall v. Stanwick (1887), 34 Ch. D. 763.

1333. —.]—A testamentary guardian is a trustee of such property as comes to his hands in that character.—**SLEEMAN v. WILSON** (1871), L. R. 13 Eq. 36; 25 L. T. 408; 20 W. R. 109.

1334. —.]—**PLOWRIGHT v. LAMBERT**, No. 467, *ante*.

1335. —.]—**BESANT v. NARAYANIAH**, No. 1130, *ante*.

1336. Not assignable.]—**BEDELL v. CONSTABLE** (1668), Vaugh. 177; 124 E. R. 1026.

Annotations:—**Foll.** Reynolds v. Tenham (1723), 9 Mod. Rep. 40. **Refd.** Grand Opinion for the Prerogative Concerning the Royal Family (1717), Fortes. Rep. 401; Villareal v. Mellish (1737), 2 Swan. 533; *In the Goods of Parnell* (1872), L. R. 2 P. & D. 379. **Mentd.** Hudson v. Hudson (1737), West temp. Hard. 155; Baxter v. Burfield (1747), 2 Stra. 1266.

1337. —.]—Testamentary guardianship is not assignable or devisable.—**SMITH v. KNOWLES** (1680), Freem. K. B. 268; 89 E. R. 192.

1338. —.]—Guardianship of an infant is not assignable to another.—**REYNOLDS v. TENHAM (LADY)** (1723), 9 Mod. Rep. 40; 2 Eq. Cas. Abr. 486; 88 E. R. 302, H. L.

1339. —.]—**SHAFTSBURY (EARL) v. SHAFTSBURY**, No. 14, *ante*.

1340. —.]—**VILLAREAL v. MELLISH**, No. 1219, *ante*.

1341. —.]—**BESANT v. NARAYANIAH**, No. 1130, *ante*.

1342. — After duties entered upon.]—Petition by testamentary guardians that infant was going abroad & that therefore they might be discharged of the trust & new guardians appointed, LORD HARDWICKE, C., refused petition as being never done on application of guardians themselves

PART XIII. SECT. 1.

1330 i. Office of trust.]—Guardians are in a fiduciary position & the ct. should be guided by the rules embodied in the Trusts Act in sanctioning changes in the investment of a minor's property. The duty of guardians is primarily to preserve & not to add to the property of the minor.—**Re CASSUMALI** (1906), I. L. R. 30 Bom. 591.—**IND.**

1330 ii. —.]—The relation of guardian & ward resembles rather that of trustee & *cestui que trust* than that of principal & agent.—**RAM CHARAN DAS v. GAYA PRASAD** (1908), I. L. R. 30 All. 422.—**IND.**

1330 iii. —.]—According to Hindu law the father is the natural lawful guardian of his own minor children. Their guardianship is a sacred duty of which he cannot divest himself if he wishes. He can delegate the performance of the daily duty of looking after the child & for that purpose place the child in the custody of someone else. If he does so, it then becomes a question under Guardians & Wards Act, 1890, s. 25, for the ct. to decide, when he applies for the

restoration of the custody, whether it is for the minor's benefit.—**SUKHDEO RAI v. RAM CHANDAE RAI** (1924), I. L. R. 46 All. 706.—**IND.**

1336 i. Not assignable.]—**SUKHDEO RAI v. RAM CHANDAE RAI** (1924), I. L. R. 46 All. 706.—**IND.**

g. Right to payment of money inherited abroad.]—The duly appointed tutors in the Province of Quebec of an infant domiciled & residing there, which province had also been the domicile of the father at his death:—**Held:** entitled to have paid over to them from the Ontario administrators of the father's estate, there being no creditors, money coming to the infant from said estate, which had been collected in Ontario.—**HANRAHAN v. HANRAHAN** (1890), 19 O. R. 396.—**CAN.**

r. Right to determine amount to be spent on upbringing.]—A guardian is the custodian of the infants with the incident of determining to a large extent what should be expended in their bringing up.—**CAMPBELL v. DUNN** (1892), 22 O. R. 98.—**CAN.**

t. Not personally liable for torts of ward.]—Guardians of a minor cannot

be held personally liable for torts committed by such minor.—**LUCHMUN DAS v. NARAYAN** (1871), 3 N. W. 191.—**IND.**

a. Power to bind ward.]—A guardian cannot contract in the name of a ward, so as to impose on him a personal liability.—**WAGHELA RAJ-SANJI v. SHEKH MASLUDIN** (1887), I. L. R. 11 Bom. 551; L. R. 14 Ind. App. 89.—**IND.**

b. —.]—A guardian cannot bind his minor ward by a personal covenant.—**SURENDRA NATH SARKAR v. ATUL CHANDRA ROY** (1907), I. L. R. 34 Calc. 892.—**IND.**

c. Power to acknowledge debt.]—A guardian has authority to acknowledge a debt on the part of the minor, provided that the debt is not barred by limitation at the date of the acknowledgment.—**SOBHANADRI APPA RAU v. SRIRAMULU** (1893), I. L. R. 17 Mad. 221.—**IND.**

d. —.]—**KAILASA PADMAOCHI v. PONNUKANNU AOCHI** (1894), I. L. R. 18 Mad. 456.—**IND.**

e. Power to pay interest on debt.]—The certificated guardian of a minor

& if they would not act in the trust as they had accepted it the ct. would compel them.—SPENCER v. CHESTERFIELD (EARL) (1752), Amb. 146; 27 E. R. 94, L. C.

Compare No. 1482, *post*.

1843. Joint guardians—Survivorship—Where appointment by will.]—EYRE v. SHAFTSBURY (COUNTESS), No. 521, *ante*.

1844. ———.]—SHAFTSBURY (EARL) v. SHAFTSBURY, No. 14, *ante*.

——— **Where appointment by the court.]—**See Nos. 1430, 1431, *post*.

1845. Distinguished from next friend.]—The guardian & the next friend of an infant are distinct characters; & an infant may sue by either; but he must defend by guardian, & not by his *prochein ami*.—SIMPSON v. JACKSON (1822), Cro. Jac. 640; Palm. 295; 79 E. R. 552.

*Annotation:—*Refd. Morgan v. Thorne (1841), 7 M. & W. 400.

1846. —.]—HARRIS v. LIGHTFOOT, HARRIS v. HARRIS, No. 1529, *post*.

For proceedings by & against infant.]—See Part XIV., *post*.

1847. Rights of guardian ex officio—No interest in lands.]—The father of an infant devisee, who is above the age of fourteen years at the death of the devisor, is not entitled to be considered as the guardian in socage of his child; & in his character of guardian by nature, he does not take any legal interest in the land, sufficient to confer upon him a settlement by estate by residing upon the estate devised.—R. v. SHERRINGTON (INHABITANTS) (1832), 3 B. & Ad. 714; 1 L. J. M. C. 71; 110 E. R. 261.

1848. —.]—A ct. of equity does not recognise the character of common law guardian as conferring a right to be receiver of the infant's estate.—*Ex p.* BOURNE (1846), 7 L. T. O. S. 43.

1849. Appointment of guardian—Does not preclude appointment of receiver of estate.]—The appointment of a testamentary guardian of an infant by his father does not, under 12 Car. 2, c. 24, constitute any objection to the appointment of a receiver of the estate of the infant.—GARDNER v. BLANE (1842), 1 Hare, 381; 66 E. R. 1080.

SECT. 2.—RIGHT OF PARENT TO BE GUARDIAN.

See, now, Guardianship of Infants Act, 1925 (c. 45).

is an agent duly authorised to pay interest upon a debt due by the minor within Limitation Act, s. 20.—NARENDRA NATH SARKAR v. RAI CHARAN HALDAR (1902), I. L. R. 29 Calc. 647; 6 C. W. N. 729.—IND.

f. Liability of agent appointed by guardian to account to minor.]—An agent appointed by the guardian of a minor is not liable to account to the minor for his acts even though he received properties belonging to the minor.—RAMANATHAN CHETTIAR v. MUTHIAH CHETTY (1919), I. L. R. 43 Mad. 429.—IND.

g. Power to give valid receipt.]—A guardian of an infant under Infants Guardianship & Contracts Act, 1887, or appointed by will, can give a valid receipt for a legacy left to such infant.—SIME v. HUME (1901), 20 N. Z. L. R. 191.—N.Z.

h. Appointment of solicitor.]—Pltf. was the natural guardian of the persons of children & the statutory guardian of their property.—*Held: an appointment by her of the solr. for the children must be filed in ct.—*

WILSON v. GRAR MEAT PRESERVING & FREEZING CO. OF NEW ZEALAND (1909), 29 N. Z. L. R. 48.—N.Z.

PART XIII. SECT. 2.

1350 i. Father.]—The fact that a father allows his child to be in the custody of a servant or friend for a limited purpose & for a limited time does not determine the father's rights as guardian.—JAGANNADHA RAO v. KAMARAJU (1900), I. L. R. 24 Mad. 284.—IND.

1350 ii. —.]—The father has the first & the mother the second title to the guardianship of their children. The father being dead the rights of the surviving mother are absolute.—Re CONGDON (1891), 7 Nfld. L. R. 572.—NFLD.

k. Mother.]—DOAN v. DAVIS (1876), 23 Gr. 207.—CAN.

l. —.]—Testator bequeathed his estate to trustees, & directed them out of their investments of the same to set apart \$1,000 "to be used by them for the purpose of educating &

1350. Father.]—R. v. THORP, No. 1120, *ante*.

1351. — "Natural" guardian.]—The income of a child's presumptive share of a contingent legacy may be paid to the father as "natural" guardian for maintenance.—Re COTTON (1875), 1 Ch. D. 232; 45 L. J. Ch. 201; 33 L. T. 720; 24 W. R. 243.

*Annotations:—*Refd. Re George (1877), 5 Ch. D. 837. Re Dickson, Hill v. Grant (1884), 28 Ch. D. 291; Re Judkin's Trusts (1884), 25 Ch. D. 743; Re Bowlby, Bowlby v. Bowlby, [1904] 2 Ch. 685.

1352. —.]—BESANT v. NARAYANIAN, No. 1130, *ante*.

1353. — Exclusion by court—When justified.]—WELLESLEY v. WELLESLEY, No. 1178, *ante*.

1354. —.]—Re AGAR-ELLIS, AGAR-ELLIS v. LASCELLES, No. 1118, *ante*.

Compare No. 1480, *post*.

1355. Guardian for nurture—Right of mother—Child under fourteen years old.]—S. having issue a son & two daughters, by will devised the custody etc., of them to his wife's father & mother, & died; the wife married a second husband, & the grandfather died; the grandmother devised her socage lands to the son in tail, remainder to the daughters, & the heirs of their two bodies begotten, equally to be divided, remainder to the mother, the daughters & heir apparent of the testatrix, & died; the son died; & the youngest daughter being under sixteen, but above fourteen, & living with the second husband, went by his consent, voluntarily, to H., where she married pltf.:—*Held: (1) the mother had the guardianship of her daughter within 4 & 5 Ph. & M. c. 8, notwithstanding her subsequent marriage; (2) she had the custody of her person, though the daughter voluntarily left her several hours before the contract of marriage, & the consent of the step-father was immaterial.*

*(3) The mother cannot be guardian in socage if the land has descended to the daughter nor for nurture because the daughter is above the age of fourteen (per CUR.).—*RATCLIFF'S CASE (1592), 3 Co. Rep. 37 a; 76 E. R. 713.

Annotations:—As to (3) Refd. R. v. Clarke (1857), 7 E. & B. 186; Re Race (1857), 26 L. J. Q. B. 169. Generally, Refd. Ex p. Barford (1860), 3 L. T. 467; R. v. Howes (1860), 3 E. & E. 332; R. v. Prince (1875), L. R. 2 C. C. R. 154. Mentd. Newman v. Edmunds (1611), 1 Bulst. 113; Magdalen College, Cambridge Case (1616), 11 Co. Rep. 66 b; James & Thoroughgood v. Collins (1628), Het. 29; Jaques v. Collins (1628), Litt. 46; Reve v. Malster & Barrow (1635), Cro. Car. 410; Grey's Case (1640), Cro. Car. 601; Smith v. Tracy (1677), 3 Keb. 806; Kellow v. Rowden (1690), 1 Show. 244; Fisher v. Wigg (1700), 1 Ld. Raym. 622; Blackborough v. Davis

giving a profession to my son, providing he has not already been educated & received a profession." He then directed the trustees to use & apply one-half of the income of the residue of the estate, as far as deemed necessary, for the maintenance & support of the said son, & that upon his arriving at the age of twenty-five years one-half of the estate with all accumulations thereon should be given to him absolutely. Testator left him surviving his wife, the mother of the son mentioned in the will, & the said son, an infant of about nine years of age. On an application by the mother of the infant to be appointed guardian of his person:—*Held: the trustees were not appointed by the will guardians of the person of the infant; the application should be granted, & the mother as such guardian had the power, subject to the order of the ct., of selecting the school at which the infant should be educated.—*Re TAYLOR (AN INFANT) (1897), 1 N. B. Eq. Rep. 461.—CAN.

m. Guardian in socage.]—As a

Sect. 2.—Right of parent to be guardian. **Sect. 3:**
1. 1, 2, 3

(1701), 12 Mod. Rep. 615; *Shaftsbury v. Shaftsbury* (1725), Gilb. Ch. 172; *Goodtitle d. Newman v. Newman* (1774), 3 Wils. 516; *Bushby v. Dixon* (1824), 3 B. & C. 298; *Sherwood v. Ray* (1837), 1 Moo. P. C. C. 353.

1356. ——— Father living in adultery.]

—Guardianship for nurture continues until a child attains the age of fourteen. Until that age the child cannot exercise his own choice as to quitting or remaining with his father. The ct., in its decree for a judicial separation, on the ground of the adultery of the husband, on proof that the husband continued to live in adultery & that the child of the marriage, a boy aged thirteen, resided with him, there being no imputation on the wife, ordered that she should have the custody of the child until the age of fourteen, provision being made for the husband having access to it.—*HYDE v. HYDE* (1859), 29 L. J. P. M. & A. 150; 23 J. P. 471.

Annotation:—*Folld. Duggan v. Duggan* (1859), 29 L. J. P. M. & A. 159.

1357. ——— ——— ———.]—A wife having obtained a decree of judicial separation on the ground of adultery, the ct. also gave her the custody of the children of the marriage under the age of fourteen, upon evidence being laid that the husband was living in adultery with another woman at the time of the application.

Contradictory medical evidence having been given on the part of petitioner & resp. respectively as to the state of petitioner's mind, the ct. directed her to be personally examined by an eminent physician, & upon his certificate that she was of sound mind made the order she prayed giving her the custody of the children.—*DUGGAN v. DUGGAN* (1859), 29 L. J. P. M. & A. 159; 23 J. P. 647.

1358. ——— Right of grandmother.]—A child cannot be with the grandmother for nurture, & a boy with her cannot be removed if he has an estate in the parish.—*HASFIELD PARISH v. FURLEY PARISH, GLOUCESTERSHIRE* (1740), 2 Stra. 1131; 93 E. R. 1082.

SECT. 3.—TESTAMENTARY GUARDIANS.

SUB-SECT. 1.—IN GENERAL.

See, generally, 12 Car. 2 (c. 24), s. 8, & *see, now, generally*, Guardianship of Infants Act, 1925 (c. 45).

1359. Appointment for unborn child.]—Testator, married, but not then having children, gave the guardianship of all his daughters born or to be born to his wife, & of all his sons hereafter to be born to his wife & his brother or the survivor. The guardianship extends to all the children by that or a future marriage. A second marriage & the birth of children, the wife & children provided for by settlement, & there being children by the former marriage, a case of exception from the rule, that marriage & the birth of a child revoke a will. Testamentary appointment of guardian not revoked by a subsequent testamentary appointment, not executed according to

mother can now inherit from her children, she is no longer capable of acting as their guardian in socage. Guardianship in socage may be considered as gone into disuse, & it can hardly be said to exist in the province.—*HOPPER v. STEEVES* (1899), 34 N. B. R. 591.—**CAN.**

n. ———.]—A mother having children by a second marriage is not thereby rendered incompetent to be guardian

to the children of her first marriage.—*CORBET v. TOTTENHAM* (1880), 1 Ball & B. 59–61.—**IR.**

o. ———.]*Held*: on a review of the circumstances of the case the application of an exor. & trustee of a father's will for guardianship & custody of his infant children in order to fulfil his testamentary wishes as to religion must be refused, & the children must remain in the custody of their legal

the statute, & not directly importing revocation.—*Ex p. ILCHESTER (EARL)* (1803), 7 Ves. 348; 32 E. R. 142, L. C.

Annotations:—*Reid. In the Estate of Tollemache*, [1917] P. 246. *Mentd. Johnston v. Johnston* (1817), 1 Phillim. 447; *Ellbeck v. Wood* (1826), 1 Russ. 564; *Andrew v. Andrew* (1855), 3 Sm. & G. 130; *Dickenson v. Stidolph* (1861), 11 C. B. N. S. 341; *Louis v. Louis* ((1864), 3 New Rep. 369; *In the Goods of Middleton* (1864), 3 Sw. & Tr. 583; *Ibbott v. Bell* (1865), 34 Beav. 395; *Dancer v. Crabb* (1873), L. R. 3 P. & D. 98; *In the Goods of McCabe* (1873), L. R. 3 P. & D. 94; *Alexander v. Kirkpatrick* (1874), L. R. 2 Sc. & Div. 397; *Ward v. Van Der Loeff*, *Burnyeat v. Van Der Loeff*, [1924] A. C. 653.

1360. Meaning of guardian—For purposes of leases & Settled Estates Act, 1856 (c. 120)—Exclusion of testamentary guardian.]—*Re NOLLESTON* (circa 1860), cited 2 Ch. D. p. 39; 34 L. T. p. 8; 24 W. R. p. 382.

Annotation:—*Reid. Re Salisbury Eccl. Comrs.* (1876), 2 Ch. D. 29.

1361. ——— For purposes of Places of Worship Sites Act, 1873 (c. 50).]—*Re SALISBURY (MARQUIS) & ECCLESIASTICAL COMRS.*, No. 1448, *post*.

1362. Appointment by mother—Of persons other than father—Right of father to be joint guardian.]—**G——** (AN INFANT), No. 1480, *post*.

SUB-SECT. 2.—WHO MAY APPOINT.

Equal rights of father & mother.]—*See, now*, Guardianship of Infants Act, 1925 (c. 45), s. 5.

Effect of appointment by both parents.]—*See* Guardianship of Infants Act, 1925 (c. 45), s. 5 (5).

1363. Appointment of co-guardian—Power conferred by will.]—The authority conferred on a father by 12 Car. 2, c. 24, ss. 8, 9, to appoint a guardian of his children during their minority, is not limited to the mere nomination of a particular guardian. He may also, if he should think fit, authorise the guardian whom he appoints in his will to nominate a co-guardian or successor in the office.

A. appointed B. & C. executors of his will & guardians of his daughter D., & directed that in the event of the death of either of them the survivor should appoint a co-guardian to act with him. B. obtained probate of the will & died, leaving part of the estate unadministered. C. appointed F. to be a guardian jointly with himself of D. during her minority, & renounced probate & administration of the estate of A. The ct. granted administration, with the will annexed, of the unadministered estate of A. to F. as substituted testamentary guardian of D., the universal legatee for life named in the will.—*In the Goods of PARNELL* (1872), L. R. 2 P. & D. 379; 41 L. J. P. & M. 35; 26 L. T. 744; 36 J. P. 376; 20 W. R. 494.

1364. For illegitimate children—Validity of appointment by father.]—In the case of a natural child, the ct. will appoint the persons named in the father's will, to be guardians, without any reference to the master.—*PECKHAM v. PECKHAM* (1788), 2 Cox, Eq. Cas. 46; 30 E. R. 22, L. C.

Annotation:—*Folld. Chatteris v. Young* (1819), 1 Jac. & W. 106.

guardian, the mother.—*O'HARE v. WALLACE* (1922), 56 I. L. T. 127.—**IR.**

PART XIII. SECT. 3, SUB-SECT. 2.

p. Father.]—A wife had obtained from the ct. an order giving to her the custody of her infant daughter until she had attained the age of twelve years:—*Held*: this did not prevent the father of the infant appointing

1365. —.]—**HORNER v. LIDDIARD** (OTHERWISE WHITELOCK, FALSELY CALLING HERSELF HORNER) (1799), 1 Hag. Con. 337; 161 E. R. 573.

Annotations:—**Mentd.** Clarke v. Hankin (1814), 2 Phillim. 328, n.; Droney v. Archer (1815), 2 Phillim. 327; R. v. Brighton (1861), 1 B. & S. 447.

1366. —.]—Persons nominated by a testator to be guardians of his natural children & consenting to undertake the guardianship, appointed without a reference.—**CHATTERIS v. YOUNG** (1819), 1 Jac. & W. 106; 37 E. R. 316.

1367. —.]—The legatee being a natural child, testator had no power to appoint guardians for her, but the persons named in the will being well known to the ct. as proper persons, they were appointed guardians without a reference to the master.—**MILLS v. ROBERTS** (1830), Tambl. 476; 1 Russ. & M. 555; 8 L. J. O. S. Ch. 141; 48 E. R. 189.

1368. —.]—**DAVIES v. ASHFORD** (1843), 1 L. T. O. S. 227.

—.]—*See, further*, **BASTARDY**, Vol. III., p. 383, Nos. 217–224.

SUB-SECT. 3.—WHO MAY BE APPOINTED.

1369. Bankrupt—Whether valid.—Testamentary guardian, being a bkpt., a person appointed to have the care of the ward.—**SMITH v. BATE** (1784), 2 Dick. 631; 21 E. R. 416, L. C. *Annotation*:—**Refd.** Johnstone v. Beattie (1843), 10 Cl. & Fin. 42.

1370. Person of different religion.—*Re* **READ**, No. 1492, *post*.

1371. Person out of jurisdiction.—The ct. ordered the child to be given over to the testamentary guardian, though residing out of the jurisdiction.—*Re* **TWO INFANT CHILDREN**, *Ex p.* **NICKELLS** (1891), 7 T. L. R. 498, D. C.

Authority to guardian to appoint co-guardian.—*See* No. 1363, *ante*.

Persons convicted of blasphemy.—*See* 9 Will. 3, c. 35, s. 1, & 53 Geo. 3, c. 160.

SUB-SECT. 4.—FORMALITIES OF APPOINTMENT.

For formalities of valid will generally, *see* **WILLS**.

1372. Compliance with 12 Car. 2, c. 24, s. 8—Necessity for.—Testamentary guardians can only be appointed by a will executed according to above sect.

Where a minor is sole next of kin & residuary legatee, she may select a guardian for all purposes in law, & especially for taking administration *cum testamento annexo*.

The Ct. might judge of the fitness of the person chosen by a minor for guardian & might refuse to grant guardianship to an improper person, but when a person was chosen by the minor against whom there was no exception & the ct. had appointed him guardian he was entitled to the administration for the benefit of the minor (**SIR GEORGE LEE**).—**FAWKENER v. JORDAN** (1756), 2 Lee, 327; 161 E. R. 358.

Annotations:—**Distd.** Hughes v. Ricards (1758), 2 Lee, 543. **Refd.** *In the Goods of Morris* (1862), 31 L. J. P. M. & A. 80.

testamentary guardians of the infant.—**DAVIS v. McCaffrey** (1874), 21 Gr. 554.—**CAN.**

q. Mother.—A mother cannot appoint a testamentary guardian.—*Re* **HUNT (A MINOR)** (1843), 2 Con.

& Law. 373.—**IR.**

PART XIII. SECT. 3, SUB-SECT. 4.

r. Words effectuating appointment—“Guardian of the estate.”—A testator appointing a person “guardian of the estate” of his infant children does not thereby constitute him a testamentary guardian under 14 & 15 Car. 2, c. 19, s. 6.—*Re* **NORBURY (LORD)** (1875), 9 I. R. Eq. 134.—**IR.**

1373. —.]—Dispute concerning the guardianship of the person & estate of an infant, appointed by will, there being no cause in ct.

The testamentary writings, appointing the guardian, not having been executed according to above Act, the judge declared the appointment to be ineffectual.—*Ex p.* **JORDAN** (1757), 1 Dick. 294; 21 E. R. 282.

1374. —.]—A marriage declared null because the guardians of a minor were not appointed by an instrument attested by two witnesses.

By the common law a father has no right to appoint guardians by his will, that power was given by statute; this statute [12 Car. 2, c. 24, s. 8] enables a father to do what he could not do before; consequently, he must do it according to the requisites of the statute, which are by deed or will attested by two witnesses (**SIR JOHN NICHOLL**).—**REDDALL v. LEDDIARD** (1820), 3 Phillim. 256; 161 E. R. 1316.

1375. —.]—**Soldier's will ineffective.**—

A guardian of a child can be appointed by a will only if the will satisfies the provisions of above sect., & therefore cannot be appointed by a soldier's will within Wills Act, 1837 (c. 26), s. 11. Neither that Act nor Stat. Frauds, s. 23, gives power to appoint a guardian by a soldier's will.—*In the Estate of* **TOLLEMACHE**, [1917] P. 246; 80 L. J. P. 154; 116 L. T. 762; 33 T. L. R. 505; 61 Sol. Jo. 696.

, now, Wills (Soldiers & Sailors) Act, 1918 (c. 58), s. 4.

1376. —.]—**Unattested will—Confirmed by attested codicil.**—Appointment of guardian by an unattested will made good by a codicil, with three witnesses, on the same paper, referring to the will, as annexed, making some alterations as to legacies, & confirming it in all other respects; as in the case of a devise of land.—**DE BATHE v. FINGAL (LORD)** (1809), 16 Ves. 167; 33 E. R. 947.

Annotation:—**Mentd.** Ferraris & Croker v. Hertford (1843), 3 Curt. 468.

Compare No. 1390, *post*.

1377. Necessity for probate.—Probate not necessary for a will appointing testamentary guardians.—**GILLIAT v. GILLIAT & HATFIELD** (1820), 3 Phillim. 222; 161 E. R. 1307.

1378. —.]—**Will appointing guardians only.**—A testamentary paper not disposing of personalty or appointing an exor., but simply appointing a guardian of testator's children, is not entitled to probate.—*In the Goods of* **MORTON** (1864), 3 Sw. & Tr. 422; 33 L. J. P. M. & A. 87; 9 L. T. 809; 12 W. R. 320; 164 E. R. 1338.

1379. Words effectuating appointment—Devise to “receive & let.”—A devise to a person as guardian, that he may “receive, set, & let,” for his ward; given him as authority only & not an interest.—**PIGOT v. GARNISH** (1599), Cro. Eliz. 678; 78 E. R. 915; *subsequent proceedings* (1600), Cro. Eliz. 734.

Annotation:—**Refd.** Daniel v. Uply (1625), Lat. 39.

1380. —.]—**Devise for maintenance.**—**BEDDELL v. CONSTABLE** (1668), Vaugh. 177; 124 E. R. 1026.

Annotations:—**Fold.** Reynolds v. Tenham (1723), 9 Mod. Rep. 40. **Consd.** Villareal v. Mellish (1737), 2 Swan. 533; *In the Goods of* **Parnell** (1872), L. R. 2 P. & D. 379. **Refd.** Grand Opinion for the Prerogative Concerning the Royal

Sect. 3.—Testamentary guardians: Sub-sects. 4 & 5.
Sects. 4 & 5: Sub-sect. 1, A.]

Family (1717), Fortes. Rep. 401; Hudson v. Hudson (1737), West. temp. Hard. 155. *Mentd.* Baxter v. Burfield (1747), 2 Stra. 1266.

1381. — Care & direction.]—BRIDGES v. HALES (1729), Mos. 108; 25 E. R. 298, L. C.

1382. — Direction to bring up & educate.]—R. v. ISLEY, No. 1231, ante.

1383. — “Management & care.”]—Testator directed the trustees of his will to procure a suitable house for the residence of his children, who were infants, & to engage a proper person for the purpose of taking the management & care of the house & of his children during their minorities; & he requested his late wife's sister, if she should be alive at his decease, to take such management & care on herself:—*Held*: testator had appointed his wife's sister to be the guardian of his children.—*MILLER v. HARRIS (1845), 14 Sim. 540; 9 Jur. 388; 60 E. R. 467.*

SUB-SECT. 5.—REVOCATION OF APPOINTMENT.

1384. What constitutes—Appointment by deed—Different appointment by will.]—Guardianship of an infant, disposed by the father by deed to one, & by will to his mother. *Semble*: the will is a revocation of the deed.—SHAFTSBURY (EARL) v. HANNAM (1677), Cas. temp. Finch, 323; 23 E. R. 177.

1385. — Appointment by subsequent will—Defectively executed.]—Ex p. ILCHESTER (EARL), No. 1350, ante.

1386. — Different appointment by codicil—Excluding others appointed by will.]—Testator appointed his widow & two other persons guardians of his children. By a codicil he “left their care, charge & education” to his widow:—*Held*: the appointment by the will of guardians was not revoked by the codicil.—HARE v. HARE (1843), 5 Beav. 629; 12 L. J. Ch. 344; 7 Jur. 337; 40 E. R. 722.

1387. — — —.]—Testator gave part of his property to A., B., C. & D. upon certain trusts, for the benefit of his children, & gave the guardianship of them to his wife & his trustees, A., B., C. & D., who were to maintain & educate them out of the trust property. By a codicil, reciting that he had appointed A., B., C. & D., exors. & trustees of his will, he revoked the appointment so far as regarded B., C. & D., & in lieu of them appointed E. & F. to act as trustees & exors. of his will along with A.:—*Held*: the appointment of B., C. & D. to act as guardians to the children, jointly with A., remained unrevoked.—*Re PARK (1844), 14 Sim. 89; 13 L. J. Ch. 369; 3 L. T. O. S. 158; 8 Jur. 372; 60 E. R. 291.*

SECT. 4.—GUARDIANS APPOINTED BY DEED OR PAROL.

1388. By deed—Revocation—By subsequent appointment by will.]—SHAFTSBURY (EARL) v. HANNAM, No. 1384, ante.

1389. — Appointment of creditor—Covenant not to revoke—Validity.]—A. indebted to B. by

deed grants the guardianship of his child to B., & covenants not to revoke it, & dies. Equity will not set aside the deed unless the debt be paid, or the trust abused.—*LECONE v. SHEIRES (1686), 1 Vern. 442; 23 E. R. 574, L. C.*

1390. — Under 12 Car. 2 (c. 24), s. 8—Guardian as attesting witness—Validity.]—A deed appointing a guardian of the person & estate of an infant is well executed within above sect., although the guardian herself was one of the attesting witnesses to the deed.—*MORGAN v. HATCHELL (1854), 19 Beav. 86; 3 Eq. Rep. 121; 24 L. J. Ch. 135; 24 L. T. O. S. 167; 1 Jur. N. S. 125; 3 W. R. 126; 52 E. R. 281.*

Compare Nos. 1372–1376, ante.

1391. By parol—Declaration on death-bed—Whether appointment constituted.]—A declaration of a father upon his death-bed, that he expected A. his father would take care to see his children educated in the Protestant religion; is a sufficient appointment to make the grandfather guardian of the infant.—*TEYNHAM (LADY) v. LENNARD (1724), 4 Bro. Parl. Cas. 302; 2 E. R. 204, H. L.*

Annotations:—Consd. Re Salisbury & Eccl. Comrs. (1876), 2 Ch. D. 29. Refd. Eyre v. Shaftsbury (1725), 2 P. Wms. 103; Ex p. Whitfield (1742), 2 Atk. 315; Ex p. Myerscough (1819), 1 Jac. & W. 151; Anon. (1821), 1 Jac. 264, n.

1392. Appointment by infant himself—Validity—Infant not bound.]—LOCKER'S CASE (circa 1752), cited in 2 Ves. Sen. 470; 28 E. R. 301, L. C.

1393. — — —.]—BALTIMORE'S (LORD) CASE (undated), Co. Litt. 88 b.

1394. — Effect on power of court to appoint.]—An infant, of the age of seventeen, appoints a guardian by deed; this does not preclude an application to the ct. to appoint a guardian.—*CURTIS v. RIPPON (1819), 4 Madd. 462; 56 E. R. 775.*

Annotation:—Folld. Coham v. Coham (1843), 13 Sim. 639.

1395. — — —.]—The ct. will refer it to the master to approve of a guardian for an infant, notwithstanding the infant, being fourteen years of age & entitled to real estate, has, by deed, appointed a guardian for himself.—*COHAM v. COHAM (1843), 13 Sim. 639; 8 Jur. 26; 60 E. R. 249.*

SECT. 5.—GUARDIANS APPOINTED BY THE COURT.

SUB-SECT. 1.—JURISDICTION TO APPOINT.

A. In General.

See Supreme Court of Judicature (Consolidation) Act, 1905 (c. 49), s. 56 (1) (b).

See CONFLICT OF LAWS, Vol. XI., pp. 442, 443, Nos. 1018–1026.

See, now, Guardianship of Infants Act, 1886 (c. 27), s. 6, & Guardianship of Infants Act, 1925 (c. 45), s. 5 (4).

1396. Crown as “parens patriae.”]—SHAFTSBURY (EARL) v. SHAFTSBURY, No. 14, ante.

1397. — — —.]—(1) Qu.: whether a bill filed to make an infant a ward of ct. ought not to allege some right or claim of the infant to property within the jurisdiction, although untruly.

(2) The Lord Chancellor, representing the

PART XIII. SECT. 4.

t. By parol.]—L. verbally requested deft. to act as pltf.'s guardian, & at the instance of L., the money payable under the policy was made payable to deft. in trust for pltf. On

the death of L. deft. applied for & obtained letters of guardianship of pltf.'s person & estate. Subsequently on the application of pltf., who had attained the age of fourteen years, the letters to deft. were revoked, & letters of guardianship of the person & estate

were granted to B., who was pltf.'s grandfather:—*Held*: the appointment by L. of deft. as guardian of pltf., should have been in writing.—*LOASBY v. EGAN (1895), 27 N. S. R. (15 R. & G.) 349.—CAN.*

sovereign as *parens patriæ*, has a clear right to interpose the authority of the ct. for the protection of the person & property of all infants resident in England, even where testamentary guardians have been appointed, & even where the father is alive & actually himself resident in England (LORD CAMPBELL).—*JOHNSTONE v. BEATTIE* (1843), 10 Cl. & Fin. 42; 1 L. T. O. S. 250; 7 Jur. 1023; 8 E. R. 657, H. L.; *affg.* S. C. *sub nom.* *BEATTIE v. JOHNSTONE* (1841), 1 Ph. 17, L. C.

Annotations:—*As to* (2) *Reid*. *Hope v. Hope* (1854), 19 Beav. 237; *Scott v. Bentley* (1855), 1 K. & J. 281; *Re Tweedale's Settlement* (1859), John. 109; *Stuart v. Bute*, *Stuart v. Moore* (1861), 9 H. L. Cas. 440. *Generally, Mentd.* *Lockwood v. Fenton* (1852), 1 Sm. & G. 73; *Re Dawson*, *Dawson v. Jay* (1854), 2 W. R. 311; *Hoskins v. Matthews* (1856), 8 De G. M. & G. 13; *Moorhouse v. Lord* (1863), 10 H. L. Cas. 273; *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34; *Re Beaumont*, [1893] 3 Ch. 490; *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *A.-G. v. Winans* (1901), 85 L. T. 508.

See, further, Part II., ante.

1398. No guardian existing.—The mother has not such a right to the guardianship in the present case, but that this ct. may certainly control it; she is not testamentary guardian. Her only pretence for the custody of the infant can be either as guardian in socage, or as guardian by nature; but she cannot be entitled to the custody of the present case as guardian in socage, it not appearing that the infant had any lands in socage descended to her; nor can she be entitled as guardian by nature; for which reason the guardianship in the present case is certainly such a one as this ct. may dispose of; & the question is, how this ct. ought to dispose of it? The mother ought not to be allowed it, by reason that she had married a papist. . . . The proper direction will be to refer it to a master to consider who will be a proper person to have the guardianship of her (LORD HARDWICKE, C.).—*EDWARDS v. WISE* (1740), Barn. Ch. 139; 27 E. R. 587, L. C.

1399. When guardians disagree.—*STORKE v. STORKE* (1730), 3 P. Wms. 51; 24 E. R. 965, L. C. *Annotation*:—*Reid*. *Ryder v. Ryder* (1861), 30 L. J. P. M. & A. 44.

1400. Palatine Court of Lancaster.—In 1875, on a petition presented to the Palatine Ct. of Lancaster, guardians were appointed to infants & a scheme sanctioned for their maintenance & education. In 1877 an action was entered in the Ch. Div. of the High Ct. for the administration of the estate in which the infants were interested, & a decree having been made, a summons was taken out for a fresh appointment of guardians & for an increase in the allowance for the maintenance & education of the infants. An application which was subsequently made to the Palatine Ct. for an order to stay all proceedings there was refused, & the judge of that ct. had taken from pltf. in the action in the Ch. Div. an undertaking not to proceed with the summons in the High Ct.:—*Held*: no case existed for any interference with the proceedings in the Palatine Ct. The jurisdiction of the Palatine Ct. was co-ordinate with that of the High Ct., but it had no jurisdiction to stay proceedings in the High Ct. The undertaking not to proceed with the summons in the High Ct. must therefore be discharged.—*Re ALISON'S TRUSTS, Re JOHNSONS (INFANTS)* (1878), 8 Ch. D. 1; 47 L. J. Ch. 755; 38 L. T. 304; 20 W. R. 450, C. A.

Annotations:—*Mentd.* *Re Swire*, *Mellor v. Swire* (1882), 46 L. T. 437; *Re Connolly*, *Wood v. Connolly*, [1911] 1 Ch. 731.

1401. Appointment by infant himself—Jurisdiction not ousted.—*CURTIS v. RIPPON*, No. 1394, *ante*.

1402. ———.—*COHAM v. COHAM*, No. 1395, *ante*.

To remove testamentary guardians.]—*See* Sub-sect. 7, F., *ante*.

PART XIII. SECT. 5, SUB-SECT. 1.—A.

1398 i. No guardian existing.—Where both the parents of an infant are dead there is no power under Infants' Guardianship & Contracts Act, 1887, for the ct. to appoint a guardian of the person or property of the infant, but the ct.'s inherent jurisdiction over the persons & estates of infants is saved by that Act, & where the infant has property the ct. will in a proper case appoint a guardian of the person & property of the infant. Where the infant has no property it is not the practice to appoint a guardian of its person, unless a suit has been constituted on behalf of the infant.—*Re STUART-FORBES* (1907), 27 N. Z. L. R. 458.—N.Z.

a. Appointment by infant himself.—An infant above the age of twelve has no right to choose a guardian. The whole matter of infants electing guardians is obsolete.—*Re PENNINGTON* (1875), 1 V. L. R. 97.—AUS.

b. Court of Chancery.—22 Vict. c. 93 does not exclude the jurisdiction of the Ct. of Ch. in respect to the appointment of guardians to infants.—*Re STANNARD* (1858), 1 Ch. Ch. 15.

c. ———.—The father of infants died intestate, & his widow obtained letters of administration, & by her will appointed her sister, a married woman, sole guardian of her two infant daughters. After her death the paternal grandfather of the infants applied to the judge of the surrogate ct. to be appointed guardian, who, in opposition to objections made by the sister, did appoint him their

guardian:—*Held*: on appeal, although the Ct. of Ch. had jurisdiction to appoint guardians to infants notwithstanding 22 Vict. c. 93, it would not do so on an appeal like this.—*Re MCQUEEN, MCQUEEN v. McMILLAN* (1876), 23 Gr. 191.—CAN.

d. ———.—A domiciled Englishman whose pupil child was entitled to a sum of money under a testamentary trust in Scotland, applied to the Ch. Div. of the High Ct. of Justice to appoint him guardian to his child. The ct. refused to make the appointment unless it was certified that the trustees would pay the money into the English Ct. The trustees refused to do so. In a petition presented by the father to the Ct. of Session, the ct. ordained the trustees to pay the income to the father for five years, & continued the petition.—*WEBB v. CLELAND'S TRUSTEES* (1904), 6 F. (Ct. of Sess.) 274; 41 Sc. L. R. 229; 11 S. L. T. 581.—SCOT.

e. Testamentary direction—How far considered.—Although the ct. pays respect to the wishes & directions of a testator in reference to the guardianship & care of his children, it will not do so where a compliance therewith would clearly be prejudicial to the happiness & moral training of the infants.—*ANON.* (1858), 6 Gr. 632.—CAN.

f. ———.—In an application for the appointment of a guardian of a minor, the ct. is bound to consider a will, although probate has not been granted. The fact that there is a contest as to the validity of the will may induce the ct. to exercise its discretion one way or the other, but it is not open to the ct. to say it

will refuse to take notice of the will.—*SARALA SUNDARI DEBI v. HAZARI DASI DEBI* (1915), 1 L. R. 42 Calc. 953.—IND.

g. Passing guardian's accounts.—There is no authority in the judge of a surrogate ct. to pass the accounts of a guardian of an infant appointed by such ct.—*MURDY v. BARR* (1901), 21 C. L. T. 526; 2 O. L. R. 310.—CAN.

h. Probate Court.—In an action of ejectment pltf. claimed title as the guardians of infants appointed by the Probate Ct. At the time the action was brought, the infants, who were each over fourteen years of age were living with deft., who occupied the premises in question with their consent & approval:—*Held*: deft. could not set up as a defence that on equitable grounds he was entitled to possession for the infants, as against pltf., & that pltf. had no title, the Probate Ct. having acted without jurisdiction in appointing them guardians.—*FURLOTTE v. LAPOINT* (1907), 3 E. L. R. 116; 38 N. B. R. 140.—CAN.

k. Father's intention—How far considered.—*Held*: the facts afforded a sufficient indication of the father's intention that his children should, after his death, be committed to the guardianship of their mother, & an order simply to that effect was made.—*Re WALSH* (1884), 13 L. R. Ir. 269.—IR.

l. Where both parents alive.—The Supreme Ct. has no jurisdiction to appoint a guardian to an illegitimate child, nor even to a legitimate child where both parents are alive.—*Re R. V. W. (AN INFANT)* (1906), 26 N. Z. L. R. 297.—N.Z.

Sect. 5.—Guardians appointed by the court: Subsect. 1, B., C., D., E. & F.]

B. Over What Infants.

1403. General rule.]—An infant, born in France, was the daughter of a Frenchwoman, but was a British subject. The father died intestate, & by French law, the mother thereupon was restored to her nationality & became entitled to the legal & natural guardianship of the infant. The infant resided in France, & was entitled to a share of the property left by her father, which was all in France. On an application to the English Cts. to appoint guardians, it was admitted that the mother, having regard to her conduct, was not a proper person to be appointed. Proceedings relating to the custody & guardianship of the infant had been commenced in France, but had been adjourned until it should be seen what order the English Cts. would make:—*Held*: the English Cts. had jurisdiction to appoint guardians, & under the special circumstances of the case, it was a proper one for the exercise of the jurisdiction.

This ct. has jurisdiction in a proper case to appoint guardians of any infant British subject, wherever that infant may be residing, & whoever may have the custody of that infant abroad (COTTON, L.J.).—*Re WILLOUGHBY* (1885), 30 Ch. D. 324; 54 L. J. Ch. 1122; 53 L. T. 926; 33 W. R. 850; 1 T. L. R. 652, C. A.

1404. British infant—Outside jurisdiction.]—LLOYD v. CAREW (1699), Prec. Ch. 106; 1 Eq. Cas. Abr. 260; 24 E. R. 51.

1405. ———.]—*Ex p.* HALES (1729), Mos. 249; 25 E. R. 378, L. C.

1406. ———.]—MORRISON v. MORRISON (1847), 8 L. T. O. S. 513.

1407. ———.]—LOCKWOOD v. FENTON, No. 1459, *post*.

1408. ———.]—HOPE v. HOPE, No. 2036, *post*.

ante. ———.] *Re WILLOUGHBY*, No. 1403,

also, CONFLICT OF LAWS, Vol. XI., pp. 442, 443, Nos. 1018–1026.

1410. Alien infant—Within jurisdiction.]—The Ct. has jurisdiction to appoint guardians to infants, foreign subjects, within the jurisdiction, & if necessary, to interfere on their behalf against their parents or guardians appointed by the Cts. of their country; but will not act against the foreign guardian, except on very special grounds, as, for instance, neglect of the children, or danger to their property.—NUGENT v. VETZERA (1866), L. R. 2 Eq. 704; 35 L. J. Ch. 777; 15 L. T. 33; 30 J. P. 820; 12 Jur. N. S. 781; 14 W. R. 960.

*Annotations:—*Consd. *Re Willoughby* (1885), 30 Ch. D. 324. *Reid. Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 10 Ch. D. 49.

———.]—*Compare* ALIENS, Vol. II., p. 121, No. 9.

PART XIII. SECT. 5, SUB-SECT. 1.—
B.

1404 i. British infant—Outside jurisdiction.]—The ct. has jurisdiction, on summons, to appoint a guardian of the estate of an infant, a British subject in Ireland, but having no property except personal estate in a foreign country.—*Re PAVITT*, [1907] 1 I. R. 234.—IR.

1413 i. Infants having no property.]—The power of the Ct. of Ch. to appoint guardians to infants, whether such infants have property or not, is possessed by the High Ct.—*Re JAGANNATH RAMJI* (1893), 1 L. R. 19 Bom. 96.—IND.

1413 ii. ———.]—*Re* STUART-FORBES (1907), 27 N. Z. L. R. 458.—N.Z.

m. Infant outside jurisdiction.]—Although an infant whose parents are domiciled & resident in Alberta is residing in another province of Canada, whither it has been sent by the father, the Supreme Ct. of Alberta has jurisdiction, if the case be shown to be a proper one in which to do so, to set aside the natural & legal guardianship of the father & to appoint the mother guardian.—*Re M.*, [1918] 1 W. W. R. 579; 13 Alta. L. R. 196.—CAN.

PART XIII. SECT. 5, SUB-SECT. 1.—
C.

n. Neglect.]—There is nothing in Children's Protection Act, 1909 (c. 12), which destroys the inherent power of the Supreme Ct. to control the guardian

1411. Infants whose father resident abroad—Mother resident in England.]—Two infants having been sent to England for their education, by their father, who was resident in India, the ct. appointed a guardian of the children, to act for the father during his absence abroad, notwithstanding that their mother was residing in this country.—*Re THOMAS* (1853), 22 L. J. Ch. 1075.

1412. Infants having no property—Within jurisdiction.]—*Re WILLOUGHBY*, No. 1403, *ante*.

1413. ———.]—CUTLER v. WRIGHT, [1890] W. N. 28.

& not being wards of court.]—*Re McGRATH*, No. 1269, *ante*.

C. Protection of Infant.

See, now, Guardianship of Infants Act, 1925 (c. 45).

Custody of children—Pending & after matrimonial causes.]—*See* Guardianship of Infants Act, 1886 (c. 27), s. 7, & generally, HUSBAND & WIFE, Vol. XXVII., pp. 418, 419, 533–535, Nos. 4232–4248, 5779–5796.

1415. Preservation of rights under a settlement—Condition that settlor be guardian—Appointment of settlor.]—A settlement being made on an infant, whose father was dead, on condition of her being under the care of the settlor, it was referred to the master, to consider whether he should be appointed guardian, taking the settlement into consideration.—FAGNANI v. SELWYN (1788), Jac. 268; 37 E. R. 852.

*Annotations:—*Reid. Anon. (1821), Jac. 264, n.; Lyons v. Blenkin (1821), Jac. 245.

1416. To prevent infant being sent abroad.]—NEWPORT v. MOORE (1752), 1 Dick. 167; 21 E. R. 233.

1417. ——— Allegation of slavery.]—*Re* GOOTOO & INYOKWANA (1891), 35 Sol. Jo. 481.

1418. Ill-treatment by father.]—WHITFIELD v. HALES, No. 876, *ante*.

1419. Ill-treatment by widowed mother.]—ANDERTON v. YATES, No. 1765, *post*.

1420. Misconduct of mother—Infant out of jurisdiction.]—*Re WILLOUGHBY*, No. 1403, *ante*.

Removal of guardian by the court—Grounds for.]—*See* Sect. 7, *post*.

D. Guardianship Vacant.

1421. Defective appointment by will.]—MAY v. MAY (1776), 2 Dick. 527; 21 E. R. 374.

1422. ——— Appointment of same person by court.]—Where a person is appointed guardian, under a will not duly executed for that purpose, the ct. will appoint him without a reference.—HALL v. STORER (1835), 1 Y. & C. Ex. 556; 5 L. J. Ex. Eq. 97; 160 E. R. 227.

1423. No appointment made by father.]—BETTESWORTH v. BETTESWORTH (1789), 2 Dick. 729; 21 E. R. 454.

who has been substituted for the natural guardian, nor is there anything therein which declares that the parents' rights are gone for ever, or however neglectful & wicked they may have been, that they must never hope to have their child as their own again. The intention of the Act is to leave the parents' rights & duties with respect to their neglected children unaffected, except in so far as the circumstances with respect to character & conduct on the part either of the

THE CHILD, WHOSE PARENTS SHOULD NOT be allowed to have control of it.—*Re* CHILDREN'S PROTECTION ACT, TRISKOW'S CASE, [1918] 3 W. W. R. 512; 43 D. L. R. 452.—CAN.

1424. Desertion by father.]—*Re* ENGLAND'S ESTATE, No. 1096, *ante*.

1425. Testamentary guardian refusing to act.]—*Ex p.* CHAMPNEY (1762), 1 Dick. 350; 21 E. R. 304.

1426. Marriage of female guardian—Effect—Remarriage of mother.]—DARCY *v.* HOLDERNESS (LORD) (1725), 1 P. Wms. 704, n.; 24 E. R. 580.

*Annotation:—*Mentd. *In the Goods of Parnell* (1872), L. R. 2 P. & D. 379.

1427. ———.]—If a female guardian marries it is a matter of course to appoint a new guardian.—ANON. (1837), 8 Sim. 346; 59 E. R. 137.

1428. ———.]—Where a female appointed by the ct. to be guardian of an infant marries, it is of course to make a new reference to the master to appoint a guardian.—*Re* GORNALL (1839), 1 Beav. 347; 8 L. J. Ch. 283; 3 Jur. 500; 48 E. R. 926.

1429. ———. Whether reappointment necessary.]—The marriage of a female guardian does not *ipso facto* render the appointment of guardians void, but renders it necessary to come to the ct. for a new appointment.—PEARCE *v.* BROOKS (1843), 2 L. T. O. S. 265.

1430. Joint guardians appointed by court—Effect of death of one—Necessity for new appointment.]—If two persons are appointed by the ct. guardians of an infant during his minority, or until further order, the guardianship is at an end on the death of one of them, & there must be a new appointment.—BRADSHAW *v.* BRADSHAW (1826), 1 Russ. 528; 38 E. R. 203.

1431. ———. Reappointment of survivors.]—HALL *v.* JONES (1827), 2 Sim. 41; 57 E. R. 706.

Compare No. 521, *ante*.

E. Religious Grounds.

1432. To educate child in father's faith.]—*Re* RACE (1857), 1 Hem. & M. 420, n.; 71 E. R. 183.

*Annotations:—*Consd. *Gurney v. Gurney* (1863), 1 Hem. & M. 413; *Re Scanlan* (1888), 40 Ch. D. 200. *Reid. Re* Meade (1871), 19 W. R. 313.

1433. Unless religious belief already formed.]—The rule that an infant ward of ct. is to be brought up in the religion professed by his deceased father will be departed from if the infant had already received such strong impressions adverse to that religion that it would be dangerous to attempt to educate him in it.

The widow of a Roman Catholic gentleman of rank, all whose relations were Roman Catholics, some time after her husband's death became a member of the Anglican Church, & brought up her only child, a boy, born after his father's death, as a member of that church, till he had arrived at the age of nearly ten years. A suit was then instituted by a relation of the father for making the infant a ward of ct., with a view to having him educated as a Roman Catholic. The Lords Justices, being satisfied, by a personal interview with the infant, that he had received strong impressions, which it would not be safe to disturb, adverse to the Roman Catholic persuasion, refused to interfere with an order of the Master of the Rolls appointing the mother sole guardian, without any directions as to the child's religious education.—STOURTON *v.* STOURTON (1857), 8 De G. M. & G. 760; 26 L. J. Ch. 354; 29 L. T.

O. S. 33; 21 J. P. 261; 3 Jur. N. S. 527; 5 W. R. 418; 44 E. R. 583, L. JJ.

*Annotations:—*Distd. *Davis v. Davis* (1862), 10 W. R. 245. *Consd. Hawksworth v. Hawksworth* (1871), 6 Ch. App. 539; *Re Meade* (1871), 19 W. R. 313; *Andrews v. Salt* (1873), 8 Ch. App. 627, n.; *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 10 Ch. D. 49. *Distd. R. v. Williams* (Secretary of National Refuges for Homeless & Destitute Children) (1888), 5 T. L. R. 104. *Reid. Hill v. Hill* (1862), 31 L. J. Ch. 505; *Re Newbery* (1865), L. R. 1 Eq. 431; *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1883), 24 Ch. D. 317; *Re McGrath*, [1893] 1 Ch. 143; *Re W., W. v. M.*, [1907] 2 Ch. 557; *Ward v. Laverty*, [1925] A. C. 101.

See, further, Part XII., ante.

1434. ———.]—*Re* AUSTIN, AUSTIN *v.* AUSTIN, No. 1274, *ante*.

1435. ———.]—In determining the custody of children, the interests of the children are paramount with the ct. In committing them to the charge of the mother when the innocent party, the ct. acts upon the principle that a wife ought not to be deprived of the comfort & society of her children by reason of the wrongful act of the husband, but it will depart from the rule when it is for the interest of the children that their education should be free from her control.

On the petition of the wife a judicial separation was decreed by reason of the husband's adultery & cruelty. The wife claimed the custody of the two children of the marriage, & avowed that her object was to bring them up in the Roman Catholic religion, which she herself professed. The husband, who was also originally a Roman Catholic, had become a Protestant, & the children, who were both young, had been placed by him in a Protestant boarding school, & were by his directions instructed in the Protestant religion. In these circumstances the ct., bearing in mind the fact that while petitioner & resp. had lived together resp. had, in the exercise of his paternal right, caused the children to be brought up as Protestants, & being satisfied that it was for the interest of the children than the course of education so determined for them should not be interrupted, committed their custody to the mistress of the school in which their father had placed them, but gave to both parents full access to them.—D'ALTON *v.* D'ALTON (1878), 4 P. D. 87; 47 L. J. P. 59.

1436. Education in conformance with father's wishes.]—*Re* CLARKE, No. 1286, *ante*.

1437. ———.]—*Re* NEVIN (AN INFANT), No. 1260, *ante*.

F. For Special Purposes.

1438. To assure title—On sale of land.]—A guardian appointed to an infant, to enable him to suffer a recovery in order to satisfy a purchaser.—STAPLETON'S CASE (1596), Cro. Eliz. 471; 78 E. R. 709.

1439. To consent to marriage.]—Guardian appointed to an orphan infant, without property, to consent to her marriage.—*Re* WOOLSCOMBE (AN INFANT) (1816), 1 Madd. 213; 56 E. R. 79.

*Annotation:—*Expld. *Re Salisbury & Eccl. Comrs.* (1876), 2 Ch. D. 29.

1440. ———.]—*Re* MOORCROFT (1835), 2 Seton's Judgments & Orders, 6th ed. p. 995.

See, now, Guardianship of Infants Act, 1925 (c. 45), s. 9 (5) & sched.

1441. For administration purposes—Father intestate & insolvent—Appointment of creditor.]—A creditor appointed guardian to minors, the only children of P., who had no known relations, for the purpose of taking out administration to the estate

PART XIII. SECT. 5, SUB-SECT. 1.— F.

o. For administration purposes.] Two of the legatees under a will, who were sons of testatrix, were in-

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Infants. The husband of testatrix, & the father of the infant legatees, was alive & in the Dominion, but the will did not appoint him a guardian of the infant legatees:—*Held: the father, until he was appointed guardian under*

Infants Guardianship & Contracts Act, 1887, had no power to receive the legacies or any part thereof on behalf of the infant legatees, but the ct. would, if in proper proceedings he were found to be a proper person,

5.—Guardians appointed by the court: Sub-sect. 1, F.; sub-sects. 2 & 3, A. & B.]

of P., who had died intestate & insolvent.—*In the Goods of PECK* (1858), 1 Sw. & Tr. 141; 27 L. J. P. & M. 106; 31 L. T. O. S. 318; 6 W. R. 793; 164 E. R. 666.

Annotation:—Refd. Coombs v. Coombs (1866), L. R. 1 P. & D. 288.

1442. To consent to application—Under Improvement of Land Act, 1864 (c. 104)—By father & tenant for life.]—Re MANCHESTER (DUKE) (1870), 2 Seton's Judgments & Orders, 6th ed. p. 994.

1443. ———.]—Re BLUNDELL (1871), 2 Seton's Judgments & Orders, 6th ed. p. 994.

1444. ———.]—Re SEFTON (LORD) (1871), 2 Seton's Judgments & Orders, 6th ed. p. 991.

1445. For purposes of Leases & Settled Estates Act (c. 120), s. 36)—Petition by infant.]—Under above sect. a guardian to an infant may, after a petition has been presented by the infant, be appointed.—Re HARGREAVE'S SETTLED ESTATES (1858), 28 L. J. Ch. 197; 32 L. T. O. S. 203; 5 Jur. N. S. 60; 7 W. R. 156.

1446. ——— Necessity for appointment.]—Re CADDICK'S SETTLED ESTATES, No. 650, *ante*.

1447. ———.]—Re JAMES, No. 648, *ante*.

1448. For purposes of Places of Worship Sites Act, 1873 (c. 50).]—(1) A father, tenant for life, is the guardian of his infant son, tenant in tail in remainder, for the purpose of concurring under above Act, in a grant by himself of a site for a church. *Semble*: the ct. has no power to appoint a guardian for the purpose of concurring under the Act.

(2) If indeed an action is brought against a minor, or a minor has to be made a party to any proceedings in a ct. of justice, a guardian *ad litem* may be appointed, but such person does not thereby become the guardian of the minor generally (MELLISH, L.J.).—Re SALISBURY (MARQUIS) & ECCLESIASTICAL COMRS. (1876), 2 Ch. D. 29; 45 L. J. Ch. 250; 34 L. T. 5; 40 J. P. 404; 24 W. R. 380, C. A.

1449. To protect infant's interests—On bill pending in Parliament.]—Re WHARTON (1856), 2 Seton's Judgments & Orders, 6th ed. p. 995.

For purposes of legal proceedings—By & against infant.]—See Part XIV., *post*.

SUB-SECT. 2.—PRACTICE ON APPLICATION FOR APPOINTMENT.

See, now, R. S. C., Ord. 55, r. 2 (12), & Statutory Rules & Orders Revised, Vol. XII., Supreme Court England, p. 203.

appoint him guardian under that Act.—*BAYLEY v. PUBLIC TRUSTEE* (1907), 27 N. Z. L. R. 659.—N.Z.

p. To consent to order of adoption.]—The ct. will appoint a guardian of a destitute orphan child for the purpose of consenting to an order of adoption under Adoption of Children Act, 1881, s. 3.—Re NASH (1884), 2 N. Z. L. R. 286 (S. C.).—N.Z.

PART XIII. SECT. 5, SUB-SECT. 2.

g. Application on behalf of infant—By guardian *ad litem*.]—On a motion to appoint a guardian of an infant's person, the infant can only appear by a guardian *ad litem*; where an objection was taken at the hearing of such a motion, that no guardian *ad litem* had been appointed, the ct. made the appointment *instanter*.—*Re PENNINGTON* (1876), 1 V. L. R. 97.—AUS.

r. Reference to master to approve—Subsequent appointment by court.]—In a suit for the purpose of having a guardian appointed, it is not the course of the ct. to direct a reference to the master to appoint a guardian but only to approve of one, to be afterwards appointed by the ct. if it see fit.—MURPHY v. LAMPHIER (1866), 12 Gr. 241.—CAN.

t. Necessity for notice—Father living.]—On a petition for the appointment of a guardian to an infant, other than his father, who was living:—Held: notice of the application should be served on the father.—Re HENRICKS (1869), 2 Ch. Ch. 418.—CAN.

a. Inquiry as to conflicting interest.]—When a *prima facie* case is made, showing that no conflicting interests exist between the infants & the proposed guardian, or the party

1450. Application on behalf of infant—By next friend.]—Re NORTH, No. 1273, *ante*.

1451. ———.]—A petition by infants for the appointment of a guardian ought to be presented by them by their next friend.—Re RUSSELL'S ESTATE (1851), 20 L. J. Ch. 384; 17 L. T. O. S. 282; 15 Jur. 981.

1452. ———.]—An application may be made by an infant for a guardian under 13 & 14 Vict. c. 35, s. 5, without a next friend.—Ex p. CRAIG (1851), 20 L. J. Ch. 136; 16 L. T. O. S. 481; 15 Jur. 782.

Evidence to support application.]—See R. S. C., Ord. 55, r. 25.

1453. Attendance of infant—Dispensed with—Danger to infant.]—On affidavit of the danger in bringing an infant who lived in town into ct. to have a guardian assigned, a commission was ordered for the purpose.—MARLBOROUGH (DUKE) v. MARLBOROUGH (DUCHESS) (1739), 1 Dick. 74; 21 E. R. 195.

1454. ——— Illness.]—Guardian appointed of an infant, & his presence in ct. dispensed with, on an affidavit of his inability to attend from illness.—HILL v. SMITH (1816), 1 Madd. 290; 56 E. R. 107.

1455. ———.]—DAWSON v. DAWSON (1837), 1 Jur. 87.

Necessity for next friend in proceedings by infant.]—See Part XIV., Sect. 1, sub-sect. 2, *post*.

SUB-SECT. 3.—WHO MAY BE APPOINTED.

A. In General.

See, now, Guardianship of Infants Act, 1925 (c. 45).

1456. Discretion of judge—Grounds for interference.]—Three applications were made at the same time as to the guardianship of infants. One that Mrs. H., their maternal grandmother, might be appointed guardian; another for the appointment of Mrs. A. & Mrs. B., their paternal aunts, both married women; & another for the appointment of C., a friend of the family. An order having been made by the judge appointing Mrs. B. sole guardian:—Held: though the discretion of the judge as to the choice of a guardian ought not to be interfered with, except on very strong grounds, yet that this order ought to be discharged, & Mrs. H. & C. appointed guardians on these grounds, that the appointment of a married woman to be sole guardian was improper; that the judge had not approved of Mrs. A., which had a bearing on the propriety of appointing Mrs. B., who was acting with her; that the father had in his lifetime shown great confidence in Mrs. H. & allowed the children, who had very little inter-

proposing him, the ct. will not go into the question of the fact or extent of interest.—*FERGUSON v. LANGTRY* (1869), 2 Ch. Ch. 473.—CAN.

b. Security.]—It is contrary to the uniform practice of the ct. to appoint any one as the custodian of infants' money, whether as trustee or guardian, without requiring security for the proper discharge of his duties.—Re THIN (1884), 10 P. R. 490.—CAN.

c. Where testamentary guardian has not acted.]—Where a testamentary guardian has not acted, the mode of proceeding in order to have a guardian appointed, is by petition; it is not necessary to file a bill. *Secus*, if after acting, he has misconducted himself.—O'KEEFE v. CASEY (1803), 1 Sch. & Lef. 106.—IR.

course with his relations, to live much with her; & that their mother, whose wishes, though she had no power to appoint guardians, ought to be taken into consideration, had made a will purporting to appoint Mrs. H. & C. guardians.—*Re KAYE* (1866), 1 Ch. App. 387; 14 L. T. 388; 12 Jur. N. S. 350; 14 W. R. 597, L. JJ.

1457. Remainderman—Infant tenant in tail.—*SWEETMAN v. EDGE* (1578), Cary, 96; 21 E. R. 51.

Exclusion of father—When justified.—*See* Nos. 1118, 1178, *ante*.

1458. Maternal uncle—Without reference.—Guardian [maternal uncle] appointed to an infant entitled to freehold property worth £80 a year, without a reference.—*Ex p. JACKSON* (1833), 6 Sim. 212; 58 E. R. 573.

1459. ——— Jointly with mother.—The maternal uncle of an infant in a suit conducted at his risk had recovered £3,000, which was in ct. in the suit, for the benefit of the infant. The infant's father was dead, & his mother, who was living apart from her second husband, was, with the infant, whose age was fourteen, in indigent circumstances at New York, & refused to allow him to be brought to this country. The uncle, by petition, asked to be appointed guardian, with an allowance for maintenance, to commence on the infant's arrival in England. The ct. appointed the mother & uncle the guardians; & after consideration of the circumstances at chambers, refused to make any allowance for maintenance.—*LOCKWOOD v. FENTON* (1852), 1 Sm. & G. 73; 17 Jur. 127; 65 E. R. 33.

See, also, No. 1460, *post*.

1460. Person out of jurisdiction—Already appointed by foreign court—Infant having foreign & English estates—Recognisances.—*Re LEVINGE* (1797), 6 Beav. 392, n.; 49 E. R. 877.

1461. ——— ——— ———.—*Re DALY* (1798), 6 Beav. 393, n.; 49 E. R. 877.

1462. ——— Property within jurisdiction.—Guardians were appointed in Ireland, to infants brought up educated & domiciled there. Their fortunes were in ct. in England. The ct. adopted the proceedings in Ireland, appointed the same

persons guardians, notwithstanding they resided out of the jurisdiction, & ordered payment to them of the maintenance money.—*DANIEL v. NEWTON* (1845), 8 Beav. 485; 50 E. R. 191.

1463. ——— Jointly with English guardian.—*DAWSON v. JAY, Re DAWSON*, No. 2057, *post*.

—*See, also*, CONFLICT OF LAWS, Vol. II., p. 443, Nos. 1020–1026.

1464. ————Persons residing out of the jurisdiction not to be appointed guardians by the ct.—*LOGAN v. FAIRLEE* (1821), Jac. 193; 37 E. R. 822, L. C.

Annotations:—*Apld. Stephens v. James* (1833), 1 My. & K. 627. *Refd. Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42; *Hope v. Hope* (1854), 4 De G. M. & G. 328.

1465. Partnership.—A partnership in London being appointed, not individually but as a firm, exors. & guardians, claimed the residue undisposed of in exclusion of persons appointed attorneys, exors. & guardians in Denmark, & others appointed attorneys & exors. in India; decreed a trust for the next of kin; & it was referred to the master to appoint a guardian.

I cannot appoint a partnership guardian (*LORD LOUGHBOROUGH, C.*).—*DE MAZAR v. PYBUS, KNUDSON v. PYBUS* (1799), 4 Ves. 644; 31 E. R. 332, L. C.

Annotation:—*Mentd. Sadler v. Turnor* (1803), 8 Ves. 617.

1466. Trustees of infant's property.—*Re MAIS* (1852), 21 L. J. Ch. 875; 19 L. T. O. S. 324; 16 Jur. 608.

1467. Married woman—Illegitimate child.—A married woman appointed guardian of an illegitimate child & payment ordered to her upon her separate receipt.—*WALLIS v. CAMPBELL* (1807), 13 Ves. 517; 33 E. R. 387, L. C.

1468. ——— As sole guardian.—*Re KAYE*, No. 1456, *ante*.

1469. Person who has abducted child—Motives of affection—Infant's benefit.—*LIVINGSTON v. HAWKER* (1913), *Times*, Oct. 18, H. L.

B. Inquiry as to Fitness.

1470. Whether reference necessary.—Guardian appointed merely on petition without any suit in

PART XIII. SECT. 5, SUB-SECT. 3.—A.

1462 i. Person out of jurisdiction—Already appointed by foreign court—Property within jurisdiction.—A foreigner was appointed trustee for infants to receive insurance moneys, without being required to give security in this province, on its being shown that he had given security upon his appointment as guardian, to the satisfaction of a ct. in the state where he & the infants resided.—*Re ANDREWS* (1885), 11 P. R. 199.—CAN.

1463 i. Married woman—As sole guardian.—The fact of the person named as guardian in the will of deceased mother of children being a married woman is itself sufficient to prevent the ct. appointing her.—*Re McQUEEN, McQUEEN v. McMILLAN* (1876), 23 Gr. 191.—CAN.

1463 ii. ————A married woman will not be appointed sole guardian of the person & estate of an infant.—*Re FREEZE* (1905), 3 N. B. Eq. Rep. 172; 26 C. L. T. 385.—CAN.

d. Holder of office.—The holder of an office for the time being may be appointed guardian of the persons of infants.—*Re TYSON, THOMPSON v. CLIFTON* (1909), 9 S. R. N. S. W. 217; 26 N. S. W. W. N. 44.—AUS.

e. Successors in office of named person—Reversionary guardianship.—It is irregular to give a reversionary guardianship of wards in ct. to the successors in office of any named person.—*MURPHY v. LAMPHIER* (1866),

12 Gr. 241.—CAN.

f. Next of kin.—It is not the practice of the ct. to give weight to the objection that a person sought to be appointed guardian to an infant is the next of kin to whom the lands of the infant would descend.—*Re McQUEEN, McQUEEN v. McMILLAN* (1876), 23 Gr. 191.—CAN.

g. Company.—By Loan & Trust Corp'n. Act, 1914 (c. 184), s. 18 (e), it is not competent for a co. to be appointed guardians of the person of an infant; & the appointment of an officer of the co. as guardian is an evasion of the spirit of that Act; & a guardian so appointed is not entitled to any compensation out of the estate for his services.—*Re RUNDLE* (1915), 7 O. W. N. 350; 32 O. L. R. 312.—CAN.

h. Testamentary guardians declining trust.—Two out of three testamentary guardians declined to accept the trust:—*Held*: they were not entitled, as of right, after the death of their co-guardian, to be appointed guardians by the ct.; but, other circumstances being equal, they would be preferred to the person nominated in the will of the mother (the third guardian), to be the guardians of the infants after her decease.—*Re JOHNSTONS, Ex p. YEATES* (1845), 2 Jo. & Lat. 222.—IR.

k. Solicitor—For persons controlling estate.—The solr. for any of the persons who exercise a control over the minor's estate will not be

appointed the guardian of their persons.—*Re JOHNSTONS, Ex p. YEATES* (1845), 2 Jo. & Lat. 222.—IR.

l. Grandmother.—An infant, a girl of three years, was placed by her parents in the care & custody of her maternal grandmother. Her mother died shortly afterwards, & she remained with her grandmother for eight years, until the death of her father. Her father had married again, & left his second wife, the stepmother of the infant, surviving him. He had lived in & carried on a hotel, & his widow continued to do so, having living with her four elder brothers & sisters of the infant. Shortly after the father's death she (the infant's stepmother) sent one of the infant's brothers, who took the infant away from a school which she was attending, & brought her to live with her stepmother & brothers & sisters at the hotel. The grandmother thereupon applied to the ct. to be appointed guardian of her person & estate. The child, then eleven years of age, when questioned by the ct., said that her grandmother had been kind to her, but that she wished to stay with her stepmother because her brothers & sisters were staying with her. The evidence showed that the grandmother had carefully attended to her. It appeared also that the grandparents had some little means:—*Held*: the grandmother ought to be appointed guardian in preference to the stepmother.—*Re DARVILL* (1901), 21 N. L. R. 134.—N.Z.

Sect. 5.—Guardians appointed by the court: Sub-sect. 3, B. Sect. 6: Sub-sects. 1, 2, 3, 4 & 5. Sect. 7.]

ct., but not without a reference to the master.—*Ex p. WATKINS* (1752), 2 Ves. Sen. 470; 28 E. R. 301, L. C.

Annotation:—Apld. Johnstone v. Beattie (1843), 10 Cl. & Fin. 42.

1471. — Amount of property material.]—Order, appointing a guardian without a reference only where the property is excessively small. Refused, where it amounted to £1,500.—*Ex p. WHEELER* (1809), 16 Ves. 266; 33 E. R. 986.

Annotation:—Folld. Ex p. Janion (1820), 1 Jac. & W. 395.

1472. — —.]—Guardian not to be appointed without a reference, when the infant's property amounts to £150 *per annum*.—*Ex p. JANION* (1820), 1 Jac. & W. 395; 37 E. R. 426.

1473. — —.]—Order made on petition without suit, for a reference to approve of a guardian & maintenance for an infant having £150 a year arising from land.—*Ex p. ANGELL* (1842), 13 Sim. 258; 60 E. R. 101.

1474. — Expense of reference.]—Guardian appointed without a reference.—*Re JONES* (1826), 1 Russ. 478; 38 E. R. 185.

1475. —.]—The fortune of an infant being £1,000 only, order made upon affidavit, without reference, appointing the mother guardian, & directing payment to her of the interest of such sum for maintenance.—*Re ALLSOP* (1838), Coop. Pr. Cas. 44; 7 L. J. Ch. 194; 47 E. R. 393.

1476. — Executor of father.]—The ct. refused to appoint certain persons to be guardians without a reference, although one of the persons was the exor. of the father of the infants, & the other had been appointed guardian by an order in Chancery.—*WHITELOCK v. FINCH* (1839), 3 Y. & C. Ex. 724.

1477. — Guardianship contested.]—Although the ct. will sometimes appoint a guardian to an infant without a reference, where no objection is made to the individual proposed, it will in no case dispense with a reference where the guardianship is contested between two parties.

Four persons domiciled & resident in Scotland had accepted the trusts of a Scottish deed, attested by two witnesses, by which they were duly appointed tutors & curators to a Scottish orphan child, whose only property consisted of real estates situated in Scotland. The child having come to reside in England for the sake of its health, & a suit having been instituted by other parties, in its name, for the purpose of making it a ward of this ct.:—*Held*: on the construction of the deed, it appeared to be made in contemplation of the child's continuing to reside in Scotland, & with reference solely to her so doing; & the care & custody of the child being considered to be, therefore, unprovided for, & the curators who, under the deed, had the management of the property, being parties, & having appeared, to the suit, the Lord Chancellor referred it to the master to approve of a scheme for the residence of the child & to appoint guardians.—*BEATTIE v. JOHNSTONE* (1841), 1 Ph. 17; 10 L. J. Ch. 300; 5 Jur. 671; 41 E. R. 537, L. C.; *affd. sub nom. JOHNSTONE v. BEATTIE* (1843), 10 Cl. & Fin. 42, H. L.

Annotations:—Reid. Lockwood v. Fenton (1852), 1 Sm. & G. 73; *Re Dawson, Dawson v. Jay* (1854), 2 W. R. 311; *Hope v. Hope* (1854), 19 Beav. 237; *Re Tweedale's Settlement* (1859), John. 109; *Stuart v. Bute, Stuart v. Moore* (1861),

9 H. L. Cas. 440; *Didisheim v. London & Westminster Bank*, [1900] 2 Ch. 15. *Mentd. Scott v. Bentley* (1855), 1 K. & J. 281; *Hoskins v. Matthews* (1856), 8 De G. M. & G. 13; *Moorhouse v. Lord* (1863), 10 H. L. Cas. 272; *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34; *Re Beaumont*, [1893] 3 Ch. 490; *A.-G. v. Winans* (1901), 85 L. T. 508.

1478. —.]—Guardian of the estate of an infant appointed on petition without suit or reference.—*Ex p. BOND* (1846), 16 L. J. Ch. 147; 8 L. T. O. S. 252; *sub nom. Re BOND*, 11 Jur. 114.

1479. —.]—Uncle & aunt appointed guardians of the person of an infant on petition without suit or reference, no allowance being asked.—*Re NEALE* (1852), 15 Beav. 250; 51 E. R. 534.

SECT. 6.—RIGHTS, POWERS AND DUTIES OF GUARDIANS.

SUB-SECT. 1.—MARRIAGE OF WARD.

See Part IV., sect. 2, ante.

SUB-SECT. 2.—CUSTODY.

See Part XI., ante.

SUB-SECT. 3.—MAINTENANCE.

See Part X., Sect. 1, ante.

SUB-SECT. 4.—EDUCATION AND RELIGION.

See Part XII., ante.

SUB-SECT. 5.—PROPERTY.

Management of property.]—*See Part VIII., Sect. 5, ante.*

Liability to account.]—*See Part VIII., ante.*

Application to maintenance.]—*See Part X., Sect. 1, sub-sect. 2, ante.*

Purchase of infant's property.]—*See Part VIII., Sect. 3, ante.*

SECT. 7.—REMOVAL OF GUARDIAN BY THE COURT.

Control of ct. over guardians generally, *see* Parts VIII., X., XI., XII.

Power to remove testamentary guardian.]—*See, now, Guardianship of Infants Act, 1886 (c. 27), s. 6.*

1480. Power to remove statutory guardian—Father—Guardianship of Infants Act, 1886 (c. 27), ss. 3 (2), 13.]—Under above sub-sect. the father is a joint guardian with the guardians appointed provisionally by the mother by virtue of the power conferred upon her by the sub-sect.

The appointment by the mother should, therefore, be in form an appointment of guardians "jointly with the father" of the infant: &, upon an application, under above sub-sect. after the death of the mother, to confirm the appointment, the ct. can make an order under the Act in that form only.

The father of the infant may, however, be displaced altogether by the ct., under its general

PART XIII. SECT. 7.

m. On guardian's own application—Guardian resident abroad.]—Where the mother of infants, whose father died intestate was permanently resident

in England, the ct. with her consent made an order under Guardianship of Infants Act, 1886 (c. 27), s. 6, substituting a paternal uncle of the infants as their guardian.—*Re LEMONS* (1887), 19 L. R. Ir. 576.—IR.

n. —.]—The ct. has jurisdiction to discharge a testamentary guardian of infant wards of ct. on his own application.—*Re GRAYS (MINORS)* (1891), 27 L. R. Ir. 609.—IR.

jurisdiction, which is preserved by the same subsect., & by sect. 13 of the Act.

Upon an application to confirm the appointment of guardians by the mother of the infant, the ct. is bound to consider whether the persons appointed as guardians are proper persons to act as such.

The mother of an infant, being separated from her husband, against whom she had commenced proceedings for a divorce, made a will by which she appointed two persons "to be the exors. & trustees of this my will, & so far as I may be able, being at the present time separated from my husband, & suing for a divorce, I appoint my said exors. & trustees, or the survivor of them, to be the guardians or guardian of my infant child." A decree nisi was subsequently pronounced, but shortly afterwards & before the decree was made absolute, the mother died. The infant, a girl aged eleven years, thereupon applied, by one of the guardians nominated by her mother as her next friend, to have the appointment of the persons so nominated confirmed by the ct., & that they might be authorised & empowered to act as guardians of the person of the infant. The ct. was satisfied, upon the evidence, that the father was unfitted to be the sole guardian:—*Held*: (1) the will must be taken as having reference to the statutory power, & the intention of the testatrix was to exercise that or any other statutory power which she might have; (2) there was a valid appointment of guardians to act jointly with the father within the meaning of the statute, & the appointment must be confirmed.—*Re G*—(AN INFANT), [1892] 1 Ch. 292; 61 L. J. Ch. 490; 66 L. T. 336.

1481. On guardian's own application—Not granted.]—SPENCER v. CHESTERFIELD (EARL), No. 1342, *ante*.

1482. — Ward unmanageable.]—*Re PEARD* (1843), 1 L. T. O. S. 319, L. C.

1483. Benefit of ward—Pecuniary.]—ANON. (1821), Jac. 254, n., 264, n.; 37 E. R. 848, 849; *sub nom.* JACKSON v. HANKEY, cited in Chambers on Infancy at pp. 29, 38, 81, etc., L. C.

Annotations:—*Reid*. Talbot v. Shrewsbury, Doyle v. Wright (1840), 4 My. & Cr. 672; *Re Fynn* (1848), 2 De G. & Sm. 457.

1484. —.]—ANDREWS v. SALT, No. 1257, *ante*.

1485. Englishwoman married to Mahomedan.]—S., an Englishwoman, had married, according to the Mahomedan ritual, N., a Hindoo Mahomedan, he being already married. The children of this marriage had been recognised by N. as his children & his heirs according to Mahomedan law.

By an agreement between S. & N. the children were brought up as Mahomedans, & S. & N. having separated, they went with their father to India, & remained there until the father's death, four years afterwards. By his will N. appointed certain persons guardians of the children.

S. now moved that an order be made giving her the custody of her children, as she admitted that her union with N. was not a marriage, & therefore contended that, as her children were illegitimate, she had the right to the custody of them:—*Held*: S. had no absolute right to the custody, & the ct. would consider what was best for the interests of the children, & having regard to the nature of their birth, the religion in which they had been educated, & the mode of life which had been adopted for

them, it was best for them to remain in the custody of the guardians whom the father had appointed.—*Re ULLEE, NAWAB NAZIM OF BENGAL'S INFANTS* (1885), 54 L. T. 286; 2 T. L. R. 8, C. A.

Annotation:—*Reid*. R. v. Barnardo, Jones's Case, [1891] 1 Q. B. 194.

1486. —.]—*Re MCGRATH (INFANTS)*, No. 1260, *ante*.

1487. Bankruptcy of guardian.]—SMITH v. BATE, No. 1369, *ante*.

1488. —.]—WILCOX v. DRAKE, No. 1192, *ante*.

1489. Lunacy of guardian.]—A testamentary guardian may be removed if he becomes lunatic.—*Ex p.* BRYDGES (LADY ANN) (1791), cited in 2 Fonblanque's Equity at p. 249.

1490. Religious grounds—Adoption of different faith by guardian.]—*Re FELL* (1870), 2 Seton's Judgments & Orders, 7th ed. p. 993.

Annotation:—*Apld.* F. v. F., [1902] 1 Ch. 688.

1491. —.]—Testator, who died in 1890, by his will appointed his sister guardian of his infant daughter, then aged eleven. Testator was a Protestant, & the infant was brought up in that faith. In 1900 the sister, from conscientious motives, became a Roman Catholic:—*Held*: under the circumstances, it was for the benefit of the infant that testator's sister should be removed from her guardianship.—*F. v. F.*, [1902] 1 Ch. 688; 71 L. J. Ch. 415.

1492. — Guardian's faith differing from infant's—Insufficiency.]—The ct. refused to remove a testamentary guardian who was of a different religious faith from the infant, but appointed a guardian to act with the testamentary guardian.—*Re READ (AN INFANT)* (1889), 5 T. L. R. 615.

Compare No. 1306, *ante*.

1493. Marriage of female guardian—Mother appointed by will.]—Where the father of an infant devised the guardianship to the mother, the Ct. of Ch. has no power to control this will, unless upon complaint & proof made of misbehaviour in the mother.—*DILLON v. MOUNT CASHELL (LADY)* (1727), 4 Bro. Parl. Cas. 306; 2 Eq. Cas. Abr. 487; 2 E. R. 207, H. L.; *reversg.* S. C. *sub nom.* MORGAN v. DILLON (1724), 9 Mod. Rep. 135, L. C. Annotation:—*Mentd.* *Re Salisbury's Estate* (1876), 24 W. R. 380.

Compare Nos. 1426–1429, *ante*.

1494. —.]—(1) Guardian will not be appointed after a marriage nor discharged because of a marriage. But without discharging guardians orders regulating their conduct may be made.

(2) Liberal allowance for maintenance where a guardian or father is in distressed circumstances.—*ROACH v. GARVAN* (1748), 1 Ves. Sen. 157; 1 Dick. 88; 27 E. R. 954, L. C.

Annotations:—*As to* (1) *Folld.* Shipbrook v. Hichinbrook (1778), 2 Dick. 547. *Reid.* Mendes v. Mendes (1748), 3 Atk. 619. *Generally, Mentd.* Brook v. Brook (1858), 3 Sm. & G. 481.

1495. —.]—SHIPBROOK (LORD) v. HINCHINBROOK (LORD) (1778), 2 Dick. 547; 21 E. R. 383, L. C.

1496. — Mother sole guardian.]—The law as to the rights of mothers as guardians of their infant children has been revolutionised by the Guardianship of Infants Act, 1886 (c. 27), & a mother is entitled under that Act to be the sole guardian if no guardian has been appointed by the father. The ct. will not appoint any one as guardian in her place or to act jointly with her unless some

1490 i. Religious grounds—Adoption of different faith by guardian.]—A person, a member of a sect calling themselves Christian Brethren, having been appointed by the master guardian of a minor whose father had lived &

died a member of the Church of England & whose mother had continued such & had brought up the minor as such for seven years after the father's death when she dissented to the said sect & from that time till

her death educated the minor in the tenets of the sect was removed by the ct. from being guardian.—*Re HUNT (A MINOR)* (1843), 2 Con. & Law. 373. —IR.

Sect. 7.—Removal of guardian by the court. Sect. 8. Part XIV. Sect. 1: Sub-sects. 1 & 2, A

special ground is shown for its interference; & the fact that she marries again is not of itself a reason for doing so, although the second husband is of a different religion to that of the first husband, the mother, & the child.—*Re X., X. v. Y.*, [1899] 1 Ch. 526; 68 L. J. Ch. 265; 80 L. T. 311; 47 W. R. 345; 43 Sol. Jo. 260, C. A.

Annotation:—Distd. F. v. F., [1902] 1 Ch. 688.

1497. Married woman as sole guardian—Appointed by the court—Removal by court of appeal.]—*Re KAYE*, No. 1456, *ante*.

1498. Misconduct of guardian—Connivance in premature marriage.]—*FOSTER v. DENNY*, No. 2067, *post*.

1499. — Marriage without leave of court.]—*LORD HARDWICKE, C.*, took the care of the infant from her testamentary guardian, & ordered that she should not marry without leave of the ct.—*TOMBES v. ELLERS* (1747), 1 Dick. 88; 21 E. R. 201, L. C.

Compare Nos. 124–126, ante.

1500. —.]—*FERMOR v. POMFRET*, No. 1315, *ante*.

1501. — Procuring residence of lunatic father—In same house as child.]—*DAVENPORT v. POWELL*, No. 1329, *ante*.

1502. — Non-fulfilment of undertaking—Subject to which appointed.]—An order appointing two persons who had been named by the adoptive mother of an Italian infant to be her guardians, on an undertaking by their solr. that the child should be brought up as one of their own, & her religion respected, was discharged, & new guardians

1500 i. Misconduct of guardian.]—The power over the real estate of infants far exceeds any power that has ever been exercised in England:—*Held*: the discretionary power of the ct. to order a sale was not determined by the appointment of a guardian, & where the guardian, who was the mother of the infants was opposed to the sale, & neglected or refused to find security, the ct. had power to remove such guardian, & substitute in her stead a suitable person as next friend to file the necessary bond & effect the sale.—*Re LAWLOR'S ESTATE* (1871), 8 N. S. R. 153.—CAN.

1500 ii. —.]—Deft. M. was appointed by order of the Ct. of Probate guardian of the person & estate of her grandson, P., an infant. The income of the estate amounted to \$125 *per annum*. Deft., in less than one year, expended \$500 of the infant's capital, & was about to make a loan to a considerable amount of the infant's money, on property of her husband, which was not a sufficient security. Pltf., who was surety for M., applied to have her removed from her position as guardian, & for an account, & to restrain the guardian from loaning the infant's money, as proposed. The infant, by his next friend, was made a party pltf.:—*Held*: the surety was justified in asking to be indemnified against loss by reason of the neglect or misconduct of the guardian; there

was a community of interest between the surety & the infant, & the order making the infant a party was within the letter & spirit of the rules & the practice of the ct.; whether the infant should be made a party pltf. or deft. was a matter within the discretion of the judge to whom the application was made; & the ct. had power to supersede the guardians & commit the powers & duties to other hands; the guardian appointed by the Ct. of Probate does not occupy a different position, & has no greater immunity from control than a testamentary guardian; the power to appoint under Act of 1894, c. 20, does not abridge the power of the ct. to interfere, whenever necessary, for the protection of infants or their property.—*POPE v. CARROLL* (1895), 27 N. S. R. (15 R. & G.) 467.—CAN.

1500 iii. —.]—A mother brought a suit on behalf of her minor son to recover from her stepson, the managing member of the family, the minor's share in the family property:—*Held*: the only ground upon which such a suit could be maintained was that of malversation; the ct. might relieve the minor from his brother's authority & appoint another guardian, but a case requiring relief must be made out.—*ALIMELAMMAL v. ARUNACHELLAM PILLAI* (1866), 3 Mad. 69.—IND.

o. On infant's application—On attaining fourteen.]—A judge of probate

appointed on the application of the guardians appointed by the Italian Ct., on proof of circumstances showing the undertaking had not been observed.—*Re SAVINI, SAVINI v. LOUSADA* (1870), 22 L. T. 61; *sub nom. DI SAVINI v. LOUSADA*, 18 W. R. 425.

1503. —.]—*Re McGRATH (INFANTS)*, No. 1269, *ante*.

SECT. 8.—TERMINATION OF GUARDIANSHIP.

1504. General rule—When majority attained.]—(1) A guardianship of an infant, notwithstanding he marries, does not determine till his age of twenty-one.

(2) The marriage of the daughters would determine the guardianship of them, though not of the sons (*LORD HARDWICKE, C.*).—*MENDES v. MENDES* (1848), 3 Atk. 619; 1 Ves. Sen. 89; 20 E. R. 1157, L. C.

1505. Marriage of ward—Male.]—*MENDES v. MENDES*, No. 1504, *ante*.

1506. — Female.]—*MENDES v. MENDES*, No. 1504, *ante*.

1507. —.]—*Re SAMPSON & WALL*, No. 739, *ante*.

Marriage of female guardian.]—*See Nos. 1426–1429, ante*.

Death of one of several guardians—Appointed by court—Termination of guardianship of survivors.]—*See Nos. 1430, 1431, ante*.

— Testamentary guardians.]—*Compare Nos. 14, 521, ante*.

On removal of guardian by the court.]—*See Sect. 7, ante*.

has power to change a guardian when the child arrives at the age of fourteen years, & the appointment of the grandfather for that purpose is a proper one.—*LOASBY v. EGAN* (1895), 27 N. S. R. (15 R. & G.) 349.—CAN.

p. Right of surety to apply for.]—*POPE v. CARROLL* (1895), 27 N. S. R. (15 R. & G.) 467.—CAN.

q. Whether infant made party—Discretion of judge.]—*POPE v. CARROLL* (1895), 27 N. S. R. (15 R. & G.) 467.—CAN.

r. Appeal.]—The Supreme Ct. of Canada has no jurisdiction to entertain an appeal from a judgment pronounced in a controversy in respect to the cancellation of the appointment of a tutrix to minor children.—*NOEL v. CHEVREUILS* (1900), 30 S. C. R. 327.—CAN.

t. Guardian out of jurisdiction.]—It is a ground for the removal of the guardian of the persons of infant children that he has removed out of the jurisdiction of the ct.—*Re LAWTON, INFANTS* (1906), 3 N. B. Eq. Rep. 279; 1 E. L. R. 201.—CAN.

PART XIII. SECT. 8.

1504 i. General rule—When majority attained.]—Guardianship ends with minority.—*HICKEY v. STOVER* (1886), 11 O. R. 106.—CAN.

Part XIV.—Legal Proceedings.

SECT. 1.—ON BEHALF OF INFANT.

SUB-SECT. 1.—IN GENERAL.

1508. Appeal in person—Incompetency.]—If an appeal is removed by *certiorari* the appellee must be arraigned on the appeal returned. Therefore if the appeal was brought by an infant in person, the ct. cannot before the arraignment admit him to prosecute it by guardian. An infant cannot prosecute an appeal in person, but he may by guardian. If an applt. appears on inspection to be an infant & the appeal was brought by him in proper person, the ct. will abate it *ex officio*. An infant within the age of eighteen sued an appeal & for his non-age the appeal was abated & the infant amerced.—SMITH v. BOWEN (1709), 2 Ld. Raym. 1288; Holt, K.B. 355; 11 Mod. Rep. 216; 92 E. R. 344.

Annotation:—Mentd. R. v. Phelps (1841), Car. & M. 180.

1509. Infant en ventre sa mère—Proceedings on behalf of—Competency.]—LUTTEREL'S CASE (*circa* 1660), cited in Prec. Ch. 50; 24 E. R. 26.

Annotation:—Reid. Villar v. Gilbey, [1906] 1 Ch. 583.

1510. ———.]—In a suit for limitation of liability, instituted on behalf of the owners of a brig [lost in a collision], an appearance was entered on behalf of a child of one of the drowned men *en ventre sa mère*. The ct. reserved leave to the child, *en ventre*, if born within due time, to prefer its claim for damages sustained by the death of its father.—THE GEORGE & RICHARD (1871),

PART XIV. SECT. 1, SUB-SECT. 1.

a. Action of ejectment.]—A guardian appointed to an infant, under 8 Geo. IV. c. 6, s. 2, may bring ejectment to try the infant's title.—DOE d. ATKINSON v. McLEOD (1852), 8 U. C. R. 344.—CAN.

b. ———.]—The guardian of an infant, appointed under C. S. U. C. c. 74, can consent to the name of the infant being added as pltf. in an action of ejectment which seems to be for the latter's benefit.—OGILVIE v. McRORY (1865), 15 C. P. 557.—CAN.

c. ———.]—C. S. U. C. c. 74, s. 5, does not vest the real estate of an infant in the guardian, & such guardian cannot, therefore, bring ejectment in his own name; he must proceed as guardian in the name of the ward.—KINSEY v. NEWCOMBE (1866), 17 C. P. 99.—CAN.

d. Infant representatives of deceased plaintiff.]—Where pltf. in a redemption suit died before the decree pronounced had been drawn up, leaving infants his real representatives:—*Held*: before an application to revive could be made, the decree must be drawn up, & a guardian *ad litem* appointed.—BEAMISH v. POMEROY (1859), 1 Ch. Ch. 32.—CAN.

e. Petition—Form.]—No substantial distinction between the petition of A. by her guardian B., & that of B. as guardian of A.—McNIEL v. McNIEL (1859), Coch. 32.—CAN.

f. Whether infant bound.]—An infant pltf. is, equally with an adult, bound by proceedings in a suit instituted by him.—McDOUGALL v. BELL (1863), 10 Gr. 283.—CAN.

g. ———.]—Infants, like adults, are bound by proceedings in a suit in which they are pltf.s.—*Re* ROBERTSON, ROBERTSON v. ROBERTSON (1875), 22 Gr. 449.—CAN.

h. ———.]—Where an infant appears & defends a suit by his guardian *ad litem*, or by his next friend institutes

proceedings, he is bound by such proceedings just as if he had been an adult.—RICKER v. RICKER (1880), 27 Gr. 576.—CAN.

k. Action for trespass.]—*Qu.*: whether an infant under fourteen years of age, & her mother living, can maintain an action for trespass to land, or whether the mother as guardian in socage is not alone entitled to sue.—BREWER v. BREWER (1883), 22 N. B. R. 450.—CAN.

l. Decree of distribution—Action to set aside—Effect of delay.]—At the time a decree of distribution was made, the daughter of deceased, then fourteen years of age, was represented by her guardian, & by counsel, & counsel was also present on behalf of the estate. The decree was made Dec. 23, 1880. Some days previously the guardian applied to be removed, but the decree releasing him was not passed until Jan. 3, 1881. The application to set aside the decree was not made until six years after the guardian's resignation:—*Held*: the ct. of probate had jurisdiction to entertain the application to set aside the decree; & petitioner, in the circumstances, could not be barred of relief by the delay in moving.—*Re* MURRAY'S ESTATE (1889), 22 N. S. R. (10 R. & G.) 125.—CAN.

m. Examination of infant—Discovery.]—An infant suing by a next friend may, in the absence of special incapacity, be examined for discovery.—FLEET v. COULTER (1902), 23 C. L. T. 43; 4 O. L. R. 714; 1 O. W. R. 775.—CAN.

n. ———.]—Under County Ct. Order 8, r. 17, an infant, a party to an action, may be examined by the opposite party for discovery before the trial.—LANCASTER v. VAUGHAN (1923), 33 B. C. R. 159.—CAN.

o. Petition for habeas corpus.]—A minor has a right to petition for *habeas corpus*.—MACDONALD v. MACDONALD (1905), Q. R. 14 K. B. 330.—CAN.

L. R. 3 A. & E. 466; 24 L. T. 717; 20 W. R. 245; 1 Asp. M. L. C. 50.

Annotations:—*Reid*. Day v. Markham (1904), 6 W. C. C. 115; Williams v. Ocean Coal Co., [1907] 2 K. B. 422. *Mentd*. Robson v. N. E. Ry. (1875), 32 L. T. 551; The Theta (1894), 71 L. T. 25; H.M.S. London, [1914] P. 72.

1511. Proceeding in Admiralty Court—By proxy.]—A minor sues in the Admlty. Ct. by proxy.—THE ALBERT CROSBY (1860), Lush. 44; 167 E. R. 23.

Proceedings in High Court.]—See R. S. O., Ord. 16, r. 16.

Proceedings in county court.]—See C. C. R., 1916, Ord. 3, r. 10.

Bankruptcy proceedings.]—See BANKRUPTCY, Vol. IV., pp. 30, 87, 248, Nos. 237, 790, 2357.

Legitimacy proceedings.]—See BASTARDY, Vol. III., pp. 369 *et seq.*

Probate & administration proceedings.]—See EXECUTORS, Vol. XXIV., p. 717, Nos. 7447–7451.

Divorce proceedings.]—See HUSBAND & WIFE, Vol. XXVII., p. 383.

SUB-SECT. 2.—BY NEXT FRIEND.

A. In General.

1512. General rule—Sues by next friend—Defends by guardian.]—SIMPSON v. JACKSON, No. 1345, *ante*.

1513. ———.]—(1) An infant may sue either by guardian or *prochein ami*, but shall defend by guardian only.

p. Action for recovery of wages.]—A parent cannot, in that capacity, nor in his own right, recover the wages earned by a minor child. The minor himself may recover his wages by either of two methods: action by next friend, or action by the minor in his own name under King's Bench Act, 1920 (c. 39), s. 26 (13).—HAAS v. NYHOLM, [1923] 3 W. W. R. 921.—CAN.

q. Removal of attorney.]—The attorney acting for an infant pltf. suing by his next friend is the attorney of the next friend, & a rule to change him cannot be entered without the authority of the next friend, & where such a rule was entered the ct. at the instance of the next friend set it aside.—ALMACK v. MOORE (1878), 2 L. R. Ir. 90.—IR.

r. Appointment of curator ad litem—Action commenced without guardian.]—Where a pupil with no legal guardian is the pursuer in an action it is competent for the action to be brought in the pupil's name & for the judge after the case is brought into ct. to appoint a *curator ad litem* with whose concurrence the action proceeds.—WARD v. WALKER, [1920] S. C. 80.—SCOT.

PART XIV. SECT. 1, SUB-SECT. 2.—A.

t. Gross negligence—Fresh action brought after majority—Not barred.]—Gross negligence on the part of a next friend in the conduct of a suit brought on behalf of a person under disability prevents the effect of the bar contained in Civil Procedure Code, s. 103, to the institution of a fresh suit by such person when the disability has ceased. Where a suit for certain property was brought on behalf of two miners by their next friend, & owing to gross want of care & diligence on the part of the next friend, the suit was struck off under sect. 103 for default of appearance:—*Held*: in a suit afterwards brought by the same pltf.s. on

Sect. 1.—On behalf of infant: Sub-sect. 2, A., B. & C. (a) & (b).]

(2) An infant shall not find pledges.—**GOODWIN v. MOORE** (1629), Cro. Car. 161; 79 E. R. 740.

1514. ———.]—Infant ought to sue by next friend; not to wait till of age.—**BLAKE v. BUNBURY** (1790), 1 Ves. 194; 30 E. R. 297, L. C.

Annotations:—Mentd. **Tidd v. Lister** (1820), 5 Madd. 429; *Re Richardson, Richardson v. Richardson*, [1900] 2 Ch. 778.

1515. Next friend an officer of court.]—MORGAN v. THORNE, No. 1, *ante*.

1516. Actions maintainable by infant through next friend—Qui tam action.]—An infant cannot be a common informer, because he can only sue by guardian; & 18 Eliz. c. 5, s. 1, requires an informer to sue either in person or by attorney.—**MAGGS v. ELLIS** (1752), Bull. N. P. 196.

1517. ———.]—An infant cannot sue by *prochein ami* in an action *qui tam*.—**ANON.** (1752), Say. 51; 96 E. R. 800.

Annotation:—Refd. **Castledine v. Mundy** (1832), 4 B. & Ad. 90.

1518. ——— Tort — Trade slander.] — **WILD v. TOMKINSON**, No. 335, *ante*.

1519. ——— Suit for specific performance.]—**FLIGHT v. BOLLAND**, No. 200, *ante*.

B. Necessity for Appointment of Next Friend.

1520. Action.]—Where an action is brought in the name of a person as pltf. without his authority & he subsequently repudiates the action, defts. on application in the action, may obtain an order for payment of their costs by the solrs. who issued the writ. So held in a case where an infant was

attaining their majority, the suit was not barred by sect. 103. The English rule of law on this point as being the law of equity & good conscience was applied by the ct. to this case, in the absence of any statutory provision.—**LALLA SHEO CHURN LAL v. RAMNANDAN DOBEY** (1894), 1 L. R. 22 Calc. 8.—**IND.**

a. ——— Withdrawal of next friend—Appointment of new next friend.]—When the next friend of a minor pltf. withdraws from the suit, it is open to the minor, through another next friend, to have the suit re-opened on review, on the ground that the former next friend, though guilty of no fraudulent conduct, was grossly negligent of the minor's interest in withdrawing from the suit.—**RAM SARUP LAL v. SHAH LATAFAT HOSSEIN** (1902), 1 L. R. 29 Calc. 735.—**IND.**

b. Appointment of next friend—Who applies.]—In applying for an order appointing a next friend to act for an infant pltf., the proposed next friend, & not the infant, must be the petitioner; & a petition by the infant with a consent by the proposed next friend is not sufficient.—**ALLEN v. DAILY SOUTHERN CROSS CO.**, 2 J. R. 154.—**N.Z.**

PART XIV. SECT. 1, SUB-SECT. 2.—B.

1520 i. Action.]—By Rule 231, an infant may now sue as pltf. by his next friend: that is an adoption of the rule of equity before the Jud. Act.—**Re STURGEON** (1911), 16 W. L. R. 415; 20 Man. L. R. 284.—**CAN.**

1520 ii. ———.]—A "next friend" is necessary in actions on behalf of infants to provide somebody against whom deft. may have recourse for the costs of an improper action.—**HILDEBRAND v. FRANCK**, [1922] 3 W. W. 70 D. L. R. 538.—**CAN.**

1520 iii. ———.]—The effect of Act XL. of 1858, s. 3, read with Code of Civil Procedure, s. 440, is that a minor pltf. must not only always sue by his next

friend, but, when the suit relates to the minor's estate, the person representing the minor must either hold a certificate under the Act, or must obtain the sanction of the ct. for the suit to proceed.—**DURGA CHURN SHAHA v. NILMONEY DASS** (1883), 1 L. R. 10 Calc. 134; 13 C. L. R. 369.—**IND.**

c. ——— In magistrate's court.]—The right of a minor to sue in the magistrate's ct. is a statutory privilege which is not destroyed by the removal of his action on the motion of deft. into the Supreme Ct.—**BUSHETT v. BUSHETT** (1906), 26 N. Z. L. R. 288.—**N.Z.**

d. Time for appointing.]—Held: pltf., an infant, having sued by attorney & not by *prochein ami* was no ground for setting aside the process, for by the practice the *prochein ami* may be appointed at any time before declaration.—**O'REILLY v. VANEVRY** (1854), 2 P. R. 184.—**CAN.**

e. ———.]—An appearance entered by an attorney for an infant deft., no *prochein ami* having been appointed, is a nullity not an irregularity. Interlocutory judgment cannot be signed until after *prochein ami* appointed.—**FOUNTAIN v. MCSWEEN** (1868), 4 P. R. 240.—**CAN.**

f. ———.]—An infant pltf. can sue out a writ of ejectment in his own name; but after appearance entered, he cannot take any further step, such as giving notice of trial, without having a next friend appointed, & any such further proceedings in the infant's own name will be set aside.—**CAMPBELL v. MATHEWSON** (1869), 5 P. R. 91.—**CAN.**

g. ———.]—Where an order is made for the trial of an interpleader issue between an infant claimant as pltf. & an execution creditor, & pltf. in the issue desires to proceed, a next friend should be appointed, & proceedings will be stayed on application of deft. in the issue until such appointment is made.—**GRANT v. MCKAY** (1894), 10 Man. L. R. 243.—**CAN.**

joined as co-pltf. by solrs. on the assumption that he was of full age.

An infant must sue by a next friend & cannot sue in his own name, he cannot give an authority to any one to sue in his name or ratify the acts of any one who does so sue (**KEKEWICH, J.**).—**GEILLINGER v. GIBBS**, [1897] 1 Ch. 479; 66 L. J. Ch. 230; 76 L. T. 111; 45 W. R. 315; 41 Sol. Jo. 243.

Annotation:—Mentd. **Adams v. London Improved Motor Coach Builders**, [1921] 1 K. B. 495.

1521. Motion.]—A motion by the next friend of infants, describing himself as such in the notice of motion, is irregular. The motion should be by the infants by their next friend.—**PIDDUCK v. BOULTBEE** (1852), 2 Sim. N. S. 223; 21 L. J. Ch. 786; 61 E. R. 326.

1522. ———.]—**COX v. WRIGHT**, No. 1618, *post*.

1523. Petition—Appointment of new trustees.]—All the *cestuis que trust* ought ordinarily to be parties to a petition for the appointment of new trustees, infants by their next friends, as well as adults.—*Re FELLOWS' SETTLEMENT* (1856), 2 Jur. N. S. 62.

— Appointment of guardian.]—*See* Part XIII., Sect. 5, sub-sect. 2, *ante*.

Debtor summons.]—*See* **BANKRUPTCY**, Vol. IV., p. 87, No. 790.

1524. Effect of suing without next friend—Suit for specific performance.]—**FLIGHT v. BOLLAND**, No. 200, *ante*.

1525. ——— Suit in Chancery—Appearance of defendant.]—In the Ct. of Ch. a suit on behalf of an infant was brought in his name by a next friend in order to give security for the costs to deft., but if the suit had been commenced without the

h. ———.]—On the trial of an action brought by pltf. to recover damages for injuries caused to his motor car through alleged negligence of deft., it appeared on the cross-examination of pltf. that at the time the action was brought he was under the age of twenty-one years. Pltf.'s counsel was thereupon permitted, against the objection of deft.'s counsel, to file the consent of pltf.'s father to act as his next friend.—*Held:* under the provision of Order 16, r. 10, such amendment was within the discretion of the judge.—**HUBLEY v. KEANS** (1921), 54 N. S. R. 371; 58 D. L. R. 637.—**CAN.**

k. County court.]—Although an infant may, perhaps, sue in the county ct. & have a transcript of the judgment filed in the Queen's Bench, without a guardian or next friend being appointed, yet he cannot obtain an order to examine the deft. as a judgment debtor in the Queen's Bench without a guardian or next friend.—**BECHER v. McDONALD** (1888), 5 Man. L. R. 223.—**CAN.**

l. Letters of administration.]—Letters of administration granted to an infant are not void, but voidable; & *semble*, until revoked, the infant can sue, *qua* administrator, & need not be represented, when so suing, by a next friend.—**TOLL v. CANADIAN PACIFIC RY. CO.** (1908), 8 W. L. R. 795; 1 Alta. L. R. 318; 8 Can. Ry. Cas. 294.—**CAN.**

m. Petition.]—On petition in the Probate Ct. for proof in solemn form of the last will of O., the will set aside as not properly proved, & a former will was admitted to probate. Appeals to the Supreme Ct. of this province & to the Supreme Ct. of Canada were dismissed. Subsequently petitioner applied to have the matter reopened, on the ground that, at the time of the former adjudication, he was an infant under the age of 21 years, & was not legally represented & some additional evidence was offered, which, with the

intervention of a next friend & deft. chose to appear, I know of no reason why it should not have been prosecuted without a next friend (JAMES, L.J.).—*Re BROCKLEBANK, Ex p. BROCKLEBANK* (1877), 6 Ch. D. 358; 46 L. J. Bcy. 113; 37 L. T. 282; 25 W. R. 859, C. A.

C. Who may be Appointed.

(a) *In General.*

1526. Occupation & character—Materiality—Labourer.]—*WALKER v. ELSE*, No. 1757, *post*.

1527. Father.]—*WATSON v. FRASER*, No. 1542, *post*.

1528. — After decree in administration suit—Ignorance of suit before decree—Substitution in place of person appointed.]—A testator gave life annuities to his six nephews & nieces, & directed the residue, which was of large amount, to be accumulated for twenty-one years, & then to be divided among such of the six as should be then living, with a proviso substituting the issue of any who died within that period for their parents. A person nominated by the exors. commenced an action against the exors. for administration of the estate, as next friend of the infant children of one of the nephews, & at once obtained a decree. The father of the infants, who had no adverse interest to them, & against whom there was no imputation, appeared to have been informed that a suit was pending for the administration of the estate, but was not aware that his children were the pltf's. until after the decree had been made. He then applied to be substituted as next friend. The application was refused on the ground that there was no authority laying down that where a suit is about to be instituted on behalf of infants a communication must be made to their father:—*Held*: the father ought to be substituted as next friend.—*WOOLF v. PEMBERTON* (1877), 6 Ch. D. 19; 25 W. R. 873; *sub nom.* *WOOLF v. PEMBERTON, Re GREENOUGH'S ESTATE*, 37 L. T. 328, C. A.

Annotation:—*Apld.* *Hutchinson v. Norwood* (1885), 31 Ch. D. 237.

1529. Mother.]—(1) Upon the question as to which of two administration suits, relating to the same estate, should proceed, the ct. will prefer the mother of infants, as next friend, although in humble life, supposing she is respectable, & direct her suit to proceed, although a decree has been made in the other suit.

(2) The appointment of a next friend is quite distinct from that of a guardian, the latter relating to the education, whereas the former only applies to the property.—*HARRIS v. LIGHTFOOT, HARRIS v. HARRIS* (1861), 10 W. R. 31.

1530. — As testamentary guardian.]—A father authorised a stranger to act as next friend to his infant children: he died, having by will appointed his wife, their mother, guardian of his children:—*Held*: the mother had the right to remove the next friend & be substituted in his place.—*HUTCHINSON v. NORWOOD* (1885), 31 Ch. D. 237; 55 L. J. Ch. 375; 54 L. T. 15; 34 W. R. 214.

previous evidence, was regarded by the majority of the ct. as leaving no room for doubt that the will set aside was duly executed:—*Held*: as petitioner was in a sense a party to the former proceedings although no guardian *ad litem* was regularly appointed, the judgment in such proceedings was binding upon him until set aside or reversed.—*Re CULLEN'S ESTATE* (1908), 43 N. S. R. 149; 6 E. L. R. 298.—CAN.

PART XIV. SECT. 1, SUB-SECT. 2.—
C. (a).

1529 i. Mother.]—The mother in possession of land belonging to the heir, a minor, may sue in trespass as the next friend of the minor.—*JOHNSON v. MCGILLIS* (1850), 7 U. C. R. 309.—CAN.

PART XIV. SECT. 1, SUB-SECT. 2.—
C. (b).

1533 i. Whether means material.]—

1531. Official solicitor.]—*Re W., W. v. M.*, [1907] 2 Ch. 557; 77 L. J. Ch. 147, C. A.

1532. Not an infant.]—Solr., having commenced action on behalf of an infant by her next friend who was also an infant:—*Held*: personally liable, as between solr. & client, for costs which defts. had incurred in defending action, including costs of application to set aside writ, but excluding costs of defts. who had put forward the next friend.—*FERNÉE v. GORLITZ*, [1915] 1 Ch. 177; 84 L. J. Ch. 404; 112 L. T. 283.

Guardian.]—See No. 1530, *ante*.

Removal of next friend.]—See Sub-sect. 2, I., *post*.

(b) *Persons of Means.*

1533. Whether means material.]—A *prochein ami* need not be a relation, but then he must be a person of substance, because liable to costs.—*ANON.* (1739), 1 Atk. 570; 26 E. R. 359.

Annotations:—*Foll.* *Hird v. Whitmore* (1856), 25 L. J. Ch. 394. *Reid.* *Nalder v. Hawkins* (1833), *Coop. temp.* Brough. 175.

1534. —.]—(1) After answer pltf. not compelled to change the next friend on affidavit that she was worth nothing, & not found till after answer; contradicted by her swearing to £44 a year.

(2) Next friend cannot sue *in formâ pauperis*; but ought not to be discharged for poverty; dangerous to displace him; though perhaps there may be a case gross enough for it.—*SQUIRREL v. SQUIRREL* (1792), 2 Dick. 765; 2 P. Wms. 297, n.; 1 Hov. Supp. 162; 21 E. R. 468; *sub nom.* *ANON.*, 1 Ves. 409, L. C.

Annotations:—*As to* (2) *Consd.* *Hind v. Whitmore* (1856), 2 K. & J. 458. *Reid.* *Colston v. Colston* (1845), 6 L. T. O. S. 81.

1535. —.]—Where a new next friend is to be substituted, the ct. refused to inquire into the circumstances of the proposed next friend, though it was suggested, that he was in indigent circumstances.—*DAVENPORT v. DAVENPORT* (1822), 1 Sim. & St. 101; 57 E. R. 40.

Annotation:—*Consd.* *Nalder v. Hawkins* (1833), *Coop. temp.* Brough. 175.

1536. —.]—A married woman may sue alone *in formâ pauperis*, but if she sues by a next friend he must be a substantial person & capable of answering the costs of the suit. If not defts. may obtain an order to stay proceedings in the suit until pltf. appoints some substantial person her next friend. The same rule does not hold in an infant's suit, because an infant does not choose his own next friend, & also because the ct. readily entertains a suit on behalf of an infant & will, of its own accord, stay the proceedings in such a suit if not for the infant's benefit.—*HIND v. WHITMORE* (1856), 2 K. & J. 458; 25 L. J. Ch. 394; 27 L. T. O. S. 55; 4 W. R. 379; 69 E. R. 862.

Annotations:—*Consd.* *Re Payne, Randle v. Payne* (1883), 23 Ch. D. 288. *Reid.* *Elliot v. Ince* (1857), 7 De G. M. & G. 475; *Re Barnes* (1862), 31 L. J. Ch. 455.

1537. — Outstanding judgment & bills of sale.]—*ELLIOTT v. INCE*, No. 1548, *post*.

1538. —.]—*JONES v. EVANS*, No. 1722, *post*.

— Bankruptcy.]—See Sub-sect. 2, C. (c), *post*.

When the ct. has appointed the natural guardian of an infant as next friend, & it appears probable that no one else can be found to act in time for the assizes, & no imposition has been practised upon the ct. in making such appointment, such next friend will not be removed nor will he be ordered to give security, although in destitute circumstances.—*MORRIS v. LESLIE* (1869), 5 P. R. 141.—CAN.

Sect. 1.—On behalf of infant: Sub-sect. 2, C. (c), (d), (e) & (f), D.

(c) Bankrupt.

1539. Whether valid appointment.] — Qu. : whether the *prochein ami* of a married woman & infants, who, after the institution of the suit, takes the benefit of Insolvent Debtors Act, will be allowed to prosecute the suit.—PENNINGTON v. PENNINGTON (1823), 1 L. J. O. S. Ch. 71.

1540. — Intervening bankruptcy.] — BYNE v. BLACKBURN (1831), 3 Hare, 81, n. ; 67 E. R. 305.

1541. — Necessity for security for costs.] — MURRELL v. CLAPHAM, No. 1720, post.

1542. — —.] — (1) Where in an action by an infant a person, not the father, was appointed *prochein ami*, & it afterwards appeared that he was an uncertificated bkpt., the ct. stayed the proceedings until he should give security for costs, or another *prochein ami* should be appointed.

(2) The father as being the natural guardian of the infant, ought in the first instance to be appointed *prochein ami* & if his evidence is likely to be required at the trial, an application ought to be made to the ct. to release him, by the appointment of a proper substitute.—WATSON v. FRASER (1841), 8 M. & W. 660 ; 9 Dowl. 741 ; 10 L. J. Ex. 420 ; 5 Jur. 682 ; 151 E. R. 1204.

Annotations :—As to (1) Folld. Lees v. Smith (1860), 5 H. & N. 632. **Reid.** Hayes v. Carr (1842), 3 Man. & G. 852.

1543. — Bankruptcy discovered since action brought.] —Where the father of an infant pltf., in an action for words imputing felony, had been admitted to prosecute the action as his *prochein ami*, the ct. vacated the appointment, on affidavit that it had since been discovered that the father had become insolvent some years before, & had not since carried on any business ; it not being satisfactorily shown that he had used due diligence to procure some other responsible person connected with pltf. to be the *prochein ami*.—DUCKITT v. SATCHWELL (1844), 12 M. & W. 779 ; 1 Dow. & L. 980 ; 13 L. J. Ex. 224 ; 3 L. T. O. S. 105 ; 152 E. R. 1414 ; *sub nom.* DUGGITT v. SATCHWALL, 8 Jur. 408.

1544. — Other person not procurable.] —When the relative of an infant, who has been appointed *prochein ami* to sue on his behalf, turns out to be insolvent, the ct. will remove him, unless it appears that no other person can be properly appointed in his place.—LEES v. SMITH (1860), 5 H. & N. 632 ; 29 L. J. Ex. 294 ; 2 L. T. 252 ; 8 W. R. 464 ; 157 E. R. 1332.

1545. — Time for objection.] — Qu. : whether a next friend will be removed on the ground of insolvency, where no objection has been made to him until the bill has been dismissed with costs, & his condition as to solvency remains the same as at the time the bill was filed.—GIACOMETTI v. PRODGERS (1873), 28 L. T. 294 ; 21 W. R. 282, L. C. & L. JJ.

(d) Persons Interested in Suit.

1546. Defendant.] — OFFLEY v. JENNEY & BAKER (1847), 3 Rep. Ch. 92 ; Nels. 44 ; 21 E. R. 738.

1547. —.] —A deft. may not be a next friend.—ANON. (1847), 11 Jur. 258.

1548. —.] — (1) A person who was deft. in cause & resp. in appeal, allowed to be next friend

of a married woman who was applt. **Qu. :** whether he might be next friend of an infant applt.

(2) The fact that there was outstanding judgments & bills of sale against a person proposed as next friend, held not to be of itself a disqualification.—ELLIOTT v. INCE (1857), 7 De G. M. & G. 475 ; 26 L. J. Ch. 821 ; 30 L. T. O. S. 92 ; 3 Jur. N. S. 597 ; 5 W. R. 465 ; 44 E. R. 186, L. C.

Annotations :—As to (1) **Reid.** Picard v. Hine (1869), 5 Ch. App. 274. **Generally, Mentd.** Turner v. Ince (1859), 34 L. T. O. S. 71 ; Daily Telegraph Newspaper Co. v. McLaughlin, [1904] A. C. 776 ; **Re Walker**, [1905] 1 Ch. 160.

1549. —.] —A deft. cannot act as next friend of infant pltf. Where infant *cestuis que trust* were suing by their mother's husband as next friend, & by amendment on the eve of trial the mother (also a *cestui que trust*), & her husband (who had no individual interest), were made co-defts., the objection being taken at the trial that the infant's next friend could not be a deft., he was ordered to be struck out as a deft.—LEWIS v. NOBBS (1878), 8 Ch. D. 591 ; 47 L. J. Ch. 662 ; 26 W. R. 631.

Annotations :—Mentd. **Re** Roth, Goldberger v. Roth (1896), 74 L. T. 50 ; **Re** Smith, Smith v. Thompson, [1896] 1 Ch. 71 ; **Re** Sisson's Settlement, Jones v. Trappes, [1903] 1 Ch. 262 ; **Re** Wragg, Wragg v. Palmer, [1919] 2 Ch. 58.

1550. — Merely formal—Without interest in suit.] —**Re** TAYLOR, TAYLOR v. TAYLOR, [1881] W. N. 81.

1551. Co-plaintiff—Conflicting interest.] — M., the personal representative of a deceased trustee, together with infants, beneficially interested in a fund, by M. their next friend, were co-pltfs. in a suit, the object of which was to make the tenant for life & his interest in the trust funds answerable for part of the trust funds which the tenant for life had applied to his own use : there were other parties interested in the restitution of the fund, who were made defts. The ct., being of opinion that the trustee's assets might, in the progress of the suit, have to be resorted to for the purpose of making good the breach of trust, & that the interests of the infants & of M. would thereby ultimately become conflicting, dismissed the bill with costs, on the ground of the misjoinder of pltfs., but without prejudice to any new bill.—JACOB v. LUCAS (1839), 1 Beav. 436 ; 8 L. J. Ch. 271 ; 48 E. R. 1009.

Annotations :—Appld. Griffith v. Vanheythuyson (1851), 9 Hare, 85. **Consd.** Norris v. Wright (1851), 14 Beav. 291.

1552. —.] —A bill was filed on behalf of an infant by the husband of her cousin as next friend, for the protection of real & personal property to which she was entitled as sole next of kin & heiress-at-law of her father. The father, besides having property of his own, was interested in the estate of his father, which had never been completely administered, & in this estate the wife of the next friend, as being another of the grandchildren of the infant's grandfather, was interested :—**Held :** there was here such a conflict of interests between pltf. & her next friend as rendered it proper that he should be removed & another next friend should be appointed in his stead.—GEE v. GEE (1863), 9 L. T. 557 ; 12 W. R. 187, L. JJ.

1553. Party liable to account.] —A person being an accounting party in the suit, removed from acting as the next friend of infant pltf. —HOPKINSON v. ROE (1830), 9 L. J. O. S. Ch. 7.

Persons connected with interested parties.] —**See** Sub-sect. 2, C. (e), *post*.

PART XIV. SECT. 1, SUB-SECT. 2.—
C. (d).

n. General rule.] —It is important that the next friend of an infant should be a disinterested person in proceed-

ings taken to sell an estate in which the infant has an interest.—BERRY v. BERRY (1875), 22 Gr. 202.—**CAN.**

e. —.] —A minor represented in

a suit by a guardian *ad litem* whose interest is adverse to that of the minor is not legally represented at all.—SELLAPPA GOUNDAN v. MASA NAIKEN (1923), 1 L. R. 47 Mad. 79.—**IND.**

(e) Persons Connected with Interested Parties.

1554. Connection with defendant—Likely to prejudice infant.]—The ct. will remove a next friend & appoint a new one, where the former is so connected with a deft., having an interest adverse to that of the infants, as to make it probable that their interest will not be properly protected by him.—*PEYTON v. BOND*, *PEYTON v. ROBINSON* (1827), 1 Sim. 390; 57 E. R. 624.

Annotation :—*Distd. Bedwin v. Asprey* (1841), 11 Sim. 530.

1555. ———.]—The ct. will not remove a next friend merely because he is nearly related to or connected with deft.; but it must see that there is a probability that the infant's interest will be prejudiced if the next friend is allowed to remain.—*BEDWIN v. ASPREY* (1841), 11 Sim. 530; 5 Jur. 362; 59 E. R. 978.

1556. ———. Near relation—Defendant accounting party.]—A suit was instituted to carry out articles for a settlement, the father being unable to perform his covenants, & his mother having made an abortive attempt to do so. The bill being by the infant children by their next friend, a near relative of deft., a motion was made to remove him & substitute the brother-in-law of the wife, on the ground of the present next friend's near connection with deft., that he was a stranger to the family, & that deft., being one of the trustees of the articles, had, in fact, filed the bill, & had omitted to enforce the articles. Motion refused with costs. *Semble*: the mere fact of a next friend being a stranger & a near connection of a deft. is no reason for his removal, unless such deft. be accountable.—*PIFFARD v. BEEBY* (1866), 14 W. R. 948.

1557. ———. Friendship.]—Doubts having arisen as to the proper custody of an infant, a suit was commenced in her name for the administration of her father's estate. A next friend was appointed who was a friend of defts., the exors. & trustees of the will, & guardians of the infant, & accepted the office at their request, & on an indemnity from their father. The solrs. on the record for pltf. were the solrs. of the exors. On an application in the name of the infant by M., the husband of her paternal aunt, as next friend *pro hac vice*, to remove the next friend & substitute M.:—*Held*: although nothing was alleged against the character, circumstances, or conduct of the next friend, his connection with the exors. made him an improper person to act as next friend, & he ought to be removed & M. substituted.—*Re BURGESS*, *BURGESS v. BOTTOMLEY* (1883), 25 Ch. D. 243; 50 L. T. 168; 32 W. R. 511, C. A.

1558. Connection with accounting party—Relation.]—Mere relationship to an accounting party is not a sufficient ground for removing a next friend.—*S—— v. S——* (1863), 1 New Rep. 384; *nom. SANDFORD v. SANDFORD*, 9 Jur. N. S. 398; 11 W. R. 336.

1559. Solicitor's clerk—Defendant's solicitor.]—(1) The clerk of the solr. to deft. in the first suit was made the next friend of the infant in the second suit:—*Held*: he was not necessarily an improper next friend.

(2) Where two suits have been instituted on behalf of an infant & on the hearing the ct. has retained the second bill & reserved the costs, the

ct. will not at a subsequent stage refuse provision for the costs of that suit.—*ASHLEY v. ALLDEN*, *JONES v. ASHLEY* (1852), 20 L. T. O. S. 14; 16 Jur. 460.

1560. ———. Solicitor acting for all parties.]—The fact that the next friend of an infant in an administration suit is the clerk to the solrs. who act on behalf of all parties, is not sufficient ground for removing him.—*LLOYD v. DAVIES*, *LLOYD v. BANKS* (1864), 3 New Rep. 700; 10 L. T. 183; 10 Jur. N. S. 1041.

(f) Married Woman.

1561. Disability—Marriage after appointment—Married woman co-plaintiff.]—On the abatement of a suit by the marriage of a female pltf., who is also next friend of infant pltf. in the suit, a deft. is entitled to an order that the suit may be revised within a limited time, or that the bill may be dismissed as against him, with costs.—*CRISPE v. BRADY* (1839), 9 L. J. Ch. 108.

1562. ———.]—Some of pltf. in a suit were infants, their sister, also a pltf., being their next friend. On her marriage the ct. directed a new next friend to be appointed, & the former next friend & her husband to be made defts.—*JONES v. JONES* (1869), 17 W. R. 1003.

1563. ———. Not removed by Married Women's Property Act, 1882 (c. 75), s. 1 (2).]—The general rule that a married woman cannot act as a next friend or guardian *ad litem* has not been abrogated by Married Women's Property Act, 1882 (c. 75), s. 1 (2), which, in providing that she shall be capable of suing & being sued . . . in all respects as if she were a *feme sole* is limited to actions relating to herself personally.—*Re SOMERSET (DUKE)*, *THYNNE v. ST. MAUR* (1887), 34 Ch. D. 465; 56 L. J. Ch. 733; 56 L. T. 145; 35 W. R. 273.

Annotations :—*Refd. London & County Banking Co. v. Bray*, [1893] W. N. 130. *Mentd. Re Smith, Clements v. Ward* (1887), 56 L. T. 850.

D. Consent of Next Friend to act.

Consent in writing—Filed.]—*See R. S. C., Ord. 16, rr. 11, 20.*

1564. Absence of authority—Effect.]—The name of a person who had been made the next friend of an infant pltf. without his authority, ordered to be struck out, but liberty was given to co-pltf. to amend by naming a new next friend.

Where a solr. makes use of the name of a person as the next friend of an infant co-pltf. without authority express or implied & no acquiescence is shown on the part of the next friend in the use of his name the solr. may be ordered to pay to the next friend the costs of the suit including the costs of the motion to strike out the name of the next friend from the bill & to pay also to the several defts. their costs of the application.—*WARD v. WARD* (1843), 6 Beav. 251; 12 L. J. Ch. 332; 49 E. R. 822.

E. Consent of Infant to Institution of Proceedings.

1565. Necessity for.]—Any one may bring a bill as *prochein ami* to an infant without his consent, because it is at his peril that he brings it, to be answerable for the event.—*ANDREWS v. CRADOCK*

PART XIV. SECT. 1, SUB-SECT. 2.—*C. (f).*

p. Disability.—Notwithstanding her change of status by virtue of Married Women's Property Act, 1920 (c. 153), a married woman is not qualified to act as "next friend" of an infant pltf.—*HILDEBRAND v. FRANCK*, [1922]

3 W. W. R. 755; 70 D. L. R. 538.—CAN.

PART XIV. SECT. 1, SUB-SECT. 2.—*D.*

q. Obtained by promise not to be made liable for costs—Practice.]—A party alleged that he was induced by

pltf.'s solr. to allow his name to be used as next friend on the assurance that he would not be rendered liable to costs. The solr. denied that. It was considered that such a fact could not be established by *ex p.* affidavits.—*BURGESS v. MUMA* (1866), 2 Ch. Ch. 43.—CAN.

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(1713), 1 Eq. Cas. Abr. 72; Prec. Ch. 376; Gilb. Ch. 36; 21 E. R. 884.

*Annotations:—*Refd. *Hulton v. Hulton*, [1917] 1 K. B. 813. *Mentd. Wake v. Parker* (1838), 2 Keen, 59.

1566. —.] — *MORGAN v. THORNE*, No. 1, ante.

1567. — *Effect of dissent.*] — *COOKE v. FRYER*, No. 1671, post.

1568. — *Infant married woman.*] — A bill may be filed in the name of an infant married woman by her next friend without her consent. — *WORTHAM v. PEMBERTON*, *NEWENHAM v. PEMBERTON* (1845), 1 De G. & Sm. 644; 5 L. T. O. S. 2; 9 Jur. 291; 63 E. R. 1233; *subsequent proceedings* (1847), 1 De G. & Sm. 656.

*Annotations:—*Refd. *Re Potter* (1869), L. R. 7 Eq. 484. *Mentd. Hill v. Edmonds* (1852), 16 Jur. 1133; *Gleaves v. Paine* (1863), 1 De G. J. & Sm. 87; *Re Briant, Poulter v Shackel* (1888), 39 Ch. D. 471.

F. Inquiry as to Propriety of Proceedings.

1569. *Infant's interest must be disclosed—When application made.*] — Where A. is tenant for life, remainder to his children, & B. has an interest in the growing timber, which, in the usual course of management, will come to be felled during the continuance of A.'s estate, the infants can have no interest in, & cannot be made parties to an agreement between A. & B. for the purchase of B.'s interest in the growing timber. Even if the master has reported that they have an interest, all the proceedings will be rescinded for irregularity, as having been a surprise on the ct. Where an application is made for a reference, to inquire whether any proceeding will be for the benefit of infants, the interest of the infants must be stated to the ct. — *ANON.* (1822), 1 L. J. O. S. Ch. 33.

1570. *Application for inquiry—Time for making.*] — It is too late at the hearing of a suit by an infant to object that the suit is not for the benefit of the infant. — *LACEY v. BURCHNALL* (1863), 3 New Rep. 293; *sub nom. LACY v. BURCHNALL*, 10 L. T. 408.

Compare No. 1575, post.

1571. — *At instance of next friend—Whether ordered.*] — No reference, upon an application by the next friend of an infant, to see whether a suit which he himself has instituted is for the infant's benefit. — *JONES v. POWELL* (1817), 2 Mer. 141; 35 E. R. 894.

1572. *When inquiry ordered—Improper motives of next friend—Spite.*] — A father left a great personal estate to two infant children, & made his wife extrix. A bill was brought in the infant's name, by a relation, as *prochein ami*, to call the mother to an account. On affidavit of several other relations, that this suit in the infant's name was out of pique, & not for the infant's good, the ct. referred it to a master, who reporting the matter to be so, the suit was stayed. — *DA COSTA v. DA COSTA* (1732), 3 P. Wms. 140; 24 E. R. 1003, L. C.

1573. — *Or of absence of benefit.*] — Ct. will not direct inquiry, whether suit is beneficial to an infant, unless upon a strong case of no benefit or improper motive. — *STEVENS v. STEVENS* (1821), 6 Madd. 97; 56 E. R. 1028.

1574. —.] — Where a bill has been filed on behalf of infants, under circumstances raising a strong suspicion against the motives of the next

friend, the ct. will direct an inquiry whether the suit is for the benefit of the infants, & if so, whether such next friend is a proper person to conduct it, or, otherwise, who is a proper person to be appointed next friend in his place. — *NALDER v. HAWKINS* (1833), 2 My. & K. 243; *Coop. temp. Brough.* 175; 39 E. R. 937, L. C.

*Annotations:—*Consd. *Clayton v. Clarke* (1861), 30 L. J. Ch. 657; *Golds v. Kerr*, [1884] W. N. 46; *Steeden v. Walden*, [1910] 2 Ch. 393.

1575. — *Not on mere suspicion.*] — A bill having been filed at the suit of infants, cestuis que trust, by their next friend, charging breaches of trust, & praying the usual administration accounts against the trustees, a motion was made on behalf of defts. that the bill might be dismissed, or for a reference to inquire whether it was for the benefit of the infants that the suit should be proceeded with; & if so, to inquire, whether the next friend was a proper person to fill that character; & if not, to approve of another person to act as next friend. The grounds alleged as a foundation for the motion were, that the suit was set on foot from sinister motives by the father of the infants, who had become bkpt., & was separated from his wife, the mother of the infants, to whose support he had ceased to contribute; that the next friend was a stranger to the matters at issue in the suit, & a mere nominee of the father; & that the proper form of proceeding, if any, was by claim, or request to the trustees to pay the trust fund into ct. under Trustee Relief Act, & not by bill. The evidence for the motion failing to establish the existence of a sinister motive leading to the institution of the suit, or any imputation upon the character or solvency of the next friend, but merely showing that the circumstances under which he was named as next friend were open to suspicion, the ct. dismissed the motion, but without costs, observing, that the question as to the propriety of the suit, & of the form of proceeding therein, might properly be dealt with at the hearing. — *SMALLWOOD v. RUTTER* (1851), 9 Hare, 24; 20 L. J. Ch. 332; 17 L. T. O. S. 118; 15 Jur. 370; 68 E. R. 399.

*Annotation:—*Refd. *Steeden v. Walden*, [1910] 2 Ch. 393.

1576. — *Institution of action by stranger—Solicitor.*] — A suit being instituted on behalf of infants by a solr. wholly unconnected with the family, it was, on the motion of deft., referred to the master to inquire whether it would be for the infants' benefit that the suit should be prosecuted, deft. undertaking to render to the master the accounts prayed for by the bill. — *RICHARDSON v. MILLER* (1826), 1 Sim. 133; 57 E. R. 528.

1577. — *Solicitor's son.*] — Where an administration suit had been instituted on behalf of infants by a next friend, who was the son of pltf.' solr., & an entire stranger to the infants, & the bill did not allege any improper dealing with the estate by defts., & no affidavit was filed by the next friend explaining his motives in instituting the suit, inquiries were directed: (1) whether the prosecution of the suit would be beneficial to the infants; (2) whether the next friend was a proper person to conduct the suit. — *TOWSEY v. GROVES* (1863), 1 New Rep. 226; 32 L. J. Ch. 225; 7 L. T. 778; 9 Jur. N. S. 194; 11 W. R. 252.

*Annotation:—*As to (2) *Distd. S — v. S —* (1863), 8 L. T. 194.

1578. —.] — *GOLDS v. KERR*, [1884] W. N. 46.

PART XIV. SECT. 1, SUB-SECT. 2.—
F.

1569 i. *Infant's interest must be disclosed—When application made.*] — An

administration of an estate in which infants were interested was made on the mere suggestion of their next friend that it would be for their benefit, with-

out going into the merits of the case between pltf. & deft., the exor. — *Re WILSON, LLOYD v. TICHBORNE* (1881), 9 P. R. 89. — CAN.

1579. Smallness of infant's interest.]

A bill was filed in the name of an infant having a very small interest:—*Held*: the ct. could not look into the motives of the next friend.—*DANCE v. GOLDINGHAM* (1873), 8 Ch. App. 902; 42 L. J. Ch. 777; 29 L. T. 166; 21 W. R. 761, L. JJ.

Annotations:—*Mentd.* Melbourne Banking Corp'n. v. Brougham (1882), 7 App. Cas. 307; Dunn v. Flood (1885), 28 Ch. D. 586; Grove v. Search, Griffin v. Search (1906), 22 T. L. R. 290.

1580. Scope of inquiry—Benefit to infant.]—*STEVENS v. STEVENS*, No. 1573, *ante*.

1581. ———.]—Where a suit was instituted in the name of an infant, by his next friend, under suspicious circumstances, though there was no other suit pending in which the infant was concerned, a reference was directed, to inquire, whether it was for his benefit that the suit should be prosecuted.—*ANON.* (1826), 5 L. J. O. S. Ch. 52.

1582. ———.]—*RICHARDSON v. MILLER*, No. 1576, *ante*.

1583. ——— & fitness of next friend.]—*NALDER v. HAWKINS*, No. 1574, *ante*.

1584. ———.]—Infants co-pltfs. with adults. Reference to master to inquire whether the suit for their benefit; & if he should find in the affirmative, whether the next friend, a pltf., should be changed.—*ROBINSON & PANTON v. STONE* (1837), Coop. Pr. Cas. 369; 47 E. R. 549, L. C.

1585. ———.]—*TOWSEY v. GROVES*, No. 1577, *ante*.

1586. Of purchase of lease.]—*GOLDS v. KERR*, [1884] W. N. 46.

1587. Appeal from order—Discretion of judge making order—No interference by Court of Appeal.]—Where a judge of first instance directed an inquiry whether a suit instituted by a next friend on behalf of an infant is for the benefit of the infant, the Ct. of Appeal will not interfere with the judicial discretion of the judge below.—*PENSOTTI v. PENSOTTI* (1874), 30 L. T. 348; 22 W. R. 461, L. J.

1588. Report after inquiry—Petition to confirm—Practice.]—Upon a reference to inquire whether it was for the benefit of infants in whose name a suit had been instituted, that the same should be prosecuted, the master reported that it was, & exceptions to his report were overruled; but a petition to confirm the report, & for payment by deft. of the costs of the reference, was, by the ct. below, ordered to stand over till the hearing of the cause:—*Held*: such an order was contrary to the practice, & it was discharged, & an order made according to the prayer of the petition.—*RAVEN v. KERL* (1848), 2 Ph. 692; 10 L. T. O. S. 480; 12 Jur. 300; 41 E. R. 1111, L. C.

1589. Dismissal of action—Where not for infants' benefit.]—Bill by a tenant for life & infants entitled in remainder under a settlement to set aside on the ground of fraud a mtge. to which the settled property was subject, & also for execution of the trusts of the settlement. The tenant for life's interest was heavily incumbered. The charges of fraud having failed, & the ct. not being of opinion that it was for the infants' benefit that the suit should be carried on; the bill was dismissed so far as it sought relief in respect of the mtge., & liberty was given to the tenant for life to apply in chambers for an account of the income.—*MCWADE v. BRODHURST* (1875), 24 W. R. 232; *affd.* (1876), 34 L. T. 924, C. A.

G. Rights, Duties & Liabilities of Next Friend.**(a) In General.**

1590. Cannot act as receiver.]—The next friend of infant petitioners not permitted to act as receiver.—*STONE v. WISHART* (1817), 2 Madd. 64; 56 E. R. 258.

1591. Officer of court.]—*MORGAN v. THORNE*, No. 1, *ante*.

1592. Must exercise judgment & discretion.]—A guardian, in instituting or carrying on a matrimonial suit on behalf of a minor wife against her husband, must exercise sound judgment & discretion; if he carry on such suit without a just foundation, he will be condemned in the costs of the husband. Under no circumstances can a wife in a matrimonial suit be condemned in costs.

When a person as guardian undertakes a suit, he is bound to exercise due caution not merely for the interest of the minor, but also for the sake of common justice, which is due to the individual against whom the suit was instituted (*DR. LUSHINGTON*).

A next friend, before undertaking a suit, is bound to exercise sound judgment & discretion (*DR. LUSHINGTON*).—*BROWN v. BROWN* (1850), 2 Rob. Eccl. 302; 7 Notes of Cases, 391; 14 Jur. 768; 163 E. R. 1325.

Annotation:—*Consd.* Rutter v. Rutter, [1921] P. 136.

1593. Liability for negligence—Non-payment into court of trust fund—Loss of interest.]—An administrator, who allowed balances of intestate's property to remain uninvested for a considerable length of time, standing at the bankers' to the credit of intestate's estate, was ordered to pay interest at 4 per cent. on the shares of those balances, which belonged to some infants. *Qu.*: whether the next friend of an infant, who omits to call for the payment of the trust moneys into ct., may not be made answerable for any loss of interest, which the infant may sustain thereby.—*GRESLEY v. HEATHCOTE* (1825), 3 L. J. O. S. Ch. 107.

(b) Conduct of Proceedings.

1594. Whether party to proceedings.]—A *prochein ami* is not a party to the suit, but simply a person appointed by the ct. to look after the interests of the infant & manage the suit for him.—*SINCLAIR v. SINCLAIR* (1845), 13 M. & W. 640; 14 L. J. Ex. 109; 4 L. T. O. S. 338; 153 E. R. 268.

Annotations:—*Refd.* Melhuish v. Collier (1850), 15 Q. B. 878. *Mentd.* Grand Junction Canal Co. v. Dimes (1850), 2 H. & Tw. 92.

1595. ———.]—A *prochein ami* is not a party to a suit.—*MELHUISE v. COLLIER* (1850), 15 Q. B. 878; 19 L. J. Q. B. 493; 15 L. T. O. S. 474; 117 E. R. 690; *sub nom.* MELLUISE v. COLLIER, 14 Jur. 621.

Annotations:—*Mentd.* Greenough v. Eccles (1859), 5 C. B. N. S. 786; R. v. White (1922), 17 Cr. App. Rep. 60.

1596. ——— Within Judicature Act, 1873 (c. 66), s. 100.]—*CATT v. WOOD*, No. 1742, *post*.

1597. ——— For purposes of discovery—Under R. S. C., Ord. 31, r. 12.]—The above rule, as to applications for orders "directing any other party to any cause or matter to make discovery on oath" of documents, does not give the ct. jurisdiction to make such an order against an infant's next friend, he being in fact not a party to the action at all. Nor will the ct., in the case

Sect. 1.—On behalf of infant: Sub-sect. 2, G. (b)**I. (a) & (b) i.**

of an action brought on behalf of the infant, stay proceedings till an affidavit is made by the next friend.—*DYKE v. STEPHENS* (1885), 30 Ch. D. 189; 55 L. J. Ch. 41; 53 L. T. 561; 33 W. R. 932; 29 Sol. Jo. 682.

Annotations:—Folld. Scott v. Consolidated Bank, [1893] W. N. 56. *Expld. Pink v. Sharwood*, [1913] 2 Ch. 286. *Reid. Paspati v. Paspati*, [1914] P. 110.

1598. ———.]—The next friend of an infant pltf. is not a "party to the action" within above rule, & therefore cannot be compelled to make discovery as to documents in his possession or power relating to the matters in question in the action.—*Re CORSELLIS, LAWTON v. ELWES* (1883), 52 L. J. Ch. 399; 48 L. T. 425; 31 W. R. 414.

Annotation:—Apld. Ingram v. Little (1883), 11 Q. B. D. 251.

1599. ———.]—*SCOTT v. CONSOLIDATED BANK*, [1893] W. N. 56.

———.]—*See now, R. S. C., Ord. 31, r. 29.*

1600. Right to direction of proceedings—To exclusion of infant.]—The writ & suit of an infant is subject only to the direction of the *prochein ami*, & not of the infant.—*TOLER'S CASE* (1700), Holt, K. B. 153; 1 Salk. 176; 90 E. R. 983; *sub nom. R. v. TOLER*, 1 Ld. Raym. 555; *sub nom. STOUT v. TOWLER*, 12 Mod. Rep. 372; Holt, K. B. 483.

1601. Right to conduct proceedings in person.]—*Re HURST, ADDISON v. TOPP* (No. 2) (1891), 36 Sol. Jo. 41, C. A.

1602. ———.]—*MURRAY v. SITWELL*, [1902] W. N. 119.

Annotation:—Folld. Re Berry, Berry v. Berry, [1903] W. N. 125.

1603. ———.]—*Re BERRY, BERRY v. BERRY*, [1903] W. N. 125.

1604. — Agent to give notice of action.]—The *prochein ami* of a minor, who brings an action in his name, is his agent under 3 & 4 Will. 4, c. 52, s. 103, for the purpose of giving notice of the action.—*DE GONDOUIN v. LEWIS* (1839), 10 Ad. & El. 117; 2 Per. & Dav. 283; 9 L. J. Q. B. 148; 3 Jur. 1168; 113 E. R. 45.

1605. Power to compromise—If for benefit of infant.]—*RHODES v. SWITHEBANK*, No. 1979,

Relationship between infant & next friend's solicitor.]—See SOLICITORS.

(c) Costs.

See Sub-sect. 10, post.

reference to documents in his possession relating to matters in the suit, was granted.—*CROWE v. BANK OF IRELAND (GOVERNOR & Co.)* (1871), 19 W. R. 910.—IR.

PART XIV. SECT. 1, SUB-SECT. 2.—H.

a. Not examinable for discovery.]—The next friend of an infant pltf. is not examinable for discovery.—*VANO v. CANADIAN COLOURED COTTON MILLS CO.* (1907), 9 O. W. R. 10; 13 O. L. R. 421.—CAN.

b. Admissibility against infant.]—A minor's mother & guardian consented to an arbitrator deciding the minor's claim to certain properties upon information & evidence however obtained by the arbitrator. The arbitrator acted on an admission from the minor's mother prejudicial to the minor, & on information obtained by him behind the parties' backs, both before & after submission, none of

which was reduced to writing:—*Held*: the guardian's consent amounted to a surrender of the minor's rights & the arbitrator's eventual decision against the minor was vitiated by his misconduct & was invalid.—*SANYASI RAO v. VENKATA RAO* (1922), 1 L. L. R. 47 Mad. 30.—IND.

PART XIV. SECT. 1, SUB-SECT. 2.—I. (a).

1607 i. Next friend cannot withdraw—Without sanction of court.]—Upon application to the ct. therefor, the next friend of an infant pltf. may be allowed to withdraw, upon such terms as the circumstances of the case & the welfare of the infant may require.—*TAYLOR v. WOOD* (1892), 14 P. R. 449.—CAN.

1608 i. Absence abroad—Abandonment of suit—Substitution of new next friend.]—Where the next friend of an infant went out of the jurisdiction pendit the suit, but swore that she intend

H. Evidence of Next Friend.

Competency as witness.]—See now, Evidence Act, 1851 (c. 99), s. 2; Evidence Amendment Act, 1853 (c. 83).

Interrogatories to next friend.]—See R. S. C., Ord. 31, r. 29.

1606. Declarations before action brought—Admissibility against infant.]—The declarations of *prochein ami* made before action brought, are not admissible for deft.—*WEBB v. SMITH* (1824), Ry. & M. 106, N. P.

Compare EVIDENCE, Vol. XXII., p. 87, Nos. 558–563.

I. Removal and Change of Next Friend.**(a) In General.**

1607. Next friend cannot withdraw—Without sanction of court.]—The next friend of an infant pltf. cannot withdraw himself from that situation, without a reference to the master.—*MELLING v. MELLING* (1819), 4 Madd. 261; 56 E. R. 702.

1608. Absence abroad—Abandonment of suit—Substitution of new next friend.]—In a suit by a husband & wife, & their infant children suing by their father, as next friend, for the recovery of property, in which the wife had a separate interest for life, with remainder to her children, the husband went abroad, after a decree had been made to account, & abandoned the suit:—*Held*: the ct. had not authority on a petition presented by the wife, to appoint a next friend for the wife, & a new next friend for the infants; but the ct. ordered that a person to be named by petitioner should be at liberty to prosecute the suit for the benefit of the wife & children.—*GREENAWAY v. ROTHERHAM* (1838), 9 Sim. 88; 7 L. J. Ch. 98; 2 Jur. 45; 59 E. R. 291.

1609. Grounds for removal—Neglect of duty.]—The ct. will not, upon petition of an infant party, direct an inquiry whether the cause has been properly conducted; but if the next friend or guardian does not do his duty, he will be removed.—*RUSSELL v. SHARPE* (1820), 1 Jac. & W. 482; 37 E. R. 452.

1610. — Non-prosecution of action.]—The ct. will change a next friend upon his not proceeding with a cause. A solr. is not to attach without orders from his client; but, where the client is next friend of an infant, & moves to discharge the attachment on that ground, although otherwise regularly issued, it seems the ct. will refer it to the master to see whether it is for the interest of the infant that the next friend should be continued.—*WARD v. WARD* (1813), 3 Mer. 706; 36 E. R. 271, L. C.

to return by a day named, the referee stayed proceedings until the appointment of a new next friend. On appeal the matter was directed to stand until after that day; & the next friend not having then returned, the appeal was dismissed with costs.—*DAVIS v. FENTON* (1877), 7 P. R. 261.—CAN.

1609 i. Grounds for removal—Neglect of duty.]—Where a ct. finds that a next friend does not do his duty in relation to a suit, it is its duty not to permit him to prejudice the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend & for the appointment of a new next friend.—*DORASWAMI PILLAI v. THUNGASAMI PILLAI* (1904), 1 L. L. R. 27 Mad. 377.—IND.

c. Insolvency.]—In the case of an infant pltf., the ct. will not require security for costs, or remove a next

1611. ———.]—The next friend of an infant *pltf.* having neglected to prosecute the suit on the infant's behalf, the *solr.* who had been retained in the suit by the next friend, upon a notice of motion signed by him as *solr.* to *pltf.*, which he caused to be served upon the next friend & *deft.* in the cause, obtained an order appointing another next friend in the place of the original next friend. Upon the motion of *deft.* to discharge this order for irregularity:—*Held*: the notice so signed by the *solr.* was regular.—*FURTADO v. FURTADO* (1842), 6 Jur. 227.

Annotation:—*Consd. Cox v. Wright* (1863), 2 New Rep. 436.

1612. ———.]—**Refusal to appeal.**—A refusal by a next friend of infant *ptf.s.* to appeal is sufficient ground for his removal & the appointment of another next friend.—*DUPUY v. WELSFORD* (1880), 42 L. T. 730; 28 W. R. 762.

———.]—**Disqualification of person appointed.**—*See, generally, Sub-sect. 2, C., ante.*

Appointment by solicitor—Whose authority revoked.—The mother of an infant employed a *solr.* to prosecute a suit on behalf of the infant. The person first named as next friend in the cause died; the mother subsequently discharged the *solr.*, & after such discharge he amended the bill, & named a new next friend without the mother's sanction. The *ct.* ordered that, on payment by the mother to the next friend of the costs incurred by him in the suit, the next friend should be removed & another appointed, & that the *solr.* should pay the costs of the application & of the new appointment.—*LANDER v. INGERSOLL* (1845), 4 Hare, 596; 5 L. T. O. S. 304; 67 E. R. 786.

Annotation:—*Refd. Woolf v. Pemberton* (1877), 6 Ch. D. 19.

1614. ———.]—**Mere suspicion insufficient.**—*SMALLWOOD v. RUTTER*, No. 1575, *ante*.

1615. ———.]—**Stranger to infants—Unfitness & impropriety.**—*LARGE v. DE FERRE* (1857), cited in *Braithwaite's Practice of the Court of Chancery*, at p. 558.

1616. ———.]—**Substitution of father.**—*WOOLF v. PEMBERTON*, No. 1528, *ante*.

Paramount right of guardian.—*HUTCHINSON v. NORWOOD*, No. 1530, *ante*.

Compare No. 1528, *ante*.

(b) Procedure

i. In General.

1618. Removal—On notice of motion—Signed by solicitor.—The next friend of an infant having been also appointed by the *ct.* general guardian & receiver, a motion was made by the infant to remove him from all those offices, the notice of motion being signed by a *solr.*:—*Held*: on the authority of *Furtado v. Furtado*, No. 1611, *ante*, although a next friend may be removed by a notice of motion signed by the *solr.*, a guardian & receiver cannot, & motion refused, with leave to amend by putting the name of a next friend *pro hac*.—*COX v. WRIGHT* (1863), 2 New Rep. 436; 32 L. J. Ch. 770; 8 L. T. 631; 9 Jur. N. S. 981; 11 W. R. 870.

friend because he is not a person of substance. A motion to remove a next friend of an infant, on the ground that during the progress of the suit he had become insolvent, was refused with costs.—*Re McCONNELL* (1871), 3 Ch. Ch. 423.—*CAN.*

d. Interests adverse to infant.—The *ct.* would restrain the further prosecution of a suit instituted in the name of an infant, if not likely to be

for his benefit. If the next friend be the mere nominee & creature of his *solr.*, or have interests adverse to the infants, the *ct.* will remove him & appoint a new one; or if the next friend's *solr.* be so identified with adverse interests as to render impossible or doubtful that he could consistently prosecute the infant's suit with zeal; the *ct.* will restrain him from acting, & require a new *solr.* to

1619. Right of next friend to oppose.

On an application by the next friend of an infant *pltf.* for the removal of a receiver in the action, the application was refused, but the judge expressed dissatisfaction with the general conduct of the next friend, & ordered that the official *solr.* should be named as the next friend of the infant in all future proceedings, & that the next friend should deliver up all documents to him. On appeal, this order was discharged, on the ground that, although the *ct.* had, on a proper application, jurisdiction to remove a next friend, such a course ought not to be taken without giving the next friend an opportunity of explaining his conduct.—*Re CORSELLIS, LAWTON v. ELWES* (1884), 50 L. T. 703; 32 W. R. 965, C. A.

1620. Application for substitute—Affidavit of fitness—Whether necessary.—On a motion to substitute a new next friend of an infant *pltf.*, the *ct.* must be satisfied by affidavit of the circumstances & respectability of the party proposed to be substituted, although all the other parties to the cause consent to the substitution.—*HARRISON v. HARRISON* (1842), 5 Beav. 130; 49 E. R. 526.

Annotation:—*Expld. Talbot v. Talbot* (1874), L. R. 17 Eq. 347.

1621. ———.]—*TALBOT v. TALBOT*, No. 1632, *post*.

———.]—**To which original next friend a party.**—*See* No. 1521, *ante*.

1622. Effect of change—On proceedings under way—Examination on commission.—Pending the examination of witnesses, a new next friend of the infant *ptf.s.* was appointed:—*Held*: it was not necessary to notice the alteration in the proceedings under the commission.—*LINCOLN v. WRIGHT, LINCOLN v. DRURY* (1841), 4 Beav. 166; 49 E. R. 302; *affd.*, 10 L. J. Ch. 331, L. C.

Procedure where next friend dead.—*See* Sub-sect. 2, I. (b) ii., *post*.

ii. On Death of Next Friend.

1623. New appointment—Necessity for—Dismissal of suit on default.—Where a *prochein ami* dies, the *ct.* will order the bill to be dismissed within a given time, unless a new *prochein ami* be named.—*ANON.* (1822), 1 L. J. O. S. Ch. 60.

1624. ———.]—Where the next friend of an infant *pltf.* dies, the proper order for *deft.* to obtain is not that the infant may appoint a new next friend within a given time or that the bill may be dismissed; but that the master may approve of a new next friend; & four days' notice of the order must be given to *pltf.*'s *solr.*—*GLOVER v. WEBBER* (1844), 12 Sim. 351; 59 E. R. 1166.

1625. ———.]—**By whom obtained.**—*LUDOLPH v. SAXBY* (1742), 12 Sim. 351; 59 E. R. 1167, L. C. *Annotations*:—*Folld. Glover v. Webber* (1844), 12 Sim. 351. *Refd. Lancaster v. Thornton* (1761), Amb. 398.

1626. ———.]—*SHELBURNE (COUNTESS DOWAGER) v. INCHQUIN (EARL)* (1781), 12 Sim. 352; 59 E. R. 1167.

1627. ———.]—**Solicitor of plaintiff.**—In an infant's suit, the next friend dying, the *solr.*,

be appointed.—*MORRISON v. BELL* (1842), 5 I. Eq. R. 354.—*IR.*

PART XIV. SECT. 1, SUB-SECT. 2.— I. (b) ii.

e. New appointment—Ex parte.—When the next friend of an infant *pltf.* dies pending the action, a new next friend may be appointed on an *ex p.* motion in *ct.*—*DALY v. DALY* (1882), 9 L. R. Ir. 383.—*IR.*

Sect. 1.—On behalf of infant: Sub-sect. 2, I. (b) ii.; sub-sects. 3, 4 & 5.]

whom he had employed, commonly obtains an order, appointing a new next friend; & the order, in the absence of any peculiarity, is of course.—**WESTBY v. WESTBY** (1847), 2 Coop. temp. Cott. 211; 47 E. R. 1131.

1628. ——— Right of defendant on default.]—**LANCASTER v. THORNTON** (1761), Dick. 346; Amb. 398; 21 E. R. 302.

1629. ——— ———.]—After decree, the *prochein ami* of infant pltf. dies; on motion of deft. a reference to the master directed, to appoint another *prochein ami*.—**BRACEY v. SANDIFORD** (1818), 3 Madd. 468; 56 E. R. 577.

Compare No. 1624, ante.

1630. ———.]—Death of one pltf., who was tenant in common for life, with remainder over to the other pltf., does not so abate the suit as to prevent application for appointment of new next friend to remaining infant pltf. in lieu of deceased pltf.; but suit merely becomes defective, & defect may be supplied by supplemental bill without bill of revivor.—**ASKEW v. PEDDLE** (1838), 2 Jur. 884, L. C.; subsequent proceedings, 2 Jur. 917.

1631. ——— As of course—Duty of solicitor to obtain.]—**WESTBY v. WESTBY**, No. 1627, ante.

1632. ——— Right of paternal relations to nominate—Affidavit of fitness not necessary.]—Where the next friend of an infant pltf. dies, his nearest paternal relations are entitled to nominate the new next friend; & their nominee may obtain orders of course in the suit changing the solrs. on the record & appointing himself next friend. In such a case the order appointing the new next friend need not be supported by any affidavit as to his fitness.—**TALBOT v. TALBOT** (1874), L. R. 17 Eq. 347; 43 L. J. Ch. 352; 22 W. R. 619.

1633. Right of new next friend—To change solicitors—As of course.]—**TALBOT v. TALBOT**, No. 1632, ante.

SUB-SECT. 3.—BY SOLICITOR WITHOUT NEXT FRIEND.

Capacity of infant to employ solicitor.]—See SOLICITORS.

1634. Infant bound by conduct of solicitor.]—Infants are bound by the conduct of their solr.,

in a cause.—**TILLOTSON v. HARGRAVE** (1818), 3 Madd. 495; 56 E. R. 586.

Annotation:—**Reid. Morison v. Morison** (1838), 4 My. & Cr. 215.

1635. Cause of action arising abroad—Power of attorney to solicitor abroad—By guardian.]—Where this ct. was satisfied of the practice in India, an order was made directing the guardian of an infant resident in this country, to execute a power of attorney, authorising a solr. at Dewan-poor to proceed with a suit there, on behalf of such infant.—**RUCK v. BARWORTH** (1855), 25 L. T. O. S. 242; 3 W. R. 592.

1636. Minority unknown to solicitor—Liability to defendant for costs.]—**GETLINGER v. GIBBS**, No. 1520, ante.

See, generally, SOLICITORS.

SUB-SECT. 4.—PROCEEDINGS AS POOR PERSONS.

1637. Right to sue in formâ pauperis.]—**SQUIRREL v. SQUIRREL**, No. 1534, ante.

1638. ———.]—**REED v. ———** (prior to 1836), cited in 5 L. J. Ch. p. 205.

Annotation:—**Apld. Fellows v. Barrett** (1836), 5 L. J. Ch. 204.

1639. ———.]—A person may sue in *formâ pauperis* by his next friend.—**BRYANT v. WAGNER** (1839), 7 Dowl. 676; sub nom. **BRIANT v. WAGNER**, 3 Jur. 460.

Annotation:—**Mentd. Sloane v. Britain S.S. Co.**, [1897] 1 Q. B. 185.

1640. ——— What must be shown.]—The ct. on special application may grant leave to an infant to sue by next friend in *formâ pauperis*.

In this case there was an affidavit of the infant, who was 20 years of age, stating that he was not worth £5; but it did not state that he could not get any other next friend than the one by whom the infant appeared, who was himself a pauper:—**Held**: not to be entitled to sue in *formâ pauperis*.—**LINDSAY v. TYRRELL** (1857), 2 De G. & J. 7; 30 L. T. O. S. 238; 6 W. R. 143; 44 E. R. 889, L. C. & L. JJ.

Annotation:—**Consd. Re A. B.** (1885), 1 T. L. R. 657.

1641. ———.]—**Semble**: there may be special circumstances, in which a guardian may be permitted to prosecute an appeal in *formâ pauperis*, on the ground of the poverty of his ward; but the ct. requires an affidavit that the infant cannot get a solvent next friend.—**GAUDIN**

PART XIV. SECT. 1, SUB-SECT. 3.

1636 i. Minority unknown to solicitor—Liability to defendant for costs.]—An infant was a part owner of a patent right & engaged in business transactions with respect to it. Along with other part owners he signed a retainer to solrs. to take proceedings to stop the infringement of the patent, & the solrs., not knowing that he was an infant, brought an action for that purpose, using his name as pltf., without a next friend. The action was prosecuted for a time with the result that the infringement ceased, but it was subsequently dismissed with costs against pltf. for want of prosecution. More than a year after he came of age, he moved to set aside all proceedings in the action:—**Held**: in the circumstances mentioned, he was not entitled to relief on the ground of infancy.—**MILLSON v. SMALE** (1894), 25 O. R. 144.—CAN.

1. Appearance.]—An infant cannot appear by attorney but must appear by guardian. If the appearance is by attorney, all subsequent proceedings are irregular.—**MACAULAY**

v. NEVILLE (1870), 5 P. R. 235.—CAN.

g. Liability of solicitor.]—Where an action by an infant has been brought without a properly qualified "next friend" it is a non-compliance with K. B. Rule 44 & being an irregularity under Rule 658 the judge has jurisdiction under Rule 658 to dismiss the action with costs, & such dismissal will not be set aside or modified by an Appeal Ct. Where such an irregularity occurs & notwithstanding that it is merely a mistaken view of the law the solrs. of pltf. may be made liable in the costs of the appeal as no other person appears on the record who can be made liable.—**HILDEBRAND v. FRANCK**, [1922] 3 W. W. R. 755; 70 D. L. R. 538.—CAN.

PART XIV. SECT. 1, SUB-SECT. 4.

1640 i. Right to sue in formâ pauperis—What must be shown.]—An infant cannot sue in *formâ pauperis* by next friend, unless it is shown that he cannot procure as next friend a person who is willing to assume responsibility for costs, & unless the proposed next friend is also a pauper.—**Re STURGEON**

(1911), 20 Man. L. R. 284; 16 W. L. R. 415.—CAN.

h. Remission to county court.]—On an application to remit to the county ct. an action brought by a minor pltf., having no visible means & suing by her father, as her next friend, for damages for injuries sustained while in the employment of deft.:—**Held**: as pltf. had no visible means, it was necessary for her, in order to retain the action in the superior cts., to show, in the first place, that she had *prima facie* a cause of action; the statement or suggestion in her affidavit did not sufficiently disclose a cause of action, & the action should be remitted.—**DOWLING v. BIRNEY** (1901), 36 I. L. T. 33. App.—IR.

k. ———.]—On an application to remit an action of tort brought by an infant pltf. sued by next friend, it is sufficient that the affidavit of deft. should state that pltf. has no visible means of paying the costs of deft. should a verdict not be found for pltf.; & it is not necessary to state further that the next friend has no such means.—**PENDER v. LEONARD**, 2 I. R. 144.—IR.

v. MESSERVY (1864), 2 Moo. P. C. C. N. S. 372 ; 15 E. R. 942, P. C.

SUB-SECT. 5.—CONCURRENT ACTIONS.

1642. Court will restrain one action.]—Ct. will not stay proceedings on either of two bills brought for the same purpose, one by the assignee of the party interested, & the other by the party himself ; but if they proceed, to hearing, the ct. will dismiss that which is improperly brought. Ct. will not on motion stay proceedings on one of two bills, for the same purpose, unless both are brought by the same person, or on behalf of an infant.—*GAGE v. BULKELEY* (1750), Amb. 103 ; 27 E. R. 65, L. C.

1643. ——— **Two suits had been instituted on behalf of infants for the same purpose, & a decree, had been obtained in the second. Upon motion to stay the first suit, the ct. ordered it to be stayed, giving liberty to the next friend in the second to apply for the conduct of the first.**—*KENYON v. KENYON* (1866), 35 Beav. 300 ; 55 E. R. 911.

1644. Inquiry as to which most beneficial—Allegation of similar purpose.]—Where two suits are instituted in the name of an infant by different persons, acting as his next friends, it is of course to refer it to the master, to see which is most for the infant's benefit, upon the mere allegation of the counsel, that both suits are for the same purpose : it being at the risk of the party moving, in case the allegation should prove untrue, to have the order for reference discharged with costs upon the special application of the other party. Upon such a reference, the master is at liberty to suggest any improvement in the frame of the suit, & to report any special circumstances that may be for the infant's advantage.—*SULLIVAN v. SULLIVAN* (1816), 2 Mer. 40 ; 35 E. R. 856, L. C.

*Annotation :—***Refd.** *Westby v. Westby*, *Westby v. Westby*, (1847), 16 L. J. Ch. 483.

1645. ——— **Two suits were instituted for similar objects, one was attached to the Lord Chancellor, & the other to the Master of the Rolls' Ct. A reference was made at the Rolls to inquire which was most for the benefit of the infants.**—*STARTEN v. BARTHOLOMEW* (1842), 5 Beav. 372 ; 12 L. J. Ch. 10 ; 49 E. R. 622 ; *subsequent proceedings* (1843), 6 Beav. 143.

1646. ——— **Not ordered—After decree in one suit.]**—After a decree in one of two suits commenced in the name of an infant, it is not usual to refer it to the master to inquire which suit is most beneficial. But in the circumstances the next friend in the suit in which a decree had been made was removed, & the next friend in the other suit substituted for him.—*TAYLOR v. OLDHAM* (1822), Jac. 527 ; 37 E. R. 949, L. C.

1647. ——— **—CROWTHER v. FLOOD,** (CROWTHER v. FLOOD, No. 1798, *post*).

1648. ——— **When one action down for hearing.]**—Where two suits are instituted on behalf of an infant, it is not of course, when one of such suits is in the paper for hearing, to refer it to the master to ascertain which of the two suits is most beneficial for the infant.—*RUNDLE v. RUNDLE* (1847), 11 Beav. 33 ; 10 L. T. O. S. 389 ; 50 E. R. 728.

1649. ——— **In clear case—Stay.]**—There being two suits instituted by different persons as the next friends of an infant, the bill of one of them ordered to be taken off the file, with costs against such next friend, without reference to the master, the circumstances being sufficiently apparent.—*ASKEW v. PEDDLE* (1838), 2 Jur. 917.

1650. ——— **Effect—No stay ipso facto.]**—A reference as to which of two suits is most for the benefit of infant pl'tfs. does not of itself stay the proceedings in the suits.—*WESTBY v. WESTBY* (1847), 1 De G. & Sm. 410 ; 16 L. J. Ch. 483 ; 9 L. T. O. S. 293 ; 11 Jur. 764 ; 63 E. R. 1127.

1651. ——— **No bar to amendment.]**—On a reference to the master as to which of two suits instituted on behalf of an infant was most for his benefit :—*Held* : it was competent for pl'tf. in either suit to amend his bill, & such amendment did not prevent the master proceeding with the reference.—*GOODALE v. GAWTHORN* (1849), 1 Mac. & G. 319 ; 2 H. & Tw. 193 ; 19 L. J. Ch. 447 ; 41 E. R. 1288, L. C.

1652. ——— **On order for leave to amend.]**—After an order by the judge, directing two suits to be referred to the master to inquire which was most for the benefit of infants :—*Held* : (1) an order of course to amend, obtained by pl'tf. in one of the causes, without stating the order of reference, was irregular, & it was discharged ; (2) the ct. had no jurisdiction to take the amendments off the file, even by consent.—*FLETCHER v. MOORE* (1849), 11 Beav. 617 ; 18 L. J. Ch. 384 ; 13 L. T. O. S. 442 ; 13 Jur. 1063 ; 50 E. R. 955.

1653. Report after inquiry—Scope of report.]—*SULLIVAN v. SULLIVAN*, No. 1644, *ante*.

1654. ——— **Must be unequivocal.]**—Two suits having been instituted on behalf of the same infant pl'tfs., it was referred to the master to inquire & state whether the bills were for the same matters, & if so, which of the suits it would be most for the benefit of the infants to prosecute : but the order did not give the master liberty to state special circumstances. The master reported that the two bills were *substantially* for the same matters, & that it would be most for the benefit of the infants to prosecute the first suit ; but that, as the same person was solr. both for the next friend & for defts. in that suit, he was of opinion that some other solr. should be appointed for pl'tfs., & that part of the funds in the cause, which were then in a country bank, should be brought into ct. :—*Held* : the master had given a qualified answer to the question referred to him, & added suggestions which he was not at liberty to make ; & therefore, it was referred back to him to review his report.—*GANDERTON v. GANDERTON* (1842), 13 Sim. 182 ; 6 Jur. 938 ; 60 E. R. 70.

1655. Effect of report—Whether conclusive.]—Where two suits on behalf of infants by different next friends were referred to the master to ascertain which was most for their benefit, & the master reported in favour of the second suit :—*Held* : not sufficient to show priority : but some distinct reason must be given why the master had come to a wrong decision.—*TALBOT v. SHREWSBURY* (EARL) (1840), 4 Jur. 1030 ; *previous proceedings, sub nom.* *TALBOT v. SHREWSBURY* (EARL), *DOYLE v. WRIGHT*, *TALBOT v. BERKELEY*, 4 My. & Cr. 672, L. C.

1656. ——— **Continuance of rejected action—At plaintiff's peril.]**—*OWEN v. OWEN* (1757), 1 Dick. 310 ; 21 E. R. 288.

1657. ——— **No dismissal of rejected action—Unless by consent.]**—Infants being made co-pl'tfs. in two suits relative to the same matter, the ct. will not, before a decree, on the master's report, that one suit is more for the benefit of the infants, dismiss the bill in the other suit, unless by consent.—*MORTIMER v. WEST*, *FORDE v. WEST* (1818), 1 Swan. 358 ; 1 Wils. Ch. 159 ; 36 E. R. 122, L. C.

Sect. 1.—On behalf of infant: Sub-sects. 5 & 6.]

1658. Grounds for staying one action—Improper institution—Brother of plaintiff's solicitor as next friend.]—Two suits were instituted on behalf of infants, but it was found that it was most for their benefit to prosecute the second. The first suit was properly instituted; but there being some impropriety of conduct on the part of the solr., who instituted it on his own authority, & nominated his brother as next friend, the first bill was, upon an interlocutory application, dismissed without costs.—**STARTEN v. BARTHOLOMEW** (1843), 6 Beav. 143; 12 L. J. Ch. 179; 49 E. R. 779.

1659. ——— Plaintiffs' solicitor London agents of defendant.]—Two suits were instituted in consecutive months on behalf of the same infant pltf. for the administration of the same estate: a decree was obtained by consent in the latter suit, & an order subsequently made staying proceedings in the earlier suit: the solrs. for-pltf. in the latter suit were the London agents of the solrs. of deft. in both suits:—**Held**: the later suit ought not to have been instituted, & the conduct of the latter suit was given to the next friend who had instituted the earlier suit.—**FROST v. WARD** (1864), 2 De G. J. & Sm. 70; 3 New Rep. 348; 9 L. T. 668; 12 W. R. 285; 46 E. R. 301, L. J. J. **Annotation**:—**Mentd.** Harvey v. Coxwell, Wilson v. Coxwell (1875), 32 L. T. 52.

1660. ——— Attempt to protect defaulting trustee.]—Two suits were instituted, in behalf of infants, against trustees for administration, the first by a stranger to the infants, & second by their father, as next friend. The second bill stated that the object of the first was to stave off inquiries from a defaulting trustee, & prayed relief against him in respect of the breaches of trust, & it was charged in affidavits, & not denied, that the next friend in the first suit was falsely described, & was a friend of the defaulting trustee. The ct. ordered the first suit to be stayed.—**VIRTUE v. MILLER** (1871), 19 W. R. 406.

1661. ——— Benefit primary consideration—Notwithstanding more relief prayed in other suit.]—(1) Of several suits instituted on behalf of infants, & for the protection of their property, the ct. will give a preference to that which is capable from its frame of being most beneficially & effectually prosecuted, notwithstanding that in point of form the relief sought by another is more extensive.

(2) Trustees for infants, persisting in unnecessary litigation, ordered to pay the costs personally.—**CAMPBELL v. CAMPBELL, CAMPBELL v. MACKAY** (1837), 2 My. & Cr. 25; 40 E. R. 550, L. C.

Annotation:—**As to** (2) **Consd.** Steeden v. Walden, [1910] 2 Ch. 393.

1662. ——— Priority in institution not material.]—Where a suit had been instituted by the next friend of infant devisees against the trustee & extrix., & a reference made on the application of deft. to inquire whether such suit was proper for the infant's benefit, & afterwards the extrix. commenced an administration suit, & obtained a decree, the reference in the first suit became unnecessary, & the frame of that suit being defective, the next friend was allowed to apply in the second suit.

The suits are identical, & some suit is proper; the question is, which is the proper suit to be proceeded with? It does not turn on the priority of the suits, but which is most for the benefit of the infants (**LORD LYNTHURST, C.**).—**MATHEWMAN v. WOODCOCK** (1845), 5 L. T. O. S. 17, L. C.

1663. Substitution of next friend of action where

decree made—For next friend of action where decree not made—Irregularity.]—Irregular to strike out the next friend of the suit which has a decree, where no charge is made against him, & insert the next friend in the suit, which has not obtained a decree.—**NANNEY v. WYNNE** (1839), 3 Jur. 498.

1664. Costs of action stayed—Right of plaintiff.]—**CROWTHER v. FLOOD, CROWTHER v. FLOOD**, No. 1798, *post*.

—.]—(1) One suit is instituted by a person interested to carry out an arrangement respecting partnership property of which infants were entitled to a share, & another suit is proposed to be instituted by a next friend of the infants objecting to the arrangement, & on a reference to the master, he found that the proposed arrangement was for the infants' benefit.

(2) The next friend in the second suit was nevertheless held entitled to his costs, though no fault on examination could be found with the conductor of the first suit.—**CROSS v. CROSS** (1845), 8 Beav. 455; 5 L. T. O. S. 234; 50 E. R. 179.

Annotation:—**As to** (2) **Apld.** Steeden v. Walden, [1910] 2 Ch. 393.

1666. ——— What costs allowed—Not costs of inquiry.]—Where two suits were instituted by claim for administration of an estate, on behalf of infants, & on a reference a report was made in favour of the latter suit, the cost only of filing the original claim were allowed to pltf., but not of the inquiry or of the affidavit.—**OPENHEIM v. HENRY** (1853), as reported in 20 L. T. O. S. 291; 1 W. R. 126.

Annotations:—**Mentd.** *Re Mervin*, Mervin v. Crossman, [1891] 3 Ch. 197; *Houston v. Burns*, [1918] A. C. 337; *Re Battle-Wrightson*, Cecil v. Battle-Wrightson, [1920] 2 Ch. 330.

1667. ——— Improperly instituted.]—**STARTEN v. BARTHOLOMEW**, No. 1658, *ante*.

For costs generally, see Sub-sect. 10, *post*.

SUB-SECT. 6.—EFFECT OF ATTAINMENT OF MAJORITY.

1668. Election to repudiate.]—(1) A bill, filed in the name of an infant, may be dismissed by him when he comes of age.

(2) He cannot make the *prochein ami* pay the costs, unless it be established that the bill was improperly filed.—**ANON.** (1819), 4 Madd. 461; 56 E. R. 775.

Annotations:—**As to** (1) **Distd.** Bicknell v. Bicknell (1863), 2 New Rep. 98. **As to** (2) **Apld.** Steeden v. Walden, [1910] 2 Ch. 393.

1669. —.]—A co-pltf. who was an infant when the suit was instituted, moved, on coming of age, that his name might be struck out of the bill. Motion granted.—**ACRES v. LITTLE** (1834), 7 Sim. 138; 58 E. R. 788.

1670. —.]—Where a suit has been instituted in the name & on the behalf of an infant, of which the infant when of age disapproves, some application by pltf. is necessary to stay further proceedings in the cause; but the motion ought not to be that the bill may be dismissed.

When pltf. comes of age she may either adopt or repudiate the suit. If pltf. should adopt the suit, or even if she does not repudiate it, but assents to its proceeding, she will become liable to all the costs, past as well as future, of the suit; but if she repudiates the suit, she is not liable for any costs, & upon very good grounds; for the suit may have been instituted without her knowledge or approbation.

. . . On the infant coming of age the cause becomes her cause, & she has a right to abandon it; but if she pleases to proceed with the cause, the next friend becomes merely her agent (LORD LYNTHURST, C.).—*BOSCHETTI v. POWELL* (1845), 5 L. T. O. S. 301, L. C.

1671. — Short time after majority.]—A suit having been instituted by a party as the next friend of an infant married woman against her husband for the specific performance of marriage articles, the lady within a fortnight after she came of age moved to have her name struck out as pltf. The ct. refused to make the order so shortly after the lady came of age, but expressed its readiness to do so on being perfectly satisfied, by her examination, that the motion was made with her consent.

The rule I apprehend to be perfectly clear, any person may sue on behalf of an infant, & may even institute a suit against his wish, subject only to the inquiries of the ct. whether it is for the benefit of the infant, & subject also to the liability for costs (LORD LONGDALE, M.R.).—*COOKE v. FRYER* (1841), 4 Beav. 13; 5 Jur. 287; 49 E. R. 242.

Annotation:—Reid. Wortham v. Pemberton, Newenham v. Pemberton (1845), 1 De G. & Sm. 644.

1672. — Application to strike out name as plaintiff—Special next friend for that purpose.]—*GUY v. GUY*, No. 1762, *post*.

1673. — Separate counsel.]—Infant pltf. coming of age during the process of the cause, & disapproving of the proceedings, cannot appear in the proceedings by counsel other than those who appear for pltf. generally; he can only complain of or repudiate the proceedings by making them the subject of a special application.—*BALLARD v. WHITE* (1843), 2 Hare, 158; 1 L. T. O. S. 76; 67 E. R. 66; *sub nom.* *BALEARD v. WHITE*, 7 Jur. 506.

1674. — Necessary where co-plaintiffs.]—Upon infant co-pltf. attaining his majority, whether before or after decree, & wishing to discontinue the suit, the proper course is to strike his name out as pltf. & insert it as deft.—*BICKNELL v. BICKNELL* (1863), 32 Beav. 381; 2 New Rep. 98; 8 L. T. 377; 9 Jur. N. S. 633; 11 W. R. 657; 55 E. R. 149.

1675. Effect of repudiation—On liability for costs—Liability of next friend.]—*ANON.* (1819), No. 1668, *ante*.

1676. — Liability of infant.]—*BOSCHETTI v. POWELL*, No. 1670, *ante*.

1677. — Retrospective effect—Return of documents deposited by order—Notwithstanding lien for costs.]—Where an infant on attaining his majority repudiates, before the hearing, a suit instituted on his behalf by his next friend, the repudiation has relation to the commencement of the suit & deeds deposited in ct. by an order therein will be ordered to be returned to the party by whom they were deposited, notwithstanding a claim of lien for costs incurred for infant pltf. in the suit set up by the next friend & his solr.

In the prosecution of a suit on behalf of infant pltf. by his next friend, deeds relating to pltf.'s title were, by order, upon admissions in deft.'s answer, deposited in ct. for the purposes of discovery, & before the hearing pltf., having attained his majority, repudiated the suit, whereupon on application by deft. the deeds were ordered by the judge to be delivered back to deft., notwithstanding the opposition of the next friend, who claimed to have them retained in ct., until the costs incurred on behalf of pltf., while an infant, had been paid. Upon an appeal against this order,

supported by affidavits showing that since the judge's order the deeds had been delivered to deft., & by him handed over to pltf. by whom they had been deposited with other persons by way of mtge. for value, the ct. refused the appeal motion with costs to be paid by the next friend.—*DUNN v. DUNN* (1855), 7 De G. M. & G. 25; 24 L. J. Ch. 581; 24 L. T. O. S. 227; 1 Jur. N. S. 122; 3 W. R. 199; 44 E. R. 10, L. JJ.

1678. — Joinder as co-defendant.]—*BICKNELL v. BICKNELL*, No. 1674, *ante*.

1679. Effect of non-repudiation—Liability for costs.]—*BOSCHETTI v. POWELL*, No. 1670, *ante*.

1680. Election to continue—Effect on position of next friend—Agent for infant.]—*BOSCHETTI v. POWELL*, No. 1670, *ante*.

1681. Continuance—Must not be by next friend—Time for objection—Before judgment.]—In a writ of error for to reverse a judgment in the C. B. in a writ of right, error because at full age he prosecuted by his *prochein ami*, & not by his attorney.

It hath been the opinion of the whole ct. before that the ct. ought not to take notice when pltf. came to his full age & deft. there hath now surceased his time, this might have been pleaded before judgment but not now assignable for error & therefore by the rule of the ct. *nullo contradicente*, the judgment was affirmed (*WILLIAMS, J.*).—*STONE v. MARCH* (1621), 1 Bulst. 24; Cro. Jac. 580; 80 E. R. 729.

1682. —]—The next friend of a sole pltf., an infant, ought not to take proceedings in the cause in the name of such pltf. after the pltf. has attained the age of twenty-one.

The costs of the next friend of the infant to the time the infant attained twenty-one allowed as between solr. & client; but no costs allowed of proceedings subsequently taken without the authority of pltf., although such proceedings were merely consequential on former proceedings, if the suit were to be prosecuted.—*BROWN v. WEATHERHEAD* (1844), 4 Hare, 122; 9 Jur. 787; 67 E. R. 586.

1683. — Change of solicitor—Necessity for application.]—An infant pltf. upon becoming of age cannot properly appear by a different solr. from the one employed by the next friend, without first applying to change the solr.; & he cannot effectually oppose a motion by pltf. for the substitution of a new next friend, until he has changed his solr.—*SWIFT v. GRAZEBROOK* (1842), 13 Sim. 185; 6 Jur. 960; 60 E. R. 72.

1684. —]—A suit was justified in the name of two infants by their next friend. One came of age, & some time afterwards, the next friend obtained an order for changing the solrs. of pltf. It was discharged with costs.—*BROWN v. BROWN, BROWN v. BASTOW* (1849), 11 Beav. 562; 18 L. J. Ch. 388; 13 Jur. 687; 50 E. R. 934.

1685. — Necessity for as co-plaintiff—To oppose motion by other plaintiff.]—*SWIFT v. GRAZEBROOK*, No. 1683, *ante*.

1686. Order in administration action—Computation of legacy due to infants—Master's report rendered nugatory.]—*ROCK v. HARDMAN* (1819), 4 Madd. 253; 56 E. R. 699.

1687. Alteration in interest & liability—Former plaintiff now defendant—R. S. C., Ord. 17, r. 4.]—Where testator appointed his two infant sons trustees on their attaining the age of twenty-one, & an administration action was commenced on the elder son attaining twenty-one, in which the infant son was made a pltf. & the elder son deft.; on the younger son attaining twenty-one, & becoming a trustee, & thus changing his interest & liability, the ct. on an *ex p.* application under

Sect. 1. On behalf of infant: Sub-sects. 6, 7 & 8.]
above rule made him a co-deft.—*Re GOOLD*,
GOOLD v. GOOLD (1884), 51 L. T. 417.

SUB-SECT. 7.—JUDGMENT.

1688. Judgment binding on infant.]—*CROMWELL v. CAREY* (1631), Toth. 70; 21 E. R. 126.

1689. —.—An infant, when pltf. is as much bound & as little privileged as one of full age (*per CUR.*).—*BROOK (LORD) v. HERTFORD (LORD)* (1728), 2 P. Wms. 518; 24 E. R. 843, L. C.

*Annotations:—**Folld. Morison v. Morison* (1838), 4 My. & Cr. 215. *Reid. Tuckfield v. Buller* (1753), Amb. 197; A.-G. v. Hamilton (1816), 1 Madd. 214; *Gaskell v. Gaskell* (1836), 6 Sim. 643.

1690. Unless obtained by fraud.]—*RICHMOND v. TAYLOUR*, No. 1700, *post*.

1691. —.—*COLCLOUGH v. BOLGER* (1816), 4 Dow, 54; 3 E. R. 1087, H. L.

1692. —.—*GREGORY v. MOLESWORTH*, No. 1909, *post*.

1693. — Effect of prior irregularities.]—The ct. will not suffer the proceedings in a cause to be impeached on the ground of irregularities of which the persons complaining have been themselves the authors; & if all persons interested in the subject matter of the suit have been substantially parties to all the subsequent proceedings, none of them can be permitted to escape from the effect of such subsequent proceedings by showing prior irregularities; & no difference in this respect is caused by the circumstance that some of such parties are infant pltfs.—*MORISON v. MORISON* (1838), 4 My. & Cr. 215; 41 E. R. 85; *sub nom. MORRISON v. MORRISON*, 3 Jur. 528, L. C.

1694. —.—*MORGAN v. THORNE*, No. 1, *ante*.

1695. — Bar to further proceedings on majority.]—In the present case the litigation, duly commenced in the name of an infant by a next friend, was prosecuted to judgment. In such case an infant is just as much bound by the proceedings as if he were adult (*BUCKLEY, L.J.*).—*CRIBB v. KYNOCH, LTD.* (No. 2), [1908] 2 K. B. 551; 77 L. J. K. B. 1001; 99 L. T. 216; 24 T. L. R. 736; 52 Sol. Jo. 581; 1 B. W. C. C. 43, C. A.

*Annotations:—**Reid. Harrison v. Wythemoor Colliery Co.*, [1922] 2 K. B. 674. *Mentd. Page v. Burtwell* (1908), 77 L. J. K. B. 1060; *Codling v. Mowlem*, [1914] 2 K. B. 61; *Edinburgh Collieries Co.* (1923), 17 B. W. C. C. 324.

—*Compare* No. 1702, *post*.

1696. Judgment by consent—No inquiry as to benefit.]—Infants are bound by a decree taken by consent, although no reference to a master to enquire whether it was for their benefit.—*WALL v. BUSHBY* (1785), 1 Bro. C. C. 484; 28 E. R. 1254, L. C.

*Annotation:—**Reid. Morison v. Morison* (1838), 4 My. & Cr. 215.

1697. Accounts & inquiries in administration action—Whether further claim barred.]—Where some of pltfs. are infants, judgment by consent for accounts & inquiries relating to the personal estate of testator, not amounting to a

compromise, will not preclude a claim for compound interest on further consideration.—*Re BARCLAY, BARCLAY v. ANDREW*, [1899] 1 Ch. 674; 68 L. J. Ch. 383; 80 L. T. 702.

*Annotation:—**Mentd. Re Whiteford, Inglis v. Whiteford*, [1903] 1 Ch. 889.

1698. — Assessment of damage by judge.]—Where, upon the dismissal of an action brought by a workman under age by his next friend, against his employers to recover damages in respect of personal injuries occasioned to pltf. by an accident arising out of & in the course of his employment an application was made to the judge who tried the action to assess compensation to pltf. under Workmen's Compensation Act, 1897 (c. 37), s. 1 (4), & the judge accordingly awarded such compensation:—*Held*: pltf. was estopped by the election to take such compensation & the award thereupon made from proceeding further with the action & therefore a subsequent application by him for judgment of a new trial in the action could not be entertained.—*NEALE v. ELECTRIC & ORDNANCE ACCESSORIES CO., LTD.*, [1906] 2 K. B. 558; 75 L. J. K. B. 974; 95 L. T. 592; 22 T. L. R. 732; 8 W. C. C. 6, C. A.

*Annotations:—**Appld. Harrison v. Wythemoor Colliery Co.*, [1922] 2 K. B. 674. *Reid. Cribb v. Kynoch* (No. 2), [1908] 2 K. B. 551. *Mentd. Codling v. Mowlem*, [1914] 2 K. B. 61.

1699. Probate action—Right to require proof in solemn form—After majority attained—Although decree to that effect made previously.]—A minor after filing a bill by her next friend against exors., & therein alleging the will & codicil to be duly proved, & after a decree to that effect, may, when she is of age, call upon the exors. to prove the codicil in solemn form, & they will be assigned to appear absolutely & prove.—*MERRYWEATHER v. TURNER* (1845), 9 Jur. 120.

SUB-SECT. 8.—RELIEF IN RESPECT OF DEFECT IN PROCEEDINGS.

1700. Against judgment—Obtained by fraud.]—Where there is any fraud in carrying on or defending the cause of an infant, he may seek his satisfaction against his guardian, or bring his bill to be relieved against the fraud.—*RICHMOND v. TAYLOUR* (1721), 1 Dick. 38; 1 P. Wms. 734; 2 Eq. Cas. Abr. 516; 21 E. R. 181, L. C.

*Annotations:—**Reid. Sheffield v. Buckingham* (1739), West temp. Hard. 582; *Montgomerie v. A.-G.* (1741), 9 Mod. Rep. 365; *Barnesly v. Powel* (1748), 1 Ves. Sen. 119; *Bradish v. Gee* (1754), Amb. 229; *Manaton v. Molesworth*, *Wortley v. Molesworth* (1757), 1 Eden, 18. *Mentd. Ineson v. Moulston, Vobe's Case* (1742), 9 Mod. Rep. 373.

1701. —.—*COLCLOUGH v. BOLGER* (1816), 4 Dow, 54; 3 E. R. 1087, H. L.

1702. — What relief given.]—An infant is not bound by the decree of a ct. of equity, but must have a reasonable time after he comes of age to show cause against it.

Upon a decree against an infant, unless within six months after he comes to age, the infant may answer, make a defence & examine witnesses

PART XIV. SECT. 1, SUB-SECT. 7.

1688. Judgment binding on infant.]—*HENRY v. ARCHIBALD* (1871), 5 I. R. Eq. 559.—*IR.*

PART XIV. SECT. 1, SUB-SECT. 8.

1702. Against judgment—What relief given.]—In the execution of a decree passed against a minor the ct. cannot inquire whether the minor was or was not properly represented in the suit in which the decree was given. It is

bound to presume that the decree was rightly passed & to execute it according to its terms. The minor's remedy is either to apply for a review of judgment or to file a suit to procure an injunction to restrain the execution of the decree.—*NAWAB MAHOMED NOOR-OOLLAH KHAN v. HAROLARAN RAI* (1874), 6 N. W. 98.—*IND.*

1. Time for objection—Before trial.]—*MORAE v. MORAE* (1859), Coch. 76.—*CAN.*

m. Discretion of judge.]—Appct. was an infant, & the proceedings were commenced without a next friend. The co. objected during & at the conclusion of the evidence taken before the judge. The judge reserved his decision, & afterwards gave written reasons for judgment, in which he stated appct. should be allowed to file the consent of some one to act as next friend, & directed that, upon this being done, the proceedings should be amended. This was done, & the

anew.—**EFFINGHAM (LADY) v. NAPIER** (1727), 4 Bro. Parl. Cas. 340; 2 E. R. 230, H. L.; *affg.* S. C. *sub nom.* **NAPIER v. EFFINGHAM (LADY)** (1726), 2 P. Wms. 401.

Annotations:—**Consd.** *Bennet v. Lee* (1742), 2 Atk. 529; *Gregory v. Molesworth* (1747), 3 Atk. 626; *Powys v. Mansfield* (1836), 6 Sim. 637. **Refd.** *Kelsall v. Kelsall* (1834), 2 My. & K. 409. **Mentd.** *Bond v. England* (1855), 26 L. T. O. S. 12.

Compare No. 1699, *ante*.

1703. — Appointing new trustees—& vesting of property in them.—Testator, in 1807, executed a deed of tailzie of his Scottish estates, limiting the same to various relatives, with clauses rendering the estates of the successive heirs substitute inalienable. In 1808, testator devised his English estates to three trustees in strict settlement, & gave them his residuary personal estate in trust, to lay out the same in the purchase of estates in England or Scotland, & to settle the purchased English estates to the uses contained in his will, & they purchased Scottish estates to the uses expressed in the deed of tailzie. By the will, power was given to the person entitled to the actual possession of the devised estates to appoint new trustees, on any of the trustees dying or declining to act. Testator died in 1812. On the death of J. D., the first party beneficially interested in the estates, there was a very large residuary personal estate, & he was succeeded in the estates by his son J. D. D., the heir substitute in possession under the deed, & tenant in tail under the will. A very considerable part of the residuary personal estate was invested by the trustees in the purchase of Scottish estates, & a small part only in the purchase of English estates, & these estates were respectively settled to the uses expressed in the deed & will. The trustees having died, & the representative of the last surviving trustee desiring to be discharged, a bill was filed in 1833 by the next friend of J. D. D., an infant, complaining that the trusts had not been properly executed, & amongst other things, seeking the appointment of new trustees, & a declaration of the ct. that the residue of the personal estate ought to be invested in the purchase of real estates in England. The earliest of the heirs substitute after J. D. D. interested in the estates were not parties to the suit, though others more remotely interested therein were, as also the representative of the last surviving trustee. A decree was made in 1833, whereby a reference was directed for the appointment of new trustees, & it was declared that the personal estate remaining uninvested ought to be invested in the purchase of real estates in England. J. D. D., having attained his majority in 1836, executed a disentailing deed, & shortly afterwards the uninvested personal estate was ordered to be transferred to him. He died in 1840 without issue. In 1841, a bill was filed by A. D. F., the next substitute heir in possession under the Scottish deed of tailzie, praying that the decrees & proceedings in the suit instituted on behalf of J. D. D. might be declared irregular, & that pltf. might be relieved therefrom:—**Held**: A. D. F. was not bound by the decree in the suit of J. D. D., & the heirs substitute under the deed of tailzie were not substantially represented in that suit, & his present bill was a proper bill; the new trustees had been irregularly appointed in the suit of J. D. D., & the personal

estate directed to be transferred in 1836 to J. D. D. ought to be restored out of his assets, & it ought to be invested in English & Scottish estates in equal moieties, although a much larger sum had already been invested in Scottish estates than in English.—**FORDYCE v. BRIDGES** (1848), 2 Ph. 497; 2 Coop. temp. Cott. 324; 17 L. J. Ch. 185; 41 E. R. 1035, L. C.

Annotations:—**Mentd.** *Brassey v. Chalmers, Seacome v. Holme* (1853), 4 De G. M. & G. 528; *Watlington v. Waldron* (1853), 4 De G. M. & G. 259; *Fletcher v. Moore* (1857), 29 L. T. O. S. 173; *Salisbury v. Denton* (1857), 3 K. & J. 529.

1704. Against defective pleading—Issue not raised—Separate trial of issue.—Counsel for an infant omitted to put in issue the question whether a purchaser from his father had notice of an incumbrance:—**Held**: the infant was not included by the slip of her counsel, & a trial of the issue as to notice was ordered.—**SAVAGE v. WHITEBREAD** (1869), 3 Rep. Ch. 24; 21 E. R. 717.

1705. — Insufficient relief prayed—Omission remedied.—An infant may have a decree upon any matter arising on the state of his case, though not particularly prayed by his bill.—**STAPILTON v. STAPILTON** (1739), 1 Atk. 2; *West temp. Hard.* 12; 26 E. R. 1, L. C.

Annotations:—**Refd.** *Legard v. Daly* (1749), 1 Ves. Sen. 192; *Baker v. Booker* (1819), 6 Price, 379; *Dimsdale v. Dimsdale* (1856), 3 Drew. 556. **Mentd.** *Baker v. Hart* (1747), 3 Atk. 542; *Doe d. Odierne v. Whitehead* (1759), 2 Burr. 704; *Goodright d. Tyrrell v. Mead* (1765), 3 Burr. 1703; *Goodright d. Stevens v. Moss* (1777), 2 Cowp. 591; *Stockley v. Stockley* (1812), 1 Ves. & B. 23; *Dunnage v. White* (1818), 1 Swan. 137; *Gordon v. Gordon* (1821), 3 Swan. 400; *Houghton v. Tate* (1829), 3 Y. & J. 486; *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911; *Cooke v. Turner* (1845), 14 Sim. 493; *Cooke v. Turner* (1846), 15 M. & W. 727; *Tarleton v. Liddell* (1851), 17 Q. B. 390; *Hoghton v. Hoghton* (1852), 15 Beav. 278; *Head v. Godlee, Reynolds v. Godlee* (1859), *John.* 536; *Williams v. Williams* (1865), 2 Drew. & Sm. 378; *Fane v. Fane* (1875), L. R. 20 Eq. 698.

1706. — — — — —.—If a bill on behalf of an infant does not ask for all the relief that he is entitled to, the ct. will order a new bill to be filed.—**WACE v. BICKERTON** (1850), 3 De G. & Sm. 751; 19 L. J. Ch. 254; 15 L. T. O. S. 323; 14 Jur. 784; 64 E. R. 690.

1707. — — — — —.—Although the prayer of a bill may be badly framed, yet if the facts are sufficiently stated, & the proper parties before the ct., the ct. will not allow the interest of an infant to be prejudiced by the insufficiency of the prayer.—**WALKER v. TAYLOR** (1861), 4 L. T. 845; 8 Jur. N. S. 681, H. L.

1708. Non-appearance at hearing of solicitor—Re-hearing ordered.—The solr. of pltf. an infant, having suffered the bill to be dismissed for want of appearing at the hearing, & the order of dismissal to be enrolled; the enrolment was set aside after pltf. had attained twenty-one, & he was at liberty to rehear the cause.—**KEMP v. SQUIRE** (1749), 1 Dick. 131; 1 Ves. Sen. 205; 21 E. R. 218, L. C.

Annotations:—**Refd.** *Pickett v. Loggon* (1800), 5 Ves. 702. **Mentd.** *Watkin & Bligh v. Brent* (1836), 1 Curt. 264.

1709. Neglect of representative—Omission to prosecute appeal.—If an appeal is dismissed on account of the neglect of the guardians of infants to bring it to a decision, the infants when they come of age will have a right to revive it.—**ORPHAN BOARD v. VAN REENEN** (1829), 1 Knapp, 83; 12 E. R. 252, P. C.

judge made an order for amendment accordingly, & subsequently made his award:—**Held**: the amendment was properly made, & the judge was fully authorised to make it as & when he did.—**Re BARRIE & DIAMOND COAL CO.**

(1914), 28 W. L. R. 701; 7 Alta. L. R. 138; 6 W. W. R. 651; 17 D. L. R. 385.—**CAN.**

n. — — — — —.]—Where an action by an infant has been brought without a

properly qualified "next friend" it is an irregularity & the judge has jurisdiction to dismiss the action.—**HILDEBRAND v. FRANCK**, [1922] 3 W. W. R. 755; 70 D. L. R. 538.—**CAN.**

Sect. 1.—On behalf of infant: Sub-sects. 8, 9 & 10, B. (a).]

1710. — Next friend.]—An infant petitioning for leave to file a bill of review will not be required to give evidence that the knowledge of the facts relied upon could not have been previously obtained by reasonable diligence. *Qu.*: whether an infant requires the leave of the ct. to file such a bill.

The proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her next friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent & will protect her interests (MALINS, V.-O.).—*Re* HOGHTON, HOGHTON v. FIDDEY (1874), L. R. 18 Eq. 573; 43 L. J. Ch. 758; 22 W. R. 854.

SUB-SECT. 9.—REMEDY AGAINST SOLICITOR APPOINTED BY NEXT FRIEND.

1711. Recovery by infant—Damages & costs paid to solicitor.]—Where an infant, suing by *prochein ami*, has obtained judgment for damages & costs, which have been paid to the attorney appointed by the *prochein ami* to conduct the suit for him, he may maintain an action against such attorney to recover the amount as money received for his use.—COLLINS v. BROOK (1860), 5 H. & N. 700; 29 L. J. Ex. 255; 2 L. T. 774; 8 W. R. 474; 157 E. R. 1360; *sub nom.* BROOK v. COLLINS, 6 Jur. N. S. 999, Ex. Ch.

Annotation:—*Mentd.* *Re* Brocklebank, *Ex p.* Brocklebank (1877), 6 Ch. D. 358.

SUB-SECT. 10.—COSTS.

A. Security for Costs.

Security for costs in county courts.]—See COUNTY COURTS, Vol. XIII., p. 485, No. 350.

1712. Liability of infant.]—The ct. will not oblige an infant pltf. to give security for costs.—ANON. (1813), 1 Marsh. 4.

Annotations:—*Appld.* Yarworth v. Mitchel (1823), 2 Dow. & Ry. K. B. 423. *Mentd.* Felton v. Easthope (1823), 1 L. J. O. S. K. B. 156.

1713. Liability of next friend—General rule—Not ordered.]—A *prochein ami* shall not be obliged to give security, because he is a privileged person.—ANON. (1729), Mos. 86; 25 E. R. 286, L. C.

1714. —.]—If an infant sues by a next friend & the suit is dismissed with costs, it would not be right to prevent him from bringing a new suit by another next friend on the ground that the costs of the former suit had not been paid (COTTON, L.J.).—*Re* PAYNE, RANDLE v. PAYNE (1883), 23 Ch. D. 288; 52 L. J. Ch. 544; 48 L. T. 194; 31 W. R. 509, C. A.

1715. — Insufficient means of next friend—Whether material to order.]—The *prochein ami*, on affidavit of his poverty, must give security to pay

costs.—WALE v. SALTER (1728), Mos. 47; 25 E. R. 262.

Annotation:—*Refd.* Hind v. Whitmore (1856), 25 L. J. Ch. 394.

1716. —.]—SQUIRREL v. SQUIRREL, No. 1534, *ante*.

1717. —.]—ANON. (1813), 1 Marsh. 4.

Annotations:—*Folld.* Yarworth v. Mitchel (1823), 2 Dow. & Ry. K. B. 423. *Mentd.* Felton v. Easthope (1823), 1 L. J. O. S. K. B. 156.

1718. — Insolvency.]—An infant who sues by his *prochein ami* need not give security for costs, even though the *prochein ami* is sworn to be insolvent.—YARWORTH v. MITCHEL (1823), 2 Dow. & Ry. K. B. 423; *sub nom.* YARWORTH'S CASE, 1 L. J. O. S. K. B. 112.

Annotations:—*Dctd.* Watson v. Frazer (1841), 9 Dowl. 741. *Consd.* Hayes v. Carr (1842), 3 Man. & G. 852; Duckitt v. Satchwell (1844), 12 M. & W. 779.

1719. —.]—Where an infant sued by a *prochein ami*, who was stated to be insolvent, & fraud was suggested, the ct. ordered him to give security for costs.—MANN v. BERTHEN (1830), 4 Moo. & P. 215; 8 L. J. O. S. C. P. 155.

Annotation:—*Refd.* Hayes v. Carr (1842), 3 Man. & G. 852.

1720. —.]—The next friend of the infant pltf. was insolvent, & had been indemnified from the costs of the suit; & for those reasons deft. moved that the proceedings in the suit might be stayed until the next friend was changed or had given security for costs. Motion refused.—MURRELL v. CLAPHAM (1836), 8 Sim. 74; 59 E. R. 30.

1721. —.]—The ct. will not compel the next friend of an infant, on the ground of poverty, to give security for costs.—FELLOWS v. BARRETT (1836), 1 Keen, 119; 5 L. J. Ch. 204; 48 E. R. 252.

Annotation:—*Expld.* & *Folld.* Murrell v. Clapham (1836), 8 Sim. 74.

1722. —.]—The impecuniosity of the next friend of an infant is not of itself sufficient ground for removing him or requiring him to give security for costs nor is the fact that he is a stranger to the family a sufficient ground for removing him when the action is *prima facie* for the benefit of the infant (NORTH, J.).—JONES v. EVANS (1886), 31 Sol. Jo. 11.

1723. — When name struck out as party.]—Co-pltf., as next friend, struck out, but, as a general rule, upon giving security for the costs incurred.—WITTS v. CAMPBELL (1806), 12 Ves. 493; 33 E. R. 186, L. C.

Annotation:—*Refd.* Fellows v. Barrett (1836), 1 Keen, 119.

1724. — Misdescription of next friend—Not found at residence described—Effect.]—Pltf., an infant, sued by *prochein ami*; the latter not being found at the place described as his residence in the petition, & deft. failing to obtain more precise information from pltf.'s attorney, a rule was obtained calling upon pltf. to show cause why the proceedings should not be stayed until security was given for costs. The ct. discharged the rule with costs.—HAYES v. CARR (1842), 3 Man. & G.

PART XIV. SECT. 1, SUB-SECT. 10.—A.

1713 i. Liability of next friend—General rule—Not ordered.]—An infant cannot be required to give security for costs nor can his guardian or next friend.—MORAN v. KELLOGG, 10 C. L. T. Occ. N. 184.—CAN.

1713 ii. —.]—Infants having a *bona fide* cause of action are privileged suitors; & the same rule as to security for costs should not be applied as in the case of adults.—SCOTT v.

NIAGARA NAVIGATION Co. (1893), 15 P. R. 409, 455.—CAN.

1713 iii. —.]—FAHEY v. JEPHCOTT (1901), 21 C. L. T. 155; 1 O. L. R. 198.—CAN.

1713 iv. —.]—The next friend of a minor pltf. cannot be compelled to give security for costs.—ST. JOHN v. BESBOROUGH (EARL) (1819), 1 Hog. 41.—IR.

*o. Insufficient means of next friend—Whether material to order.]—*In the case of an infant pltf., the ct. will

not require security for costs, or remove a next friend because he is not a person of substance.—*Re* MCCONNELL (1871), 3 Ch. Ch. 423.—CAN.

*p. Next friend abroad.]—*Action by the father of an infant as next friend & also on his own behalf to recover damages resulting to the father & the infant from an injury to the infant for which it was alleged defts. were liable. The father resided in England, & the infant in Ontario, as shown by indorsement on writ of

852; 4 Scott, N. R. 560; 11 L. J. C. P. 111; 133 E. R. 1383.

1725. — Occupation.]—The next friend of an infant pltf. described himself as of a certain address, "clerk." From inquiries made upon the spot, it appeared that he was in occupation of the house mentioned in the description, but was a letter carrier in the General Post Office.

Motion by deft. to compel this next friend to give security for costs on the ground of misdescription, refused with costs.—*WATTS v. KELLY* (1858), 6 W. R. 206.

1726. — Next friend abroad.]—The next friend of infant pltf. having gone to Australia, the ct., at the instance of deft., ordered security for costs to be given.—*BURNIE v. GETTING* (1852), 18 L. T. O. S. 253.

1727. — Time for applying for security—Discretion of court.]—The old rule in Chancery that an application that a next friend should give security for costs must be made before the next material step in the cause is taken, & the old rule at Common Law that the like application must be made before issue joined, are abrogated by the new Judicature Rules; & under R. S. C., Ord. 16, r. 8, the ct. has a judicial discretion to direct security for costs to be given at any time.—*MARTANO v. MANN* (1880), 14 Ch. D. 419; 49 L. J. Ch. 510; 42 L. T. 890, C. A.

Annotation:—Reid. Re Smith, Bain v. Bain (1896), 75 L. T. 46.

1728. Security for costs of appeal.]—Pltf., an infant, brought an action in the county ct., & sued by his next friend. Judgment was given for defts. with costs, but they were unable to obtain payment owing to the next friend's insolvency. Pltf. appealed from the judgment. On an application by defts. for an order that the next friend should give security for the costs of the appeal:—*Held*: by R. S. C., Ord. 59, r. 17, which applies the provisions of Ord. 58, r. 15, to appeals from county cts., there was power to make an order, & as the next friend was insolvent, & was prosecuting the appeal for the benefit of another person, she must give security.—*SWAIN v. FOLLOWS* (1887), 18 Q. B. D. 585; 56 L. J. Q. B. 310; 56 L. T. 335; 35 W. R. 408, D. C.

Annotations:—Folld. Wilcox v. Wallis Crown Cork & Syphon Co. (1914), 58 Sol. Jo. 381. *Reid. Masling v. Motor Hiring Co.* (Manchester), [1919] 2 K. B. 538.

1729. —.]—Infant pltf. by her next friend brought an action in the county ct. under the Employers' Liability Act, 1880 (c. 42), when judgment was given for defts. Pltfs. by her next friend gave notice of appeal, & defts. applied to the Div. Ct. for an order for security of costs, giving evidence on affidavit that the next friend would be unable, if unsuccessful, to pay deft.'s costs. Counsel for pltf. contended that the ct. should look into the merits,

& if they thought there were reasonable grounds for the appeal, should not order security. The ct. following *Swain v. Follows*, No. 1728, *ante*, without examining into the merits, made an order for security of costs.—*WILCOX v. WALLIS CROWN CORK & SYPHON CO., LTD.* (1914), 58 Sol. Jo. 381; 78 J. P. Jo. 124, D. C.

B. Costs on Judgment or Order.

(a) Liability of Infant.

1730. General rule—No liability.]—An infant shall not pay costs.

If an infant brings trespass by guardian, & afterwards he was nonsuit, he shall render no costs (*per* CUR.).—*GRAVE v. GRAVE* (1584), Cro. Eliz. 33; 78 E. R. 298.

Annotations:—Apld. Turner v. Turner (1726), 2 Stra. 708. *Consd. Dow v. Clark* (1833), 3 Tyr. 866.

1731. —.]—Infant pays no costs on a bill filed by *prochein ami*.—*TURNER v. TURNER* (1726), 2 Stra. 708; 2 Eq. Cas. Abr. 238; 93 E. R. 799, L. C.; *previous proceedings* (1725), 2 P. Wms. 297, L. C.

Annotation:—Reid. Dow v. Clark (1833), 1 Cr. & M. 860.

1732. —.]—*COOKE v. FRYER*, No. 1671, *ante*.

1733. —.]—The petition of an infant pltf. in a cause is the petition of his next friend, & the next friend was ordered to pay costs.—*JONES v. LEWIS* (1847), 1 De G. & Sm. 245; 63 E. R. 1052; *sub nom. JONES v. LEWIS, Re TRINITY HOUSE*, 9 L. T. O. S. 168; 11 Jur. 511.

1734. Repudiation after majority—Whether liability incurred.]—*ANON.* (1819), No. 1668, *ante*.

1735. —.]—*BOSCHETTI v. POWELL*, No. 1670, *ante*.

1736. Adoption after majority—Or omission to repudiate—Liability for all costs.]—*BOSCHETTI v. POWELL*, No. 1670, *ante*.

1737. Establishing right to fund—Costs payable thereout.]—Where a fund to which an infant was absolutely entitled was standing in the bank books in the joint names of the infant & another person deceased: upon petition, that the costs of a suit establishing the infant's right to the fund might be raised & paid out of the fund, the ct. ordered the fund to be brought into ct., the costs to be raised & paid, & the dividends to accumulate for the infant's benefit.—*Re PITT* (1855), 26 L. T. O. S. 135; 1 Jur. N. S. 1155.

1738. Infant suing without next friend—Execution for costs—No relief given.]—The ct. refused, on motion, to discharge an infant pltf., who had sued without *prochein ami* or guardian, & was in execution for the costs.—*FINLEY v. JOWLE* (1810), 13 East, 6; 104 E. R. 97.

1739. — Costs of amendment.]—*FLIGHT v. BOLLAND* (1828), 4 Russ. 298; 38 E. R. 817.

Annotations:—Reid. King v. Bellord (1863), 11 W. R. 900.

summons. Defts. moved for an order for security for costs. Order granted & in default of security being given it directed that the claim of the father be struck out.—*FELGATE v. HEGLER*, (1904), 4 O. W. R. 439; 5 O. W. R. 91; 9 O. L. R. 315.—CAN.

q. Form of jurat.]—*Re AUSEBROOK (AN INFANT)* (1853), 4 Gr. 109.—CAN.

r. Infant out of jurisdiction.]—An infant out of the jurisdiction petitioning for relief will be required to give security for costs.—*STINSON v. MARTIN* (1863), 2 Ch. Ch. 86.—CAN.

t. —.]—An infant, residing out of the jurisdiction, brought an action for administration, by her mother, who resided in the jurisdiction, but was without substance, as next friend:—*Held*: pltf. could not be

required to furnish security for costs.—*ROBERTS v. COUGHLIN* (1898), 18 P. R. 94.—CAN.

PART XIV. SECT. 1, SUB-SECT. 10.—B. (a).

1730 i. General rule—No liability.]—If a guardian or next friend of an infant retain an attorney to act for the infant, no contract is created between the attorney & the infant upon which the attorney can sue the infant for costs.—*RADEANATH BHOSE v. SUTTOPROSONO GHOSE* (1867), 2 Ind. Jur. N. S. 269.—IND.

1730 ii. —.]—A solr. cannot recover the costs of litigation incurred by the next friend of a minor on his behalf from the *quondam* minor, who, on coming of age, repudiates the pro-

ceedings, there being no relation of contract between them. Assuming that the legal proceedings were in the nature of necessities, the next friend is the person responsible to the solr.—*BRANSON v. APPASAMI* (1894), 1 L. R. 17 Mad. 257.—IND.

a. Solicitor's costs.]—Where a suit has been brought by a minor through his next friend for declaration of the infant's title to & possession of property, the attorney is entitled to have a charge declared on the properties for the amount of costs incurred by him, & he is entitled to recover the same in a suit.—*KUMAR KRISHNA DUTT v. HARI NARAIN GANGULY* (1916), 1 L. R. 43 Cal. 676.—IND.

b. Action for breach of trust.]—Where in an administration action

Sect. 1.—On behalf of infant: Sub-sect. 10, B. (a) (b) i.]

Mentd. *Pickering v. Ely* (Bp.) (1843), 2 Y. & C. Ch. Cas. 249; *Norris v. Jackson* (1860), 1 John. & H. 319.

1740. Application by solicitor undertaking suit—To charge infant's estate—Infant must oppose application.]—The ct. will not hear an application by a solr. for an order to change the real estate of an infant with the costs of a suit instituted for its recovery unless the application is substantially opposed on behalf of the infant.—**BONSER v. BRADSHAW** (1862), 10 W. R. 481, L. JJ.; *subsequent proceedings* (1863), 4 Giff. 260.

Annotations:—Consd. *Re Keane, Lumley v. Desborough* (1871), L. R. 12 Eq. 115. **Refd.** *Baile v. Baile* (1872), L. R. 13 Eq. 497.

1741. Concurrent liability with next friend.]—**SLINGSBY v. A.-G.**, No. 1751, *post*.

Recovery of costs paid to solicitor.]—*See* No. 1711, *ante*.

Security for costs.]—*See* Sub-sect. 10, A., *ante*.

(b) *Liability of Next Friend.*

i. *To Defendant or Opposite Party.*

1742. General rule.]—The definition clause in the Judicature Act, 1873 (c. 66), s. 100, enacts that "parties shall include every person served with notice of or attending any proceeding, although not named on the record." Whether this includes next friend or not, it is clear that a next friend is liable to pay costs; & in my opinion the true construction of "parties" in these rules includes all persons who initiate claims, whether they do so for themselves or on behalf of others (**KENNEDY, L.J.**).—**CATT v. WOOD**, [1908] 2 K. B. 458; 77 L. J. K. B. 756; 98 L. T. 919; 24 T. L. R. 542, C. A.; *affd.*, [1910] A. C. 404, H. L.

Annotations:—Mentd. *Heard v. Pickthorne*, [1913] 3 K. B. 299; *Wayman v. Perseverance Lodge of the Cambridge-shire Order of United Brethren Friendly Soc.*, [1917] 1 K. B. 677.

1743. Neglect to prosecute action.]—*Prochein ami* to pay costs for her default.—**ENGLEFIELD v. ROUND** (1727), Cooke, Pr. Cas. 32; 125 E. R. 940.

1744. Unsuccessful proceedings.]—**BUCKLY v. BUCKERIDGE** (1767), 1 Dick. 395; 21 E. R. 323.

1745. —.]—Writ of *Ne exeat regno*, obtained by a resident here against a resident in the West Indies upon a demand arising there, when the answer came in, was discharged under the circumstances, with costs against the *prochein ami* of infant pltf.: but upon the admission in the answer deft. was ordered to give security to abide the decree.—**RODDAM v. HETHERINGTON** (1799), 5 Ves. 91; 31 E. R. 487, L. C.

1746. —.]—The *prochein ami* of an infant pltf. who is non-suited, is liable for the costs of the action.—**NEWTON v. LONDON, BRIGHTON & SOUTH COAST RY. CO.** (1849), 7 Dow. & L. 328; 19 L. J. Q. B. 12; 14 L. T. O. S. 206.

1747. —.]—A bill was filed on behalf of an infant, with the sanction of the master, to set aside deeds, executed by a lunatic at a time

subsequent to that at which he had been found lunatic by inquisition. An issue having been directed, the jury found in favour of the deeds. The bill was dismissed with costs of suit & of the issue.—**FRANK v. MAINWARING** (1841), 4 Beav. 37; 49 E. R. 251.

1748. —.]—*Re BROCKLEBANK, Ex p. BROCKLEBANK*, No. 1525, *ante*.

1749. —.]—**BOLTON v. BOLTON** (1884), 28 Sol. Jo. 737.

1750. —.]—next friends take care what they are about when they institute hostile actions in the name of infants. They ought not to be allowed to institute actions which fail except at their own risk & not at the risk of the infants. In our opinion it would be wrong to let these costs come out of the estate; those who have incurred them ought to pay them (**LINDLEY, L.J.**).—*Re FISH, BENNETT v. BENNETT*, [1893] 2 Ch. 413; 62 L. J. Ch. 977; 2 R. 467; *sub nom. Re FISH, FISH v. BENNETT*, 69 L. T. 233, C. A.

Annotations:—Mentd. *Clarkson v. Robinson*, [1900] 2 Ch. 722; *Re Robinson, Clarkson v. Dixon* (1900), 83 L. T. 164; *Re Chalinder & Herington*, [1907] 1 Ch. 58.

1751. —.]—In this legitimacy suit in which the judge of first instance gave judgment for infant petitioner but ordered each of the parties, other than the A.-G. to pay his own costs, the Ct. of Appeal reversed the judgment for petitioner & ordered the infant & his guardian to pay the costs both in the Ct. of Appeal & in the ct. below. The House of Lords upheld the decision of the Ct. of Appeal & dismissed the appeal to that House with costs to be paid personally by the guardian *ad litem* or next friend.—**SLINGSBY v. A.-G.** (1916), 33 T. L. R. 120, H. L.

Annotations:—Folld. *Rutter v. Rutter*, [1921] P. 136. **Mentd.** *A.-G. v. Cory, Kennard v. Same* (1919), 88 L. J. Ch. 410; *Compafila Martiartu v. Royal Exchange Assce. Corpn.* (1922), 92 L. J. K. B. 546.

1752. —.]—The guardian *ad litem* of an infant husband who is petitioner in the Divorce Div. is in the same position as a next friend in the Ch. & K. B. Divs. as to costs, & is liable to be ordered to pay the costs of an unsuccessful petition apart from any question of misconduct.—**RUTTER v. RUTTER**, [1921] P. 136; 90 L. J. P. 129; 124 L. T. 796; 37 T. L. R. 264.

1753. Proceedings improperly instituted.]—The *prochein ami* of pltf. an infant, ordered to pay the costs of an improper & unfounded application.—**BUCKTON v. BUCKTON** (1769), 2 Dick. 794; 21 E. R. 479.

1754. — Insufficient previous inquiry.]—Bill by an infant dismissed with costs upon a fact, which, though not known, when the bill was filed, might with reasonable diligence have been known: the next friend not allowed the costs out of the infant's estate: & consideration reserved whether those costs shall be repaid, & out of what fund, or by whom, until hearing.—**PEARCE v. PEARCE** (1804), 9 Ves. 548; 32 E. R. 715, L. C. **Annotation:—Consd.** *Caley v. Caley* (1877), 25 W. R. 528.

beneficiaries set up claims against the trustees in respect of alleged breaches of trust, & fail in respect of some of them & abandon others, they may be ordered to pay the trustees' costs in connection with such claims. Infant parties to the action may be ordered to pay the costs of matters they have litigated.—**MILLS v. ISAAC** (1901), 20 N. Z. L. R. 752.—N.Z.

PART XIV. SECT. 1, SUB-SECT. 10.— B. (b) i.

1742 i. General rule.]—A next friend is liable for costs incurred while acting as such next friend, & not for other or

past costs.—**POOLE v. POOLE** (1869), 2 Ch. Ch. 459.—CAN.

1742 ii. —.]—In general a next friend is in the same position as any other litigant, & receives or pays costs personally as between himself & defts.—**SMITH v. MASON** (1897), 17 P. R. 444.—CAN.

1744 i. Unsuccessful proceedings.]—Pltf. had been represented in this action by next friend & the action had been dismissed. A side bar had been taken out for payment of costs, which were duly taxed, but next friend refused to pay same. Order absolute for attachment issued against next friend.

—**McGAW v. FISH** (1908), 6 E. L. R. 373; 39 N. B. R. 1.—CAN.

1754 i. Proceedings improperly instituted—Insufficient previous inquiry.]—The ct. being of opinion that a suit had been instituted recklessly & without proper inquiry, ordered the next friend of pltf. to pay the costs of defts. as between party & party.—**HUTCHINSON v. SARGENT** (1870), 17 Gr. 8.—CAN.

1754 ii. —.]—Where one commenced an action as next friend to an infant to restrain waste on the infant's property without any notice to deft., & without any investigation as to the good reasons which deft. had for acting

1755. — — —.]—A next friend having filed a bill for the administration of testator's estate, & to protect the infants, without being a friend of the family, & without making sufficient inquiries:—*Held*: she must pay her own costs, although the suit resulted in the appointment of a new trustee, which was a protection to the estate.—*EDGLEY v. ADAMS*, *EDGLEY v. ADAMS* (1874), 31 L. T. 15.

1756. — — —.]—*Re HICKS*, *LINDON v. HEMERY*, [1893] W. N. 138.

1757. — — — **Improper motives—Harassing defendant.**]—A bill filed on behalf of an infant ordered to be taken off the file, without any reference to the master, with costs to be paid by the next friend, he being a person in low circumstances, & of immoral character, & there being reason to suppose that he had instituted the suit from spite against one of defts.—*WALKER v. ELSE* (1835), 7 Sim. 234; 4 L. J. Ch. 54; 58 E. R. 826.

1758. — — —.]—*GOLDS v. KERR*, [1884] W. N. 46.

1759. — — —.]—The ct. being of opinion that an action for an account brought by an infant suing by his father as next friend was instituted by the father with the sole object of extorting money & ought never to have been commenced, stayed the action on the application of deft. & ordered the next friend to pay the costs.—*HUXLEY v. WOOTTON* (1912), 29 T. L. R. 132; 57 Sol. Jo. 145.

1760. — — — **Own purposes.**]—In a clear case, the ct. being of opinion that a suit had been commenced by the next friend of infants to promote his own views, & not for the benefit of the infants, summarily, & without a reference to the master, dismissed it with costs to be paid by the next friend.—*SALE v. SALE* (1839), 1 Beav. 586; 48 E. R. 1068.

Annotation:—*Folld. Guy v. Guy* (1840), 2 Beav. 460.

1761. — — — **Unnecessary.**]—*CAMPBELL v. CAMPBELL*, *CAMPBELL v. MACKAY*, No. 1661, *ante*.

1762. — — — **No benefit to infant.**]—A suit was instituted on behalf of two infant pltfs., one of whom, on attaining twenty-one, gave notice of a motion that her name might be struck out of the bill as pltf., & that it might be referred to the master to inquire whether it was for the benefit of the other pltf. that the suit should be continued. The ct. granted the former part of the motion; but refused, upon the notice of motion, to dismiss the bill as to infant pltf. On the following seal day, a motion was made on behalf of infant pltf., by the former co-pltf., as her next friend for this application, that the bill should be dismissed, with costs, to be paid by the next friend. The ct. being satisfied that the suit had not been instituted with a view of benefiting the infants, & that it would not be for their benefit that it should be continued, granted the motion without a reference to the master.—*GUY v. GUY* (1840), 2 Beav. 460; 9 L. J. Ch. 289; 4 Jur. 313, 500; 48 E. R. 1259.

1763. — — — **Exhaustion of assets.**]—*M'INTOSH v. WATSON* (1843), 1 L. T. O. S. 252.

1764. — — —.]—The next friend of infant

pltfs. ordered to pay the costs of an action against exors. for administration, the chief clerk having found in answer to an inquiry directed shortly after the issue of the writ that it would not be fit & proper, & for the benefit of pltfs., that the action should be further prosecuted.—*THOMAS v. ELSUM* (1877), 46 L. J. Ch. 793; *subsequent proceedings, sub nom. Re ELSOM*, *THOMAS v. ELSUM*, 6 Ch. D. 346, C. A.

1765. — — — **Unfounded allegation of ill-treatment—By person having custody.**]—A widow, on the death of her husband, entered into possession of the small real & personal property he had left, & out of its rents, & by carrying on his trade, maintained herself & his five infant children, the three eldest of whom were his children by a former marriage. Shortly after the husband's death a bill was filed in the names of all the children by the maternal grandfather of the three eldest, as their next friend, for a declaration of the rights of the infants & for accounts, & the appointment of guardians & of a receiver. Infant pltfs., by their next friend, presented a petition in the cause containing imputations against the widow of improper treatment by her of the infants, & asking the appointment of guardians & of a receiver. The ct. directed a reference to the master, who by his report approved of the widow & her co-exor. as the guardians of all the children, & found that the whole income ought to be allowed for their maintenance. The ct. on petition confirmed this report, & directed that the receiver should pay all the income of the property to the widow for the maintenance of the children, thereby leaving all parties just in the same position as they had been in before the suit was instituted; & the costs of all the proceedings were ordered to be paid by the next friend, & all further proceedings were stayed until further order.—*ANDERTON v. YATES* (1852), 5 De G. & Sm. 202; 64 E. R. 1081.

1766. — — —.]—The master reported that a suit instituted on behalf of infants was improperly instituted, & ought not to be prosecuted: it was dismissed, with costs to be paid by the next friend.—*FOX v. SUWERKROP* (1839), 1 Beav. 583; 48 E. R. 1068.

Annotation:—*Folld. Guy v. Guy* (1840), 2 Beav. 460.

1767. **Defect in form—Address of next friend omitted—Costs of amendment.**]—*MAJOR v. ARNOTT* (1856), 26 L. T. O. S. 232; 2 Jur. N. S. 80; 4 W. R. 229.

1768. — — — **Erroneous pleading by solicitor—Application for payment by solicitor—Irregular.**]—The issue in this action was, by a judge's order, directed to be amended, & the costs occasioned by the error were ordered to be paid by the *prochein ami*, upon whom a copy of the order was served, with a demand for payment of the costs. The error arose from a mistake of pltf.'s attorney, who admitted to the *prochein ami* his liability, & promised to pay the costs. The attorney did not pay, & the order was made a rule of ct.; further costs were incurred, & an execution for the amount was issued against the *prochein ami*. On an application to the ct., on the part of the

in the manner complained of:—*Held*: the next friend should pay the costs.—*MILL v. MILL* (1885), 8 O. R. 370.—*CAN.*

1761 i. — — — **Unnecessary.**]—The ct. will not countenance the unnecessary incurring of costs of filing a bill for the partition & sale of the estate of infants for the purpose of discharging a mtge. thereon, which object could be obtained as effectually in the ordinary

way by proceedings being taken at the instance of the mtgee.; & where such a suit was brought in the name of infants, the ct. on dismissing the bill, ordered the costs of defts. to be paid by the next friend of the infants.—*CARROLL v. CARROLL* (1876), 23 Gr. 438.—*CAN.*

1762 i. — — — **No benefit to infant.**]—In the case of small estates an administra-

tion suit can only be justified where every possible means of avoiding the suit has been exhausted before suit brought. Where a next friend filed a bill for a minor without having observed this rule, & the suit did not appear to have been necessary in the interests of the minor, the next friend was charged with all the costs.—*MCANDREW v. LA FLAMME* (1872), 19 Gr. 193.—*CAN.*

ct. 1.—On behalf of infant: Sub-sect. 10, B. (b) i., ii. & iii., (c) & (d).]

prochein ami, for an order to compel the attorney to pay the sum due, under the rule of ct., with the costs of this application:—*Held*: the application was without precedent, & must be refused. The nature of the negligence complained of was not shown, & a party making such an application ought to be prepared on affidavits to show what the negligence was: *Semble*: it would have been different if the judge's order had directed the costs to be paid by the attorney.—*DICKINSON v. JACOBS, Re AN ATTORNEY* (1862), 5 L. T. 757; 10 W. R. 303.

1769. Infant without means.]—*RHODES v. SWITHENBANK*, No. 1979, *post*.

1770. Order to pay—Attachment for non-compliance.]—*SLAUGHTER v. TALBOTT*, No. 548, *ante*.

1771. — Finality against next friend personally.]—Where, at the hearing, costs are ordered to be paid by a next friend, without any reservation of the question how they are ultimately to be borne, the order is final against him personally, & cannot be reopened on further consideration.—*CALEY v. CALEY* (1877), 25 W. R. 528.

1772. — — —.]—*HARRISON v. O'DONNELL*, [1919] W. N. 104.

1773. Personal liability—Necessity for dishonest intention—Mistake or misapprehension insufficient.]—Nothing short of a dishonest intention will be sufficient to fix a *prochein ami* personally with costs. No degree of mistake or misapprehension will be sufficient.

A master's report on a reference to inquire whether a suit instituted in the name of an infant by a *prochein ami* was necessary is not a subject for exceptions; but any objection to it must be made on the motion to confirm the report.

Whoever will stand forward in that character [*prochein ami*] on the behalf of infants is to be encouraged to every possible extent, while he can be supposed to intend the infants' benefit (*LORD THURLOW, C.*).—*WHITTAKER v. MARLAR* (1786), 1 Cox, Eq. Cas. 285; 29 E. R. 1169, L. C.

Annotations:—*Consd.* *Nalder v. Hawkins* (1833), *Coop. temp. Brough.* 175; *Clayton v. Clarke* (1861), 30 L. J. Ch. 657. *Refd.* *Steeden v. Walden*, [1910] 2 Ch. 393.

ii. To Solicitor Employed by Him.

1774. General rule.]—A person who signs the usual authority for the use of his name as next friend to an infant, becomes *primâ facie* liable to pay the infant's solr.'s bill of costs, as well as those of the other side.

If for any cause he disputes this liability, the solr. may nevertheless obtain the common order for taxation against him without mentioning that fact, for the defence cannot be raised in the ordinary process of taxation, but requires independent proceedings to be taken to enforce it.—*Re FLOWER* (1871), 19 W. R. 578.

Annotation:—*Refd.* *Re Jones* (1887), 36 Ch. D. 105.

1775. Order discharging solicitor—Irregularly obtained.]—*BROWN v. BROWN, BROWN v. BASTOW*, No. 1684, *ante*.

1776. Formal retention by next friend—Instructions to solicitor given by third party.]—If a client repudiates his retainer of an attorney to conduct

a suit, the latter is entitled to bring an action for his costs without waiting for the final completion of the suit. Where a person lends his name as the next friend of an infant pltf., & for the purpose of complying with the rules of the Ct. of Ch. signs a retainer to an attorney to conduct the suit, although he does not further interfere in the matter, & the attorney receives his instructions from third parties, the next friend is liable on his retainer for the costs, unless he displaces his *primâ facie* liability by clear proof that the attorney acted on the credit of other persons.—*HAWKES v. COTTRELL* (1858), 3 H. & N. 243; 27 L. J. Ex. 369; 157 E. R. 462.

1777. Death of next friend—Liability of estate.]—*SOTHERBY v. WILLIAMSON* (1845), 5 L. T. O. S. 284.

iii. Deprivation of Costs.

1778. Proceedings consequential on former suit—Instituted after majority—Without infant's consent.]—*BROWN v. WEATHERHEAD*, No. 1682, *ante*.

1779. Proceedings not for infant's benefit.]—Pltf. acted in the cause as the next friend of infant children, which cause was instituted for the purpose of establishing the will of the father of the children. The next friend, a solr., had, as it was alleged, been induced to take upon himself the office of next friend by the discharged solr.; the bill was filed on the day of the funeral of testator, & before the will was proved by defendant, the exor.:—*Held*: nevertheless pltf. was entitled to his costs of the suit.

The circumstances did not authorise him [the master] to deprive pltf. of his costs, notwithstanding the unusual haste in filing the bill might show a great want of delicacy, yet it might be for the benefit of the infants; & if the suit was not for their benefit, the parties might have applied to the ct. to stop the proceedings in the cause (*WIGRAM, V.-C.*).—*PARLEBEAN v. WICKHAM* (1848), 11 L. T. O. S. 44.

1780. — — —.]—(1) Although the ct. will not allow an infant's suit to proceed which is not for the infant's benefit, it ought not, in making a decree for accounts in such a suit, to direct an inquiry whether any benefit has accrued to the infants from the suit, so as to make the answer to that inquiry depend on the result of the accounts.

(2) Where an administration suit had been instituted by an infant, in which accounts had been directed, & property secured, but the suit appeared not to have been instituted with the view of benefiting the infant, the ct. gave the next friend no costs up to the decree.

(3) It is a *primâ facie* benefit to an infant to be made a ward of ct. & to have his property secured & duly administered.—*CLAYTON v. CLARKE* (1861), 3 De G. F. & J. 682; 30 L. J. Ch. 657; 4 L. T. 489; 7 Jur. N. S. 562; 9 W. R. 718; 45 E. R. 1042, L. JJ.

Annotation:—*As to* (2) *Refd.* *Steeden v. Walden*, [1910] 2 Ch. 393.

(c) Indemnification of Next Friend.

1781. In respect of costs paid to defendant or opposite party.]—*SLAUGHTER v. TALBOTT*, No. 548, *ante*.

PART XIV. SECT. 1, SUB-SECT. 10.—B. (b) ii.

1774 i. General rule.]—A solr. cannot recover the costs of litigation incurred by the next friend of a minor on his behalf from the *quondam* minor, who, on coming of age, repudiates the proceedings, there being no relation of contract between them. Assuming

that the legal proceedings were in the nature of necessities, the next friend is the person responsible to the solr.—*BRANSON v. APPASAMI* (1894), 1 L. R. 17 Mad. 257.—*IND.*

e. Only while acting as next friend.]—*TAYLOR v. WOOD* (1892), 14 P. R. 449.—*CAN.*

PART XIV. SECT. 1, SUB-SECT. 10.—B. (c).

d. Costs of appeal.]—An order was made indemnifying the next friend of infant pltf. out of their money for the costs of an appeal to the Supreme Ct. of Canada, where the appeal was advised by more than one counsel, & one of the judges of the ct.

1782. —.]—**BROWN v. JONES** (1748), 2 Fowler's Exchequer Practice 2nd ed. 316.

1783. — **Action for infant's benefit.**—The next friend of an infant allowed costs though the bill had been dismissed; the master having previously reported the suit for the infant's benefit.—**TANER v. IVIE** (1752), 2 Ves. Sen. 466; 28 E. R. 298; *sub nom.* **TANNER v. IVIE**, 1 Dick. 168, L. C. Annotations:—**Consd.** Steeden v. Walden, [1910] 2 Ch. 393. **Mentd.** M'Leod v. Drummond (1810), 17 Ves. 152.

1784. —.]—The suit was in fact as to part of it a suit for benefit of the infants who were entitled to the residuary estate, & pltf. was in effect in the situation of their *prochein ami* for this purpose; & if she had been really *prochein ami*, she clearly would have been entitled to her costs (**ARDEN, M.R.**).—**THOMPSON v. SHEPPARD** (1789), 2 Cox, Eq. Cas. 161; 30 E. R. 74.

1785. —.]—Under the advice of counsel, an infant, by his next friend, brought an action. The action was unsuccessful & was dismissed with costs, damages being given to defts. In an action brought by the next friend against the infant claiming to be indemnified against the costs incurred & the costs & damages which he had been ordered to pay, & further claiming a declaration that he was entitled to a charge or lien upon certain property of the infant:—**Held:** the next friend was entitled to be indemnified by the infant against the costs & damages, but that no declaration of charge could be made as the ct. was not administering the infant's property.—**STEEDEN v. WALDEN**, [1910] 2 Ch. 393; 79 L. J. Ch. 613; 103 L. T. 185; 26 T. L. R. 590; 54 Sol. Jo. 681.

1786. In respect of own costs—**Right of representative of deceased next friend.**—Legatees' suit by an adult & an infant pltf. by A., his next friend. After decree & payment of money into ct., A. died. No other next friend was named, & adult pltf. did not prosecute the suit. Deft., the exor., filed a supplemental bill, & brought on the cause for further directions:—**Held:** (1) adult pltf. in the original suit was not entitled to her costs of that suit; (2) if any person would be entitled to such costs, as representing pltf. in that suit, it could only be the personal representative of deceased next friend; & defts. in the original suit, & pltf. & all defts. in the supplemental suit, were entitled to their costs out of the estate.—**JACKSON v. WOOLLEY, WOOLLEY v. JACKSON** (1841), 12 Sim. 12; 10 L. J. Ch. 197; 59 E. R. 1034.

Annotation:—**Generally, Mentd.** Hearn v. Wells (1844), 1 Coll. 323.

1787. — **Successful action.**—**PALMER v. JONES**, No. 1792, *post*.

1788. — **Right of set-off against debt due to estate—Administration action.**—The costs of a next friend of an infant in an administration

action are treated as the costs of the infant, & accordingly they cannot be set off against a debt which the next friend owes to the estate.—**Re BARTON, HOLLAND v. KERSLEY** (1912), 56 Sol. Jo. 380.

(d) *What Costs Allowed.*

1789. Costs beyond taxed costs.]—The ct. refused a *prochein ami* the costs beyond the taxed costs.—**OSBORNE v. DENNE** (1802), 7 Ves. 424; 32 E. R. 172.

1790. — **Fair expenses.**—Trustee or the next friend of an infant entitled to fair expenses, beyond taxed costs, under the head of just allowances.—**FEARNS v. YOUNG** (1804), 10 Ves. 184; 32 E. R. 815, L. C.

Annotations:—**Mentd.** Graham v. Wickham (1865), 2 De G. J. & Sm. 497; Wilkes v. Saunton (1877), 7 Ch. D. 188.

1791. Costs of solicitor instructed—**Notice of retainer to defendant.**—An infant, suing by his next friend, & who has recovered in an action, is entitled to the costs of an attorney employed to conduct such action for him, although the writ of summons was sued out in person, & the only notice to deft. of an attorney being employed was the address of the next friend being at the office of such attorney, as stated on the back of the declaration, as follows:—"E. B., next friend, at C.'s, 8, Symond's-inn, Chancery-lane."—**BRYANT v. WILSON** (1858), 3 C. B. N. S. 722; 30 L. T. O. S. 287; 4 Jur. N. S. 362; 6 W. R. 292; 140 E. R. 925.

1792. Costs before action brought.]—The next friend of infants conducting a suit on their behalf to a successful issue:—**Held:** entitled to his costs, charges, & expenses, properly incurred before suit with reference to the institution thereof, out of a fund in ct., recovered in the suit.—**PALMER v. JONES** (1874), 22 W. R. 909.

1793. Costs between party & party—**When paid out of fund in court.**—When the costs of infant pltf. suing by their next friend are directed to be paid out of a fund in ct. to which the infants are entitled in reversion, party & party costs only will be immediately paid; the next friend having liberty to apply for the difference between those costs & costs as between solr. & client when the fund comes into possession.—**DAMANT v. HENNEL** (1886), 33 Ch. D. 224; 55 L. T. 182; 34 W. R. 774.

Annotations:—**Folld.** *Re* Burton, Burton v. Burton, [1887] W. N. 160. **Distd.** *Re* Slaughter, Walton v. Aitchison, [1907] W. N. 197.

1794. —.]—**Re BURTON, BURTON v. BURTON**, [1887] W. N. 160.

Annotation:—**Distd.** *Re* Slaughter, Walton v. Aitchison, [1907] W. N. 197.

1795. —.]—**Re ALDRED, MARSHALL v. MARSHALL**, [1888] W. N. 82.

Annotation:—**Distd.** *Re* Slaughter, Walton v. Aitchison, [1907] W. N. 197.

of appeal had dissented from the rest.—**COTTINGHAM v. COTTINGHAM** (1885), 11 P. R. 13.—**CAN.**

e. —.]—Pltf., infants suing by a next friend, claimed against their father & the exors. of a will a forfeiture by their father of his share of testator's estate, & that they had become entitled to it. The action was occasioned by acts which, if they occurred, were done by the legatee after testator's death. The action was successful in the High Ct., but was dismissed on appeal:—**Held:** the costs should not be made payable out of testator's estate, nor out of the share of the infants' father, but should be paid by the next friend, without prejudice to his claim for indemnity out of the shares of the infants whenever they should come into possession.—**SMITH**

v. MASON (1897), 17 P. R. 444.—**CAN.**

PART XIV. SECT. 1, SUB-SECT. 10.—**B. (d).**

f. *Costs necessarily incurred by reason of infancy.*—In a case where infants were interested, & it was necessary to have the conveyance settled by the master, & one of the parties to the conveyance being out of the jurisdiction, it also became necessary to obtain a vesting order, the referee allowed the purchaser the extra costs so incurred.—**Re McMORRIS** (1871), 3 Ch. Ch. 430.—**CAN.**

g. —.]—Where in consequence of some of defts. being infants, a conveyance which might otherwise have been settled by the parties was necessarily referred to a master, the costs of such reference were ordered to be

borne by testator's estate.—**RODGERS v. RODGERS** (*circa* 1867), 2 Ch. Ch. 241.—**CAN.**

h. *Effect of defect.*—Where a cause was carried to a hearing in a defective state through an error common to all parties, diverse interests of infants being represented by one guardian & one counsel, no costs of that hearing were given to either party on the final disposition of the cause.—**MUNRO v. SMART** (1879), 26 Gr. 310.—**CAN.**

k. *Charge on judgment—Taxed costs.*—The power given by r. 1129 to make an order in favour of a solr. for a charge upon a judgment recovered by his exertions, is a discretionary one; the right given by the rule is ancillary to the solr.'s right to be paid on his

Sect. 1.—On behalf of infant: Sub-sect. 10, B. (d), (e) & (f) Sect. 2: Sub-sects. 1 & 2, A.]

1796. Costs between solicitor & client—When other fund available—To which infants absolutely entitled.]—*Re BURTON, BURTON v. BURTON, [1887] W. N. 160.*

Annotation:—Distd. Re Slaughter, Walton v. Aitchison, [1907] W. N. 197.

1797. — — — — —.]—*Re ALDRED, MARSHALL v. MARSHALL, [1888] W. N. 82.*

Annotation:—Distd. Re Slaughter, Walton v. Aitchison, [1907] W. N. 197.

(e) Costs in Concurrent Actions.

1798. One action discontinued—Costs of action discontinued—When allowed.]—Two suits were instituted in the name of an infant, by different persons as next friends. On a reference to the master, he reported that the second ought to be alone prosecuted. After a decree in the second suit, the next friend in the first suit applied by petition for his costs in that suit:—*Held*: the determination of the master did not imply that the first suit was improper, & the party was therefore entitled to his costs.

The ct. refused a reference to inquire as to the propriety of the first suit.—*CROWTHER v. FLOOD, CROWTHER v. FLOOD (1836), 5 L. J. Ch. 352.*

1799. — — — — —.]—*CROSS v. CROSS, No. 1665, ante.*

1800. — — — — — What costs allowed.]
OPENHEIM v. HENRY, No. 1666, ante.

1801. — — — — — Costs reserved.]—*ASHLEY v. ALLEN, JONES v. ASHLEY, No. 1559, ante.*

(f) Out of What Funds Payable.

Costs of solicitor retained by next friend—Lien on property recovered.]—*See SOLICITORS.*

1802. Fund in court—To which infant entitled—Defendant absconded—Poverty of next friend.]—Deft. who was decreed to pay the costs, being run away, & the *prochein ami* poor, the solr. was paid his bill of costs, out of money lodged in ct. for the benefit of pltf., during their infancy.—*STAINES v. MADDOX (1730), Mos. 319; 25 E. R. 416, L. C.*

1803. — — — — —.]—Petition by an infant entitled to a moiety of a fund in ct. asking the costs out of the funds, & to save expense, that a prospective order might be made as to the other moiety:—*Held*: the costs must come out of petitioner's share, & no prospective order could be made.—*RIVERS v. OADES (1852), 1 W. R. 75.*

1804. — — — — — Recovered by action.]—*PALMER v. JONES, No. 1792, ante.*

1805. In administration proceedings—Power of court to order costs out of estate—By sale or mortgage.]—In a suit to ascertain the construction of a will of real estate, & to carry the trusts thereof into execution, the ct. has power, if necessary, to direct a sale or mtge. of a sufficient part of the property, for the purpose of raising the taxed costs of the suit, although some of pltf. are infants.—*MANDENO v. MANDENO (1853), Kay, App. ii; 2 Eq. Rep. 419; 23 L. J. Ch. 50; 2 W. R. 33; 69 E. R. 311.*

1806. — — — — — As between solicitor & client.]—*Re SLAUGHTER, WALTON v. AITCHISON, [1907] W. N. 197.*

1807. — — — — — Out of infant's share—Unnecessary action.]—A residuary estate was divisible amongst several persons. An account was made up, & the adults received their shares. The infants

filed a bill for an account against the exors. & the other residuary legatees. The latter being satisfied, deprecated the proceedings. The accounts turned out to be substantially correct:—*Held*: the costs were payable out of pltf.'s share alone.—*MACKENZIE v. TAYLOR (1844), 7 Beav. 467; 49 E. R. 1146.*

Annotations:—Distd. Hilliard v. Fulford (1876), 4 Ch. D. 389. Refd. Re Cope, D'Auguler v. Cope (1885), 1 T. L. R. 611.

1808. Out of estate—Party liable insolvent.]—A suit was instituted by a next friend, on behalf of infants interested in the administration of testator's estate, for the purpose of setting aside an agreement which had been entered into by the exors. & trustees for the disposal of testator's business, & the bill contained charges of gross misconduct against T., one of the trustees & exors. T. defended the suit, & the bill was dismissed with costs, the ct. being of opinion that the agreement was for the benefit of the estate, & that the charges against T. were unfounded. The next friend being insolvent, T. applied in a suit for the administration of testator's estate to be allowed his costs out of the estate, but they were refused on the ground that he had not previously obtained leave to defend. But, on appeal, the decision was reversed & the costs were allowed.—*WALTERS v. WOODBRIDGE (1878), 7 Ch. D. 504; 47 L. J. Ch. 516; 38 L. T. 83; 26 W. R. 469, C. A.*

Annotations:—Consd. Re Dunn, Brinklow v. Singleton, [1904] 1 Ch. 648. Refd. Re Llewellyn, Llewellyn v. Williams (1887), 37 Ch. D. 317; Bruty v. Edmundson, [1917] 2 Ch. 285.

1809. — — — — — As "testamentary expenses."]
—*Re PARTON, PARTON v. PARTON (1911), 131 L. T. Jo. 106.*

1810. Charging order on real estate recovered—Attorneys & Solicitors Act, 1860 (c. 127), s. 28.]—Although in a suit instituted on behalf of an infant pltf., the ct. will, where defts. have been ordered to pay the costs of the suit but are insolvent, direct the costs due to pltf.'s solr. to be paid out of a fund in ct., the proceeds of sale of real estate recovered in the cause, it will not, under above sect., direct those costs to be made a charge on the real estate so recovered, inasmuch as that sect. applies only to suits instituted by adult pltf.—*BONSER v. BRADSHAW (1860), 30 L. J. Ch. 159; 3 L. T. 545; 25 J. P. 483; 7 Jur. N. S. 231; 9 W. R. 229; on appeal (1862), 10 W. R. 481, L. JJ.; subsequent proceedings (1863), 4 Giff. 260.*

Annotations:—Consd. Re Keane, Lumley v. Desborough (1871), L. R. 12 Eq. 115; Baile v. Baile (1872), L. R. 13 Eq. 497.

1811. — — — — —.]—The bill in this suit was filed on June 15, 1863, by M., as next friend of the then infant pltf., for a guardian, directions as to the maintenance of pltf. & his brothers & sisters, defts., accounts of the estate of testator, their grandfather, & for a receiver. The solr. employed by the next friend was a Mr. J. On July 4, a decree was made, directing inquiries as to testator's real estate; & on Feb. 6, 1864, the Chief Clerk made his certificate that the real estate was worth about £350 *per annum*. On Mar. 2, 1864, an order was made for the appointment of a guardian & receiver, & allowing a sum of £220 *per annum* for the maintenance of pltf. & defts. On Aug. 10, 1866, Mr. J., the solr., died. On Oct. 14, 1867, the infant pltf. attained twenty-one years of age. In Nov. 1867, he disentailed the real estate, of which

retainer. Where an infant recovered judgment for damages for personal injuries, the solr. retained by his father

was allowed a charge upon the judgment, but only to the extent of the costs taxed against deft.; & the ct.

refused to direct a sale of the judgment to enforce the charge.—*NEVILLS v. BALLARD (1898), 18 P. R. 134.—CAN.*

he was tenant in tail under his grandfather's will. In June, 1868, he obtained an order to discharge the receiver; & on Feb. 10, 1872, procured an order to change his solr. On a petition presented under above Act, by the personal representative of the solr., to establish a charge on the real estate for J.'s costs:—*Held*: the suit was properly instituted, & the solr. duly "employed" on behalf of the infant; the property was "preserved" in the suit for the benefit of the infant through the instrumentality of the solr.; the infant had, on attaining twenty-one, adopted the suit; Stat. Limitations was not a bar to the claim.—*BAILE v. BAILE* (1872), L. R. 13 Eq. 497; 41 L. J. Ch. 300; 26 L. T. 283; 20 W. R. 534.

Annotations:—*Appld. Re Turner, Wood v. Turner*, [1907] 2 Ch. 126. *Mentd. Briscoe v. Briscoe*, [1892] 3 Ch. 543.

—*See, generally*, SOLICITORS.

1812. In action for specific performance—Costs of infant heir—Out of purchase-money.]—B. contracted to sell real estate, & died before completion of the purchase intestate as to real estate, leaving an infant heir. On a bill for specific performance of the contract being filed by B.'s extrix. against the purchaser & infant heir:—*Held*: the heir was entitled to his costs as between solr. & client out of the purchase-money.—*BARKER v. VENABLES* (1865), 34 L. J. Ch. 420; 12 L. T. 796; 11 Jur. N. S. 480; 13 W. R. 803.

1813. In partition action—Out of infant's share.]—On bill filed by infant pltf.'s against an infant deft. for partition or sale of land an order was made for sale, & the infant's costs were charged on their respective shares.—FRANCE v. FRANCE (1871), L. R. 13 Eq. 173; 41 L. J. Ch. 150; 25 L. T. 785; 20 W. R. 230.

Annotation:—*Mentd. Higgs v. Dorkis* (1872), L. R. 13 Eq. 280.

1814. ———.]—Re RUDD, [1887] W. N. 251. *See, further*, PARTITION.

1815. In action for recovery of land—Infant tenant in tail—Equitable mortgage of land.] Re JONES, No. 411, *ante*.

SECT. 2.—AGAINST INFANTS.

SUB-SECT. 1.—IN GENERAL.

1816. Bound by conduct of solicitor.]—TILLOTSON v. HARGRAVE, No. 1634, *ante*.

1817. Description of infant—Not yet named.]—Ordered that deft., a female infant not baptised, should be described in the subpoena as the youngest female child of her father & mother.—ELEY v. BROUGHTON (1825), 2 Sim. & St. 188; 57 E. R. 317.

Infant's partners.]—See PARTNERSHIP.

SUB-SECT. 2.—REPRESENTATION OF INFANT.

A. In General.

By guardian ad litem.]—See Nos. 1821–1829, post.

By trustees & executors—Where infant cestui que trust.]—See R. S. C., Ord. 16, r. 8; & generally, PRACTICE.

Representation order.]—See R. S. C., Ord. 16, r. 32 (a).

1818. Necessity for separate counsel—Though same solicitor—Infant & adult defendants.]—Although in a claim parties may appear by the same solr., the interests of infants must be protected by separate counsel.—WRIGHT v. WOODHAM (1851), 17 L. T. O. S. 293.

1819. Infants with identical interests—One out of jurisdiction—Dispensed with as party.]—15 & 16 Vict. c. 86, s. 51, applies to a special case stated under 13 & 14 Vict. c. 35. The name of one of several children whose interests were identical, who was on a voyage to the East Indies, was allowed to be omitted as a deft. in a special case, in which the interests of the children were proposed to be determined.—Re BROWN (1861), 29 Beav. 401; 7 Jur. N. S. 650; 9 W. R. 430; 54 E. R. 682.

1820. Construction of will—Representation of dead infants.]—MENDES v. GUEDALLA (1862), 10 W. R. 485.

PART XIV. SECT. 2, SUB-SECT. 1.

l. Foreclosure action—Summary reference to master.]—In foreclosure suits against infant defts. the ct. will make a decree for summary reference to the master under the Ord. 77 of May, 1850; the decree, however, directing that in the proceedings before the master pltf. should be obliged in the first instance to prove the execution of the conveyance.—CREELMAN v. CLEFFORD (1850), 2 Gr. 213.—CAN.

m. — Infants proper parties.]—In a mtge. action for foreclosure, although it may be that since Devolution of Estates Act, as a matter of title, the record is complete with the general administrator of deceased owner of the equity of redemption as the sole deft., yet, as a matter of procedure, the infant children of the deceased are proper parties, & as such should appear as original defts., unless some good reason exists for excluding them.—KEEN v. CODD (1891), 14 P. R. 182.—CAN.

n. Amendment of bill—To make infant party defendant.]—Where, in a suit by the personal representatives of a vendor for the specific performance of the contract of sale, an infant heir was joined as a co-pltf., the ct. refused to make a decree, although the bill had been taken *pro confesso* against deft. the purchaser, & ordered the case to stand over, with a view to pltf's amending their bill, by making the infant a party deft., in order that the contract might be established against him.—HAMILTON v. WALKER (1865), 12 Gr. 172.—CAN.

PART XIV. SECT. 2, SUB-SECT. 2.—A.

o. Application for appointment of guardian ad litem—Practice.]—On a motion for the appointment of a guardian ad litem, under Ord. 21 of May, 1850, the ct. permitted an affidavit, showing that defts. were infants, to be filed after the day named for the motion to be heard.—FREELAND v. JONES (1851), 2 Gr. 581.—CAN.

p. ———.]—It is no bar to the appointment of a guardian ad litem to an infant deft., in an administration in chambers by motion, that the application for guardian is made before the return of the notice of motion for the usual administration order.—BARRY v. BRAZILL (circa 1864), 1 Ch. Ch. 237.—CAN.

q. Appeal by executors—Infants in same interest need not appear.]—Where exors. have appealed, infants in the same interest need not appear, & will not be allowed costs if they do. In such a case where they had appeared & contested, the guardian was allowed only an attending fee without brief.—MCLAREN v. COOMBS (1867), 2 Ch. Ch. 124.—CAN.

r. Guardian's costs.]—The ct. will direct the costs of a guardian to be paid before granting a vesting order to the purchaser.—THORNE v. CHUTE (circa 1867), 2 Ch. Ch. 221.—CAN.

t. ———.]—When on a pltf.'s motion for appointing a guardian to an infant deft., the person appointed is nominated by or at the instance of the infant, he is not entitled as of course to his costs against pltf.—CLEMENTS v.

ARNOLD (1870), 3 Ch. Ch. 75.—CAN.

a. ———.]—In a suit by a vendee of land brought against the representatives of the vendor for specific performance of the agreement, he was held not entitled to his costs. Some of defts. being infants, pltf. applied for the appointment of a guardian ad litem, & one was appointed accordingly. The ct., following the general rule, ordered pltf. to pay the costs of the guardian, & refused to give pltf. any remedy therefor against the estate of the vendor.—MOONEY v. PREVOST (1873), 2 Gr. 418.—CAN.

b. ———.]—A solr. upon pltf.'s application having been appointed guardian ad litem to infant defts., & being unable to recover his costs from pltf. or from the infants' estate, it was ordered that they be paid out of the suitors' fee fund.—MCKAY v. HARPER (1873), 6 P. R. 54.—CAN.

c. ———.]—Where on a rehearing the decree was affirmed, but the ct. was of opinion that the guardian of the infant defts., who reheard, was justified in raising the question for the determination of the Full Ct., they directed his costs to be paid out of the fund after satisfaction of pltf.'s claim.—AIREY v. MITCHELL (1874), 21 Gr. 510.—CAN.

d. ———.]—The official guardian's costs of defending the action on behalf of an infant deft. were ordered to be paid by pltf., notwithstanding that judgment was pronounced in favour of pltf. against the infant deft., & that the latter had been found to be a party to the fraud which occasioned the action.—WESTGATE v. WESTGATE (1885), 11 P. R. 62.—CAN.

Sect. 2.—*Against infants: Sub-sect. 2, B. (a) i., ii. iii., &*

B. By Guardian ad litem.

(a) *Appointment of Guardian.*

i. *Necessity for.*

See R. S. C., Ord. 13, r. 1, & Ord. 16, rr. 16, 18 & 19.

1821. Infant defendant out of jurisdiction.]—A guardian appointed to put in an answer for an infant, who was sole deft. to a supplemental bill, & out of the jurisdiction.—*KYAN v. GALLI* (1842), 12 L. J. Ch. 72.

1822. —.]—Guardian *ad litem* appointed to infant deft. abroad.—*FOWLER v. WARD* (1842), 6 Jur. 403.

1823. —.]—Course of proceeding where service of the subpoena has been effected on infant defts. residing out of the jurisdiction.—*ANDERSON v. STATHER* (1846), 15 L. J. Ch. 260; 16 L. J. Ch. 152; 7 L. T. O. S. 77; 8 L. T. O. S. 252; 10 Jur. 382; 11 Jur. 96; *subsequent proceedings* (1848), 12 L. T. O. S. 25; (1849), 14 L. T. O. S. 83.

Annotation:—Reid. Chaffers v. Baker (1855), 3 Eq. Rep. 639.

1824. — Proof as to adverse interest.]—Guardian *ad litem* to infant deft. resident out of the jurisdiction, appointed on motion upon proof of respectability, & that she had no interest adverse to that of the infant.—*SMITH v. PALMER* (1840), 3 Beav. 10; 49 E. R. 4.

1825. Father & natural guardian a party.]—*ELLIS v. GUITTON*, No. 1836, *post*.

1826. Notwithstanding female infant married.]—The answer of a married woman, who is an infant, cannot be taken either separately or jointly with her husband until she has had a guardian assigned.—*COLMAN v. NORTHCOTE* (1843), 2 Hare, 147; 12 L. J. Ch. 255; 7 Jur. 528; 67 E. R. 61.

1827. Infant heiress-at-law.]—*Re MILLINGTON* (1854), 2 Eq. Rep. 158, L. JJ.

1828. Consent to discontinuance.]—N. filed a bill to which there were infant defts., & subsequently moved to take his bill off the file. No guardian *ad litem* of the infants had then been appointed:—*Held*: a guardian *ad litem* for the infants must first be appointed in order to consent.

PART XIV. SECT. 2, SUB-SECT. 2.— B. (a) i.

1829 i. Sale on partition.]—Where in a partition suit commenced by summary application the infants interested in the estate had been joined as plffs., & a sale of the land had taken place by public auction:—*Held*: the infants were improperly joined as plffs.; they should have been defts. & represented by the official guardian.—*BROWN v. BROWN* (1882), 9 P. R. 245.—CAN.

e. Infant landlord.]—An infant will be admitted to defend as landlord, by guardian.—*DOE d. SANDERSON v. ROE* (1841), 2 Ont. Dig. 3182.—CAN.

f. Revivor by amendment.]—When it becomes necessary to revive by way of amendment against infant defts., the proper course is to amend simply in the first instance by making the infants parties. After that is done, if the infants fail to have a guardian appointed, pltf. may apply under Ord. 13 to have a solr. appointed guardian, & in either case pltf. will be in a position to move that the suit do stand revived.—*KIRKPATRICK v. FOUQUETTE* (1854), 4 Gr. 549.—CAN.

g. Death of guardian.]—Where a guardian *ad litem* dies, a new one may be appointed without notice.—*HARPER v. HARPER* (circa 1864), 1 Ch. Ch. 217.—CAN.

h. Guardian leaving province.]—Where a guardian *ad litem* of infant defts. leaves the province, another will be appointed on the *ex p.* application of pltf.—*WELDON v. TEMPLETON* (circa 1865), 1 Ch. Ch. 360.—CAN.

k. Failure to appear.]—Where the guardian for infant defts., being notified, did not appear at the hearing, & their interests, which were not fully ascertained, were not represented, the ct. refused a decree in their absence, appointed another guardian, & directed the cause to be again brought on.—*SANBORN v. SANBORN* (1865), 11 Gr. 123.—CAN.

l. Administration proceedings.]—Administration proceedings taken against an infant co-exor. without observing the usual practice of serving the official guardian:—*Held*: invalid.—*Re JACKSON, MASSEY v. CROOKSHANKS* (1888), 12 P. R. 475.—CAN.

m. Action for seduction.]—In an action of seduction brought against an infant, deft. was served personally, & entered an appearance in person:—*Held*: the common law practice referred to in con. rule 261 means the practice by which a real guardian & not a fictitious one was appointed; & an order was made requiring deft. to appear by guardian within six days,

v. N— (1874), 31 L. T. 79; 22 W. R. 819.

1829. Sale on partition.]—In a partition action the request for sale on the part of an infant (Partition Act, 1876 (c. 17), s. 6, may be made by his next friend or guardian *ad litem* as being the person "authorised to act" on his behalf in the action; the word "guardian" in the sect. meaning guardian *ad litem*. The ct. will not comply with a request for sale made on behalf of an infant under the above sect. unless it is satisfied that a sale is for the benefit of the infant.—*RIMINGTON v. HARTLEY* (1880), 14 Ch. D. 630; 43 L. T. 15; 29 W. R. 42.

Annotation:—Reid. Wallace v. Greenwood (1880), 16 Ch. D. 362.

ii. *Who Appointed.*

1830. Guardian in personam.]—It is of course, for the guardian *in personam* of an infant to be the guardian *ad litem*.—*SANDYS v. COOPER* (1835), 4 L. J. Ch. 162.

1831. Party to the cause—Not having adverse interest.]—A party to the cause not having an adverse interest to that of an infant deft., is a more proper person than a solr. or stranger to be appointed guardian *ad litem* to the infant.—*ANON.* (1852), 9 Hare, App. I. xxvii; 22 L. J. Ch. 288; 68 E. R. 770.

1832. Person within jurisdiction.]—Infant deft. out of jurisdiction. Guardian *ad litem* ought to be within the jurisdiction.—*v. —* (1854), 18 Jur. 770.

1833. Husband of defendant.]—*KEMEYS v. KEMEYS* (1752), 2 Hare, 148 n.; 67 E. R. 62.

1834. Father.]—*SMITH v. EDWARDS* (1753), 1 Dick. 234; 21 E. R. 258.

1835. — No adverse interest.]—Infant deft. residing abroad, his father, not interested in the suit, assigned guardian, for the purpose of putting in his answer, on motion.—*JONGSMA v. PFIEL* (1804), 9 Ves. 357; 32 E. R. 640, L. C.

Annotation:—Apld. Lushington v. Sewell (1821), 6 Madd. 28.

1836. —.]—Where a special case to which infants were parties, stated that A. who was also a party to the case, was their father & natural guardian:—*Held*: it was unnecessary for a special guardian to be appointed by the ct., but,

& in default that pltf. should be at liberty to appoint a guardian for him, the consent of such guardian being shown, as also that he had no interest adverse to deft.—*HYNE v. BROWN* (1889), 13 P. R. 17.—CAN.

n. Duty of court.]—Where deft. or resp. to a suit or appeal is a minor it is the duty of the ct. not only to appoint a guardian but to satisfy itself that the proposed guardian is a fit & proper person to represent the minor, to put in a proper defence & generally to act in the interests of the minor. The duty of the ct. is not a mere matter of form.—*RAMCHANDRA DAS v. JOTI PRASAD* (1907), I. L. R. 29 All. 675.—IND.

o. Solicitor appearing in ignorance of infancy.]—Where a writ of summons is served on an infant, & an appearance entered for him by a solr., without knowledge of his infancy & *bond fide*, & costs are subsequently incurred by pltf. in proceedings in the action which became abortive by reason of deft.'s infancy:—*Held*: although the appearance & defence would be set aside as irregular, the solr. entering the appearance was not personally liable for the costs thereby occasioned to pltf.—*WADE v. KEEFE* (1888), 22 L. R. Ir. 154.—IR.

upon the application to set down the case for hearing, it must be shown, by affidavit, that the father had no interest adverse to that of the infants.—*ELLIS v. GURTON* (1852), 18 L. T. O. S. 269.

1837. Father-in-law.]—A husband & wife, parties to a suit, being minors, & the wife having no guardian, the ct. directed a reference to the master to appoint a guardian for her, & that the master should give a preference to her father-in-law, if there appeared to be no objection to him.—*QUARRILL v. BINMORE* (1844), 4 L. T. O. S. 212; 8 Jur. 1113.

1838. Testamentary guardian.]—Testamentary guardian of an infant trustee, who was residing out of the jurisdiction, appointed guardian *ad litem*, without either the appearance of the infant in ct. or a commission.—*SHUTTLEWORTH v. SHUTTLEWORTH* (1843), 2 Hare, 147; 67 E. R. 61.

1839. — Unless having conflicting interest.]—*Re MILLINGTON* (1854), 2 Eq. Rep. 158, L. JJ.

1840. Official solicitor.]—Under Order 2, Apr. 11, 1842, the ct. nominates the solr. for the infant, & usually appoints the solr. of the suitors' fund.—*THOMAS v. THOMAS* (1843), 7 Beav. 47; 49 E. R. 980; *sub nom.* *THOMAS v. GWYN*, 13 L. J. Ch. 79.

1841. —.]—Pltf.'s solr. ought to be appointed guardian *ad litem* to a deft. under Order 32, of May 1845. The solr. to the suitors' fund ought in general to be appointed such guardian.—*SHEPPARD v. HARRIS* (1845), 15 L. J. Ch. 104; 6 L. T. O. S. 295; 10 Jur. 24.

1842. —.]—Appointment of the solr. of the suitors' fund as guardian *ad litem* to an infant deft. on the application of pltf., where the infant was not in default either for not appearing or not answering.—*BENTLEY v. ROBINSON* (1853), 9 Hare App. II. lxxvi; 68 E. R. 801.

1843. — Probate court.]—*WHITE v. DUVERNAY*, No. 1900, *post*.

1844. Not plaintiff's solicitor.]—*SHEPPARD v. HARRIS*, No. 1841, *ante*.

1845. Not stranger having no interest in suit.]—The ct. will not appoint, as guardian *ad litem* of an infant deft., a person unconnected with the infant,

& not interested in the suit.—*FOSTER v. CAUTLEY* (1853), 10 Hare App. I. xxiv; 22 L. J. Ch. 639; 21 L. T. O. S. 262; 17 Jur. 370; 1 W. R. 275; 68 E. R. 1127.

1846. Not necessarily next of kin.]—The ct. may in its discretion pass by the next of kin in appointing a guardian *ad litem* to an infant.—*QUICK v. QUICK & QUICK* (1864), 33 L. J. P. M. & A. 177; 10 Jur. N. S. 372.

1847. Not married woman—Effect of Married Women's Property Acts.]—*Re SOMERSET (DUKE)*, *THYNNE v. ST. MAUR*, No. 1563, *ante*.

1848. —.]—*LONDON & COUNTY BANKING Co. v. BRAY*, [1893] W. N. 130.

iii. By Whom Appointed.

On infant's default of appearance.]—See R. S. O., Ord. 13, r. 1.

1849. Infant abroad — Commission.]—Infant defts. being out of the kingdom a commission was sent abroad for the appointment of a guardian to put in their answer.—*LUSHINGTON v. SEWELL* (1821), 6 Madd. 28; 56 E. R. 999.

1850. Infant lunatic—Court of Chancery.]—A guardian to an infant deft. of unsound mind, not so found by inquisition, should be appointed by the Ct. of Ch., & not under the jurisdiction in lunacy.—*PIDCOCK v. BOULTBEE* (1852), 2 De G. M. & G. 898; 22 L. J. Ch. 611; 20 L. T. O. S. 267; 42 E. R. 1123; *sub nom.* *PIDDOCK v. BOULBEE*, 1 W. R. 94, L. JJ.

(b) Position and Status of Guardian.

1851. Does not become guardian generally.]—*Re SALISBURY (MARQUIS) & ECCLESIASTICAL COMRS.*, No. 1448, *ante*.

1852. Necessity for appointment.]—A guardian cannot appear & plead on behalf of a minor without having been duly elected & appointed.—*WELLS v. COTTAM (FALSELY CALLED WELLS)* (1863), 3 Sw. & Tr. 364; 33 L. J. P. M. & A. 41; 10 L. T. 138; 12 W. R. 672; 164 E. R. 1316. *Annotation:—Mentd. Gilroy v. Gilroy*, [1914] P. 122.

1853. As witness—Against infant.]—The answer of a guardian to a bill in Chancery against his ward cannot be read in evidence in a ct. of law to conclude

PART XIV. SECT. 2, SUB-SECT. 2.— B. (a) ii.

1838 i. Testamentary guardian.]—The ct. will appoint the testamentary guardian a guardian *ad litem* to infant defts., without requiring all the infants to be produced in ct., when it appears that the interest of the guardian is not opposed to that of the infants.—*WHITE v. CUMMINS* (1851), 2 Gr. 487.—CAN.

1840 i. Official solicitor.]—Where an absent deft. is an infant, the ct. will call upon such deft. to show cause why a solr. of the ct. should not be appointed his guardian *ad litem*.—*DUFFY v. O'CONNOR* (circa 1866), 1 Ch. Ch. 393.—CAN.

1844 i. Not plaintiff's solicitor.]—The ct. will not, even at the request of the infant defts., in an amicable suit, appoint pltf.'s solr. their guardian *ad litem*.—*JAMES v. ROBERTSON* (circa 1864), 1 Ch. Ch. 197.—CAN.

1848 i. Not married woman.]—The appointment of a married woman as guardian *ad litem* in a suit instituted against a minor is an irregularity.—*KACHAYI KUTTIALI HAJI v. UDUMPUMTHALA KUNHI PUTHA* (1906), I. L. R. 29 Mad. 58.—IND.

p. Not agent of plaintiff's solicitor.]—A suit had been instituted by a creditor for the administration of the estate of a party deceased, & the agent of pltf.'s solr. was appointed guardian *ad litem* to the infant defts. After a

sale of the lands under the decree, at which pltf., by leave of the ct., had bid for a portion of the lands, a motion was made to change the name of the purchaser. The ct. refused the application, & directed that a new guardian should be appointed, who, unless the parties consented thereto, was to take measures to set the proceedings aside.—*FLETCHER v. BOSWORTH* (1856), 5 Gr. 458.—CAN.

q. Not father's solicitor — Father's interest conflicting with infant's.]—When a father & his infant children are co-defts., if it appears that the interest of the father conflicts with that of the children, the ct. will not appoint his solr. guardian *ad litem* to the infants.—*AIKINS v. BLAIN* (1864), 1 Ch. Ch. 249.—CAN.

r. Not plaintiff's nominee.]—On motion to appoint a guardian, the master should not appoint pltf.'s nominee, but should select one of the practitioners in the county town, the one who seems best fitted for the duty, & appoint him in all cases in which he is not concerned for any of the parties, if no nomination is made on the part of the infants, & if no special reason exists for naming in preference some other solr.—*CLEMENTS v. ARNOLD* (1870), 3 Ch. Ch. 75.—CAN.

t. Solicitor appointed by mother — Mother's interest not conflicting with infant's.]—A suit was brought for

redemption of mtged. property, & the mtgee. having died, his widow & infant heirs were defts. Upon an application for the appointment of a guardian *ad litem* to the infant defts., a solr., nominated by the mother, was appointed guardian, it being considered that there could be no conflict of interest between the mother & her children.—*HORKINS v. HARTY* (1874), 6 P. R. 200.—CAN.

a. Not settlor — Action to set aside settlement.]—Where an action is brought to set aside a settlement in order to make the settled property available for payment of the settlor's debts, the ct. will not appoint the settlor guardian *ad litem* of infant defts. beneficially interested in the settlement, though they are his children.—*DUNEDIN FINANCE, LOAN & AGENCY Co. v. BAIRD* (1892), 11 N. Z. L. R. 192.—N.Z.

PART XIV. SECT. 2, SUB-SECT. 2.— B. (b).

b. Cesser of authority—When object of suit accomplished.]—The guardian *ad litem* to an infant has no authority after the object of the suit has been accomplished, to act for the infant in investing any funds for the infant.—*DIX v. JARMAN* (1859), 1 Ch. Ch. 38.—CAN.

c. Subject to supervision by court.]—The ct. will exercise a supervision

ct. 2.—*Against infants: Sub-sect. 2, B. (b); sub-sects. 3 & 4, A. & B.*

the infant — *EGGLESTON v. SPEKE* (1689), 3 Mod. Rep. 258; 87 E. R. 170; *sub nom.* *ECCLESTON v. PETTY* (*alias* *SPEKE*), Carth. 79; *sub nom.* *EDLESTON v. SPEAK* (*alias* *PETTY*), Comb. 156; *sub nom.* *ANON.*, 2 Vent. 72.

*Annotations:—**Reid*. *Stanton v. Percival* (1855), 5 H. L. Cas. 257. *Mentd.* *Onyons v. Tryers* (1716), Prec. Ch. 459; *Limbery v. Mason & Hyde* (1735), 2 Com. 451; *Christopher v. Christopher* (1771), 2 Dick. 446; *Goodright d. Roffe v. Harwood* (1773), Loft, 282; *Ex p. Ilchester* (1803), 7 Ves. 348.

1854. — — —.] — *WROTTESELEY v. BENDISH*, No. 1879, *post*.

1855. — — —.] — The answers of a guardian (father) of minors, parties in the cause, cannot be called for nor his declarations received as evidence, against the minors for whom he is guardian. — *ECCLES v. HARRISON* (1848), 6 Notes of Cases, 204; *sub nom.* *HARRISON v. ECCLES*, 12 Jur. 506.

1856. **Power to consent — To taking evidence by affidavit.** — Under the new practice, a guardian *ad litem* may consent on behalf of infants, without the leave of the ct., to evidence being taken by affidavit instead of *viva voce*. — *FRYER v. WISEMAN* (1876), 45 L. J. Ch. 199; 33 L. T. 779; 24 W. R. 205; 3 Char. Pr. Cas. 330.

*Annotation:—**Folld.* *Piggott v. Toogood* (1904), 48 Sol. Jo. 573.

1857. — — —.] — The guardian *ad litem* of an infant deft. is competent to give the consent requisite for taking evidence by affidavit under Rules of Ct., 1875, Ord. 38, r. 1. — *KNATCHBULL v. FOWLE* (1876), 1 Ch. D. 604; 24 W. R. 629; 3 Char. Pr. Cas. 332.

*Annotation:—**Folld.* *Piggott v. Toogood* (1904), 48 Sol. Jo. 573.

1858. — — —.] — *PIGGOTT v. TOOGOOD* (1904), 48 Sol. Jo. 573.

— — —.] — R. S. C., Ord. 16, r. 21.

1859. **Cannot appear in person.** — *MURRAY v. SITWELL*, [1902] W. N. 119.

*Annotation:—**Folld.* *Re Berry, Berry v. Berry*, [1903] W. N. 125.

1860. — — —.] — *Re BERRY, BERRY v. BERRY*, [1903] W. N. 125.

1861. **Subject to removal — For sufficient cause.** — *RUSSELL v. SHARPE*, No. 1609, *ante*.

1862. — — —.] — Where a will is disputed on behalf of infants by a guardian *ad litem*, the Ct. of Probate has power to inquire whether the action is for their benefit, & also, if satisfied, that it be so, to appoint a new guardian *ad litem* where good cause is shown for such change. — *PERCIVAL v. CROSS* (1882), 7 P. D. 234; 52 L. J. P. 16; 47 L. T. 353; 46 J. P. 792; 31 W. R. 124.

SUB-SECT. 3.—SERVICE OF PROCEEDINGS.

Service of writ. — See R. S. C., Ord. 9, r. 4.

1863. — **Infant out of jurisdiction.** — Where an infant deft. is out of the jurisdiction, a bill

cannot be taken against him *pro confesso* upon substituted service on the infant's father (the guardian), also out of the jurisdiction. The proper course is to serve the infant personally & to have a guardian to the infant to defend the suit assigned by the ct., under Order 32, of May 1845. — *CHAFFERS v. BAKER* (1855), 3 Eq. Rep. 639; 24 L. T. O. S. 295; 3 W. R. 280, L. JJ.

1864. — — —.] — Where an infant deft. is out of the jurisdiction, the ct. will order service of the copy of the bill upon him, upon an affidavit showing that he is residing abroad. — *TURNER v. SOWDON* (1864), 10 L. T. 60; 12 W. R. 522.

1865. — — —.] — *PONEY v. HORDERN* (1897), Halsbury's Laws of England, Vol. XVII. p. 140.

1866. — **Refusal by father to give information.** — An order, that the service on the father of an infant deft. should be good service on the infant, granted, on an affidavit, stating the refusal of a father to say where his child was, the age of the child, & that the usual residence of the child was with his father. — *LLOYD v. LLOYD* (1842), 11 L. J. Ch. 109; 6 Jur. 313.

1867. — **Whether father served on behalf of several infants — Father co-defendant.** — Motion under Order 33, of May 1845, to serve subpoena & copy of bill upon deft. & his wife & six infant children, out of the jurisdiction, order made. Service on deft. would be good service on his wife, but not upon the infant children, who must all be served separately. — *JONES v. GEDDES* (1845), 15 L. J. Ch. 65; 6 L. T. O. S. 254; 9 Jur. 1002.

*Annotation:—**Consd.* *Chaffers v. Baker* (1855), 3 Eq. Rep. 639.

1868. **Parent's address undiscoverable — Service on principal of college.** — Service of a copy of the bill & notice of an application to appoint a guardian *ad litem* to an infant deft. upon the principal of the college of which the infant was an undergraduate member, held sufficient, pltf. being unable to discover the residence of the infant's parent. — *CHRISTIE v. CAMERON* (1856), 25 L. J. Ch. 488; 27 L. T. O. S. 166; 2 Jur. N. S. 635; 4 W. R. 589.

1869. — **Infant kept in — To avoid service.** — Infants secreted to prevent their being served with a subpoena to appear & answer, service on their mother good. — *GARNUM v. MARSHAL* (1740), 1 Dick. 77; 21 E. R. 197; *sub nom.* *SMITH v. MARSHALL*, 2 Atk. 70, L. C.

1870. — — —.] — *HOCKLY v. LUKIN* (1762), Dick. 353; 21 E. R. 305, L. C.

1871. — — —.] — An infant having a day to show cause against a decree of foreclosure, after he attained twenty-one; having attained, & having left the kingdom before he was served to avoid his creditors. Application to serve his clerk in ct. with the subpoena; but LORD THURLOW thought it must be personal service; but being again moved, upon a strong affidavit, it was granted. — *ELCOCK v. GLEGG* (1792), 2 Dick. 764; 21 E. R. 468, L. C.

over solrs. appointed guardians *ad litem*, & expect at their hands a proper attention to the interests of the infants. — *DUNCAN v. ROSS* (1869), 2 Ch. Ch. 443. — CAN.

d. *Examinable for discovery.* — A party deft. is not absolved from examination for discovery by reason of being also guardian *ad litem* of infant defts. — *BEAVEN v. FELL* (1897), 5 B. C. R. 453. — CAN.

PART XIV. SECT. 2, SUB-SECT. 3.

1863 i. **Service of writ — Infant out of jurisdiction.** — In a partition suit an

order allowing substitutional service of the bill on the official guardian of an infant deft., resident without the jurisdiction of the ct., was granted on the ground that the share of the infant in the lands in question amounted to only \$40, & substitutional service would be inexpensive. — *WEATHERHEAD v. WEATHERHEAD* (1881), 9 P. R. 96. — CAN.

1863 ii. — — —.] — The costs of serving an infant personally who is out of the jurisdiction, will not be allowed. The proper method is to obtain a *præcipe* order appointing a guardian *ad litem*, & serve him. The official

guardian is now such guardian. In this case an allowance was ordered to be made if the personal service on the infants had facilitated the official guardian in communicating with them or their relatives. — *REW v. ANTHONY* (1883), 5 P. R. 545. — CAN.

1871 i. — — —.] — The provisions of the rules & general orders as to service in case of infancy apply whether the infant be a sole or joint deft., & whether he be sued personally or in a representative capacity. — *Re JACKSON, MASSEY v. CROOKSHANKS* (1888), 12 P. R. 475. — CAN.

e. **By publication.** — Where

1872. —.]—Service of subpoena upon the father-in-law of an infant good service.—**THOMPSON v. JONES** (1803), 8 Ves. 141; 32 E. R. 306, L. C.

1873. — Infant temporarily out of jurisdiction —Not to evade service.]—Service on the mother & father-in-law of an infant, who usually resides with the mother & father-in-law, but is on a temporary visit out of the jurisdiction, not deemed good service on the infant, there being no reason to suppose the infant was purposely kept out of the way.—**SMITH v. SMITH** (1846), 7 L. T. O. S. 155.

1874. Service of notice to appoint guardian *ad litem*.]—An affidavit of service under Ord. 32 of May 1895 of notice upon an infant whilst residing with A. held not to be sufficient to show that the notice was served on the dwelling-house of A.—**TAYLOR v. ANSLEE** (1845), 6 L. T. O. S. 274; 9 Jur. 1055.

1875. —.]—Notice of an application, under Order 32, of May 1845, to appoint guardians *ad litem* to infants whose father was dead, was served at the house of the mother & her second husband with whom the infants were residing:—*Held*: sufficient.—**HITCH v. WELLS** (1845), 8 Beav. 576; 50 E. R. 226.

1876. —.]—**CHRISTIE v. CAMERON**, No. 1868, *ante*.

Citations—In probate actions.]—See **EXECUTORS**, Vol. XXIII., pp. 277, 278, Nos. 3410–3428.

SUB-SECT. 4.—PLEADING BY INFANT.

A. In General.

1877. Necessity for defence.]—In order to enable an infant deft. to enter into evidence in support of facts which would not otherwise be in issue in the cause, it is proper that they should be stated in his answer; but whatever admissions may be made, or points tendered in issue in the answers of an infant, pltf. is not in any degree exonerated from proving as against the infant the whole case on which he relies.

I think that the answer of an infant, stating

an absent deft. is an infant the ct. has like powers as to granting an order for service by publication as in case of an adult; but *semble*, the notice published should not state that in default of answer the bill will be taken *pro confesso*.—**DUFFY v. O'CONNOR** (*circa* 1866), 1 Ch. Ch. 393.—CAN.

f. — On official guardian.]—In a proceeding by petition under Quietening Titles Act service on the official guardian is good service upon infants who are required to be notified of the proceedings.—*Re MURRAY* (1890), 13 P. R. 367.—CAN.

—.]—In a mtgo. action, where possession is claimed, the writ of summons if served on the official guardians need not be served personally on the infant heirs of the mtgor. if they are not personally in possession, & the costs of such service will be disallowed.—**SPARKS v. PURDY** (1892), 15 P. R. 1.—CAN.

h. — On infant's father.]—The guardian intended by Ditches & Watercourses Act, 1897 (c. 285), s. 3, is such a guardian as has by law the management & control of the infant's land, & not merely the guardian of his person:—*Held*: notice of proceedings under the Act, given to an infant's father whose land was affected by the proceeding, the father not having been appointed guardian of the infant's estate, was insufficient to satisfy

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sect. 8 of the Act, which requires notice to be given to every "owner," & the result was that the infant was not properly made a party to the proceedings, & was not bound by the award, & the whole drainage scheme fell to the ground.—**HEALY v. ROSS** (1915), 33 O. L. R. 368; 8 O. W. N. 134.—CAN.

1874 i. Service of notice to appoint guardian *ad litem*.]—The subpoena & notice of motion for the appointment of a guardian had been served on the persons with whom infant defts. were residing; this was considered sufficient service to entitle pltf. to move.—**BOWMAN v. BECKTEL** (1851), 2 Gr. 556.—CAN.

1874 ii. —.]—Where the mother & father of an infant deft. were living apart & the infant had absconded & could not be served with notice of application for the appointment, the notice was directed to be served at the residence of the mother, that being the infant's last place of residence; service on the father being dispensed with.—**BIGGER v. BEATY** (*circa* 1864), 1 Ch. Ch. 236.—CAN.

1874 iii. —.]—An infant should be served with the bill before the return of the notice of application for the appointment of guardian, otherwise notice of the application will have to be reserved.—**ROBINSON v. DOBSON** (*circa* 1864), 1 Ch. Ch. 257.—CAN.

facts which are intended to form the defence of the infant, extremely important, as enabling her to go into evidence as to matters which would not otherwise be in issue in the cause (**LORD LANGDALE, M.R.**).—**HOLDEN v. HEARN** (1839), 1 Beav. 445; 8 L. J. Ch. 260; 3 Jur. 428; 48 E. R. 1012.

1878. —.]—As to the necessity of infants raising the points of their defence specifically by the answer, instead of putting in what is termed the common answer. In a case, in which the defence of an infant had not been properly raised & proved, a decree was made for pltf., without prejudice to any bill to be filed by the infant within six months to establish his right.

In the case of infants, it has been erroneously thought, that it is merely necessary to put in what is called a common infant's answer, submitting his rights to the protection of the ct.; but that is not so, for, in reality, the preparation of an infant's answer in some cases require consideration. He may have a defence, yet at the hearing it may be found impossible to make it effectual, in consequence of its not having been properly raised & the proper facts put in issue by his answer (**LORD LANGDALE, M.R.**).—**LANE v. HARDWICKE** (1846), 9 Beav. 148; 50 E. R. 300.

B. How far Infant bound by Pleading.

See R. S. C., Ord. 19, r. 13.

1879. Admission not binding on infant.]—An infant's answer cannot be given in evidence against him, because it is not the infant's answer, but the guardian's, & the guardian is sworn, & not the infant.—**WROTTESELEY v. BENDISH** (1733), 3 P. Wms. 235; 2 Eq. Cas. Abr. 517; 24 E. R. 1042, L. C.

Annotations:—**Apld.** **Whiting v. Rush** (1837), 2 Y. & C. Ex. 546. **Consd.** *Ex p. Lloyd* (1839), 8 L. J. Ex. 147. **Mentd.** **A.-G. v. Duplessis** (1752), Park. 144; **A.-G. v. Lucas** (1843), 12 L. J. Ch. 506.

1880. — Plaintiff must prove whole case.]—**ANON.** (1708), 2 Eq. Cas. Abr. 237; 22 E. R. 202.

1881. —.]—**HOLDEN v. HEARN**, No. 1877, *ante*.

1882. — Workman's compensation claim.]—Admissions by or on behalf of an infant

1874 iv. —.]—Upon an application to appoint a guardian *ad litem* to an infant, who was a resident pupil at Upper Canada College, Toronto, it appeared that notice of the application had been served upon the principal of the college:—*Held*: this was service upon "a person with whom, or under whose care" the infant was residing within Ord. 13, s. 5.—**WHITMARSH v. FORD** (*circa* 1864), 1 Ch. Ch. 357.—CAN.

1874 v. —.]—An order appointing a guardian *ad litem* was set aside for irregularity, where the notice of motion for the appointment did not allow the infant six weeks to appear & show cause, but the guardian thus irregularly appointed was allowed his costs up to decree.—**HAMILTON v. HAMILTON** (1867), 2 Ch. Ch. 160.—CAN.

PART XIV. SECT. 2, SUB-SECT. 4.—A.

k. Infants made parties by revivor —Cannot set up defence not set up by ancestor.]—Where infants have been made parties by revivor, they cannot set up a defence which their ancestor had not set up, except when such ancestor has been prevented by fraud or mistake from pleading such defence; & all the more particularly where deceased deft. has been guilty of gross laches.—**BURKE v.** (1867), 2 Ch. Ch. 193.—CAN.

Sect. 2.—Against infants: Sub-sect. 4, B., C. & D.; sub-sects. 5, 6 & 7, A.]

cannot be relied upon, & all allegations against an infant must be proved, in proceedings under Workmen's Compensation Act, 1906 (c. 58), as well as in ordinary judicial proceedings.—**MARSHALL, SONS & CO., LTD. v. PRINCE**, [1914] 3 K. B. 1047; 84 L. J. K. B. 16; 111 L. T. 1081; 30 T. L. R. 654; 58 Sol. Jo. 721; 7 B. W. C. C. 755, C. A.

Annotations :—**Mentd.** Moreland v. Eley, Eley v. Moreland, [1916] 1 K. B. 85; Carlton Main Colliery Co. v. Clawley, [1917] 2 K. B. 691.

1883. — Payment into court as admission.]—**HITCHCOCK v. TYSON** (1786), 2 Esp. 481 n., N. P.

1884. — Admission of deceased predecessor in title.]—Infant heir not bound by the admission in deceased heir's answer, of the will of testator.—**CARTWRIGHT v. CARTWRIGHT** (1778), 2 Dick. 545; 21 E. R. 382.

Annotation :—**Expld. & Dbtd.** Look v. Foote (1833), 4 Sim. 132.

Admissions generally.]—See EVIDENCE, Vol. XXII., pp. 133 *et seq.*

1885. Statement in pleadings in former proceedings—Statements made as plaintiff—Same solicitors.]—Infant defts. who appeared by the same solr. as they did as pltf's. in a former suit :—**Held** : not bound by the allegations in such former suit, on the mere ground of being so represented by the same solr.—**MARKER v. MARKER** (1851), 9 Hare, 1; 20 L. J. Ch. 246; 17 L. T. O. S. 176; 15 Jur. 663; 68 E. R. 389.

Annotations :—**Mentd.** Micklethwait v. Micklethwait (1857), 26 L. J. Ch. 721; Ashby v. Hincks (1888), 58 L. T. 557; Stafford v. Sutherland (1892), 36 Sol. Jo. 381.

See, generally, **ESTOPPEL**, Vol. XXI., pp. 179–181, Nos. 303–316.

C. Failure to plead.

See R. S. C., Ord. 19, r. 13; Ord. 27, r. 11.

1886. Allegations of opponent not thereby admitted.]—If a pltf. who is of age, does not reply, it is an admission of the facts in the answer; but an infant can admit nothing, & therefore his not replying does not affect him.—**LEGARD v. SHEFFIELD** (1742), as reported in 2 Atk. 377; 26 E. R. 628, L. C.

1887. Whether judgment obtainable on motion for judgment—Cause must be set down for trial.]—On motion for judgment the ct. has no power, under R. S. C., 1875, to order that the evidence shall be taken by affidavit. Accordingly, where a consent action, in which an infant & a married woman were defts., & in which the evidence had been taken by affidavit, was set down on motion for judgment, the ct. gave judgment, but directed that notice of trial should be given to the infant & married woman, & that the action should be placed in the paper again *pro forma*.—**ELLIS v. ROBINS** (1881), 50 L. J. Ch. 512.

Annotation :—**Distd.** *Re* Fitzwater, Fitzwater v. Waterhouse (1882), 52 L. J. Ch. 83.

1888. — —.]—An action against several defts., one of whom was an infant, was, where no defences had been put in, directed by the ct. to be set down for trial, on notice of trial against the infant, & on motion for judgment against the

other defts.—**NATIONAL PROVINCIAL BANK v. EVANS** (1881), 51 L. J. Ch. 97; 30 W. R. 177.

Annotations :—**Distd.** *Re* Fitzwater, Fitzwater v. Waterhouse (1882), 52 L. J. Ch. 83. **Refd.** Gardner v. Tapling (1885), 33 W. R. 473.

1889. — On affidavit verifying statement of claim.]—In an action for sale in lieu of partition the sole deft. was an infant. The facts were simple, & no defence was put in. Pltf's. moved for judgment & supported their motion by affidavits which verified the statement of claim. The guardian *ad litem* did not object to the proposed minutes of judgment :—**Held** : under the circumstances, pltf's. had taken the proper course, & notice of trial need not be given.—**Re** FITZWATER, FITZWATER v. WATERHOUSE (1882), 52 L. J. Ch. 83.

Annotations :—**Folld.** Gardner v. Tapling (1885), 33 W. R. 473; Cheek v. Cheek, [1910] W. N. 87.

1890. — —.]—The defence of two infant defts. in an ejectment action was withdrawn under an order of ct. The other defts. having made admissions, judgment was moved for, supported by an affidavit proving the statement of claim :—**Held** : the correct course where infants are parties & their defence is withdrawn & judgment is moved for, is to prove the statement of claim by affidavit.—**GARDNER v. TAPLING** (1885), 33 W. R. 473.

Annotation :—**Folld.** Cheek v. Cheek, [1910] W. N. 87.

1891. — —.]—On a motion for judgment in default of pleading by pltf's. in a partition action, some of defts. being infants :—**Held** : it was not necessary that any affidavit should be made verifying the statements in the statement of claim.—**RIPLEY v. SAWYER** (1886), 31 Ch. D. 494; 55 L. J. Ch. 407; 54 L. T. 294; 34 W. R. 270.

1892. — —.]—Upon motion for judgment in an action for sale in lieu of partition, where all persons interested (some being infants) asked that an inquiry as to title might be dispensed with & for an immediate sale by auction & an order was made for an immediate sale out of ct., subject to directions for fixing a reserve price & the auctioneer's remuneration in chambers, & for the conditions of sale to require the purchaser to pay into ct. his purchase-moneys.

Having regard to the fact that infants were interested, & to Rules of Dec., 1888, r. 9, which modifies R. S. C., Ord. 51, r. 1a, the ct. required the allegations in the claim to be verified by affidavit, notwithstanding that such allegations were admitted by deft. in his pleading.—**WILLIS v. WILLIS** (1889), 61 L. T. 610; 38 W. R. 7.

Annotation :—**Apld.** Crook v. Crook, [1890] W. N. 26.

1893. — —.]—**CHEEK v. CHEEK**, [1910] W. N. 87.

D. Plea of Infancy.

1894. Evidence as to age—Declarations by relative—Deceased father.]—*Qu.* : whether, to support a plea of infancy, declarations by deft.'s father, since deceased, as to his son's age, are admissible in evidence. *Semble* : they are not.—**FIGG v. WEDDERBURN** (1841), 11 L. J. Q. B. 45; 6 Jur. 218.

Annotation :—**Apprvd.** Haines v. Guthrie (1884), 13 Q. B. D. 818.

PART XIV. SECT. 2, SUB-SECT. 4.—
C.

1. Infancy — New trial granted.]—**MERNEE v. KLEIN** (1866), 17 C. P. 287.—**CAN.**

PART XIV. SECT. 2, SUB-SECT. 4.—
D.

m. Evidence as to age—Brother

sole witness.]—Where the maker of a promissory note set up infancy as a defence against the indorsee, & the only witness to prove the infancy was the payee of the note, who was a brother of the maker, & who had himself indorsed it to pltf., the ct. refused to disturb a verdict in favour of the indorsee, although the witness was not contradicted or otherwise

discredited than by the above circumstances, the judge having left the case to the jury upon the credit of the witness.—**BUGBEE v. McDONALD** (1842), 2 Kerr, 61.—**CAN.**

n. — Infant's own hearsay evidence insufficient.]—Where the indorser of a promissory note set up the defence of infancy, the said defence

1895.

Made in previous action.]

The rule which admits hearsay evidence in pedigree cases is confined to the proof of pedigree, & does not apply to proof of the facts which constitute a pedigree, such as birth, death, & marriage, when they have to be proved for other purposes. Therefore in an action for goods sold, to which the defence was infancy, an affidavit stating the date of deft.'s birth, which had been made by his deceased father in an action to which pltf. was not a party, was held inadmissible as evidence of the age of deft. in support of his defence.—*HAINES v. GUTHRIE* (1884), 13 Q. B. D. 818; 53 L. J. Q. B. 521; 51 L. T. 645; 48 J. P. 756; 33 W. R. 99.

Annotations:—*Consd. Re Turner, Glenister v. Harding* (1885), 29 Ch. D. 985. *Reid. Mahomed Syedol Ariffin v. Yeoh Ool Gark*, [1916] 2 A. C. 575.

1896. — **Commission to examine witnesses—**

—When granted.]—The ct. will grant an application for a commission to examine witnesses in support of a plea of infancy, although deft. does not swear that there is a good defence upon the merits, or that he believes he was an infant, as the plea alleges, if it appear that the application is *bona fide*, & not made for the purposes of delay.—*WESTMORLAND v. HUGGINS* (1842), 1 Dowl. N. S. 800; 11 L. J. Q. B. 273; 6 Jur. 734.

1897. — **Order to admit certificate of baptism.]**

—In an issue of infancy pltf. put in an order of a judge to admit the certificate of the baptism, a party bearing the same name as deft.:—*Held*: in the absence of proof that there was any other person bearing the same name, the admission was proof of identity.—*DORMER v. HOWARD* (1849), 12 L. T. O. S. 457, N. P.

SUB-SECT. 5.—PROCEEDINGS IN DEFAULT OF APPEARANCE.

See R. S. C., Ord. 13, r. 1.

1898. **Whether judgment obtained set aside.]**

In an action for breach of promise, deft. had never appeared all through the proceedings, & a verdict was recovered in his absence for £500. On its appearing that the defendant was an infant:—*Held*: the judgment must be set aside, though without costs.—*JARMAN v. LUCAS* (1863), 15 C. B. N. S. 474; 3 New Rep. 157; 33 L. J. C. P. 108; 12 W. R. 202; 143 E. R. 870.

1899. — **]**—Where pltf. signs judgment for default of appearance, not knowing that deft. is an infant, it is matter entirely for the discretion of the ct. or a judge whether such judgment should be set aside.—*FURNIVAL v. BROOKE* (1883), 49 L. T. 134, D. C.

Annotation:—*Expld. Leaver v. Torres* (1899), 43 Sol. Jo. 778.

1900. **Infant out of jurisdiction—Refusal of guardian to appear—Solicitor of court appointed.]**

Deft. in a probate action was a minor resident out of the jurisdiction. Notice of the writ had been served upon her, & upon her guardian

cannot be supported by his own evidence of the date of his birth, which information he got from his mother, & from a copy of a certificate of his birth, since the said evidence was hearsay.—*MARTIN HARGREAVES CO. v. WRIGLEY* (1914), 30 W. L. R. 92; 7 W. W. R. 760.—CAN.

PART XIV. SECT. 2, SUB-SECT. 5.

1898 i. **Whether judgment obtained set aside.]**—Where a judgment by default was entered against two defts., B. & C. (B. alone being served with process), upon a joint & several promissory note,

purporting to be signed by B., for himself & also for C., & a *sci. fa.* was now issued whereon to found an execution against C.:—*Held*: upon a motion, supported by affidavits stating that C. at the date of the note was an infant, did not authorise B. to sign the note for him, & that the note was made wholly without his consent or knowledge, C. was entitled to be relieved against the judgment.—*MITCHELL v. ASTLE* (1843), 2 Kerr, 86.—CAN.

PART XIV. SECT. 2, SUB-SECT. 6.

a. **Acquiescence in continuation of**

nominated by the foreign ct., but no appearance had been entered on her behalf, & it appeared that her guardian declined to enter an appearance. The ct. holding that the practice was governed by R. S. C., Ord. 13, r. 1, & not by rule 74 of the Contentious Rules of the Probate Ct., 1862, nominated the official solr. of the ct. to be deft.'s guardian *ad litem*, & ordered that his costs should be part of the costs of pltf. who was the exor. propounding the will.—*WHITE v. DUVERNAY*, [1891] P. 290; 60 L. J. P. 89.

SUB-SECT. 6.—ATTAINMENT OF FULL AGE DURING PROCEEDINGS.

1901. **Whether defendant may put in new or amended defence.]**—It is a motion of course for deft. after he came to age to be at liberty to put in a new answer or amend his answer put in whilst he was an infant if he has a day by his decree to show cause after he comes to age.—*ANON.* (1728), Mos. 66; 25 E. R. 274, L. C.

Annotation:—*Distd. Powys v. Mansfield* (1836), 6 Sim. 637.

1902. — **Stating different case.]**—Where a decree has been made against an infant deft., who put in the common answer by his guardian, the general rule is that such deft. on coming of age has the privilege of putting in a new answer stating a different case, & of going into evidence in support of that case. The privilege does not extend to foreclosure suits.—*KELSALL v. KELSALL* (1834), 2 My. & K. 409; 39 E. R. 1000, L. C.

Annotations:—*Reid. Powys v. Mansfield* (1836), 6 Sim. 637. *Mentd. Malone v. Malone* (1841), 8 Cl. & Fin. 179.

1903. **Whether defendant may make objection to decree.]**—*GUERNSEY (LORD) v. RODBRIDGES* (1708), Gilb. Ch. 3; 25 E. R. 3, L. C.

1904. **Time within which steps must be taken.]**—(1) An infant bound by the offer made by him in his answer, if the other side are thereby delayed; & if the infant does not immediately after his coming of age apply to the ct. in order to retract his offer, & amend his answer.

(2) Infant exchanges land & continues in possession of the lands given him in exchange after his coming of age, he shall be bound.—*CECIL v. SALISBURY (EARL)* (1691), 2 Vern. 224; 23 E. R. 745.

Annotations:—*As to* (1) *Consd. Harvey v. Ashley* (1748), 3 Atk. 607; *Cory v. Gertoken* (1816), 2 Madd. 40.

1905. — **]**—*BENNET v. LEIGH* (1743), 1 Dick. 89; 2 Atk. 529; 21 E. R. 202, L. C.

Annotations:—*Folld. Kelsall v. Kelsall* (1834), 2 My. & K. 409. *Reid. Powys v. Mansfield* (1836), 6 Sim. 637.

SUB-SECT. 7.—JUDGMENT.

A. *In General.*

1906. **Judgment after hearing—Whether binding on infant.]**—*CROMWELL v. CAREY* (1631), Toth. 70; 21 E. R. 126, L. C.

proceedings—Effect of.]—Proceedings which a deft. allows to be taken against him after he comes of age, are binding on him. There is no necessity for his being served with notice of the suit after his coming of age.—*LAWRASON v. BUCKLEY* (1869), 2 Ch. Ch. 477.—CAN.

PART XIV. SECT. 2, SUB-SECT. 7.—A.

p. **Decree after hearing—Whether binding on infant.]**—In a decree against an infant deft. as trustee of real estate, it is not necessary to reserve a day for

Sect. 2.—Against infants: Sub-sect. 7, A. & B.]

1907. ———.]—ANON. (1866), No. 2002, *post*.

1908. ———.]—An infant, unless there is new matter or fraud, or collusion, is bound by a decree for his benefit.—SHEFFIELD *v.* BUCKINGHAM (DUCHESS) (1739), 1 Atk. 628; 1 Dick. 74; 26 E. R. 395, L. C.

Annotation:—Mentd. Henfrey *v.* Henfrey (1842), 6 Jur. 355.

1909. ———.]—An infant is bound by a decree in a cause where he is pltf., as much as a person of full age.

Though an action be brought for several demands, & judgment for one only, it is as much a judgment as if there had been a particular determination upon each.

An infant after being of age is not allowed by a new bill to dispute anything that was done during his minority with regard to maintenance etc. The rule at law is that an infant is as much bound by a judgment in his own action as if by full age.—GREGORY *v.* MOLESWORTH (1747), 3 Atk. 626; 26 E. R. 1160, L. C.

Annotations:—Refd. Morison *v.* Morison (1838), 4 My. & Cr. 215. *Mentd.* Stainton *v.* Carron Co. (1864), 11 L. T. 1.

1910. ———.]—No new trial where there must be the same issues, & no surprise, etc., on the former trial. Infancy no ground for it in such a case.—LEGARD *v.* DALY (1749), 1 Ves. Sen. 102; 27 E. R. 976, L. C.

1911. ———.]—Infant, on coming of age, no longer to show cause against a decree made during his infancy.—POWYS *v.* MANSFIELD (1836), 6 Sim. 637; Donnelly, 92; 5 L. J. Ch. 297; 47 E. R. 248.

1912. ———.]—Decree of court of equity.]—Lands are given by will to a woman & the heirs of her body; & it is declared, if she left no sons, & only two daughters, the eldest should pay the younger £300 & have the estate. There being only two daughters, & the £300 not being paid, the younger brought her bill for an account of

deft. to show cause after attaining twenty-one years of age.—LAKE *v.* MCINTOSH (1859), 7 Gr. 532.—CAN.

q. ———.]—SUTHERLAND *v.* DICKSON (*circa* 1866), 2 Ch. Ch. 25.—CAN.

r. ———.]—A decree against infants should not reserve a day to show cause after they come of age.—SCOTTISH MANITOBA INVESTMENT & REAL ESTATE CO. *v.* BLANCHARD (1885), 2 Man. L. R. 154.—CAN.

t. ———.]—In an action upon a mtge. made by a deceased person, who died in 1889, payment, foreclosure, & possession were claimed, & the exors., to whom the real estate had been devised, were the only defts. Judgment for possession was recovered, & a writ of possession placed in the sheriff's hands. The widow, who was one of the exors., & the infant children of deceased mtgor., had an interest under the will in the mortgaged lands, & were in possession when the sheriff attempted to execute the writ. The infants, & the widow as their guardian, made a claim to the possession as against the writ, based on the ground of the infants not having been made parties to the action:—*Held*: the action, as regards the claim for possession, was properly constituted; & the infants were bound by the judgment against the exors.—EMERSON *v.* HUMPHRIES (1892), 15 P. R. 84.—CAN.

a. ———.]—Judgments Act, 1902 (c. 91), s. 3, making a registered judgment a lien & charge upon the lands of the judgment debtor "the same as though charged in writing under his hand & seal" must be read as implying such a charge as an adult

could create, so that an infant's lands will be bound by the registration of a certificate of judgment against him in the same way as those of an adult.—MCDOUGALL *v.* GAGNON (1906), 3 W. L. R. 387.—CAN.

b. ———.]—Where proceedings defective.]—Deft. was not quite of age, & no guardian had ever been appointed, but the fact of infancy was well known to deft.'s parents & to the solr. & counsel who appeared for him at the trial, & no objection on this ground was taken till this motion before the Div. Ct.:—*Held*: the appointment of a guardian was not imperative; the ct. had a discretion; & in this case the judgment obtained against deft. at the trial should not be interfered with.—STRAUGHAN *v.* SMITH (1890), 19 O. R. 558.—CAN.

c. ———.]—In a mortgage-decree M. was one of the judgment-debtors, & the guardian *ad litem* of two of the other judgment-debtors, viz., J., her minor daughter, & K., another person, wrongly described as a minor. After the decree was made absolute, proceedings were taken in execution, but upon payment of a part of the decretal amount the sale was stayed. M. then died, & although her heirs were some of the other judgment-debtors, no one was brought on the record as her representative, & no one was appointed guardian *ad litem* either for J. or K. Upon a fresh application for sale in which the parties were described as in the decree, the sale was held. An application was then made on behalf of J. & K. to set aside the sale:—*Held*: neither the absence of a guardian *ad litem* for J., nor the description of K. as a minor affected the validity of the proceedings.—NET

profits, & for possession of half the estate. The ct. may decree deft., though an infant, to pay the £300 in six months, with interest from the mother's death, or in default, to account for profits of a moiety, & the moiety to be set out by comrs.; but deft. being an infant, must have a day to show cause, when she comes of age.—GUNDY *v.* BAYNARD (1704), 2 Vern. 479; 23 E. R. 907.

1913. ———.]—EFFINGHAM (LADY) *v.* NAPIER, No. 1702, *ante*.

Where proceedings defective.]

A guardian suffered a dowress to recover at law, by not setting up a term, which was created for protecting a purchaser, & the infant was relieved.—WRAY *v.* WILLIAMS (1711), Prec. Ch. 151; 24 E. R. 73; *sub nom.* WILLIAMS (LADY) *v.* WRAY, 1 P. Wms. 137; 2 Vern. 680.

Annotations:—Consd. Banks *v.* Sutton (1732), 2 P. Wms. 700. *Refd.* Casburne *v.* Inglis (1737), West temp. Hard. 221; Maundrell *v.* Maundrell (1802), 7 Ves. 567.

1915. ———.]—An infant deft., on attaining twenty-one, discharged the solr. who had acted for her in the suit. Afterwards that solr. was served with a subpoena, for her, to hear judgment. He returned the subpoena to pltf.'s solr., & stated at the same time that deft. had come of age, & that he was no longer employed for her. Some months afterwards the cause was heard, but without deft. having been served with a subpoena to hear judgment, or any one appearing for her at the hearing; & a decree was made in which she was described as an infant:—*Held*: she was entitled to put in a new answer to the bill.—SNOW *v.* HOLE (1846), 15 Sim. 161; 7 L. T. O. S. 318; 10 Jur. 347; 60 E. R. 578.

1916. ———.]—Where fraud or collusion can be alleged.]—RICHMOND *v.* TAYLOUR, No. 1700, *ante*.

1917. ———.]—A decree against an infant *nisi*, etc., is an absolute decree; & when he comes of age, he cannot set it aside by original bill unless for fraud & collusion between pltf. & his guardian,

LALL SAHOO *v.* SHEIKH KAREEM BUX (1896), I. L. R. 23 Calc. 686.—IND.

d. ———.]—Under Civil Procedure Code, s. 443, the ct. is bound, after satisfying itself of the fact of minority, to appoint a proper person to act on behalf of a minor in the conduct of a suit; & this rule should be strictly followed; but where the ct., by its action, has given its sanction to the appearance of a person as such a guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings. The mother of certain minor defts. appeared throughout the proceedings in a suit as their guardian; the ct. admitted the plaint in which she was described as guardian, & in the decree & execution proceedings the ct. so described her:—*Held*: although no formal order appointing her guardian *ad litem* was drawn up, the minors were effectively represented in the suit by their mother, & with the sanction of the ct.; the absence of a formal order appointing the mother guardian *ad litem*, & the fact that no attempt was made to serve the minors (members of a joint family) or their mother personally with a summons, before serving it on the adult male member & the manager of the joint family, were (there being nothing to suggest that the interests of the minors were not duly protected, & the defects in procedure not having prejudiced them) merely irregularities under Code of Civil Procedure, s. 578, & not errors fatal to the suit.—WALLAN *v.* BANKEE BEHARI PERSHAD SINGH (1903), I. L. R. 20 Calc. 1021; 7 C. W. N. 774; L. R. 30 Ind. App. 182.—IND.

e. ———.]—The provisions of Code of Civil Procedure, s. 443, as

but he may amend his answer & file a bill of discovery to that end.

He [deft.] may controvert this decree two ways, if there was any fraud or collusion between plffs. & his guardian by an original bill, or if matter that then appeared was not insisted on, or if he has discovered a new matter since, he may amend his defence, & have a bill of discovery (LORD KING, C.).—TREFUSIS v. COTTON (1730), Mos. 306; 25 E. R. 409, L. C.

1918. — Where no day given to show cause against decree.]—RICHMOND v. TAYLOUR (1721), 1 Dick. 38; 1 P. Wms. 734; 21 E. R. 181, L. C.

Annotations:—Mentd. Sheffield v. Buckingham (1739), West temp. Hard. 682; Montgomerie v. A.-G. (1741), 9 Mod. Rep. 365; Ineson v. Moulston, Vobe's Case (1742), 9 Mod. Rep. 373; Barnesly v. Powel (1748), 1 Ves. Sen. 119; Bradish v. Gee (1754), Amb. 229; Manaton v. Molesworth, Wortley v. Molesworth (1757), 1 Eden. 18.

1919. — Discovery of new matter—Or matter not insisted on by plaintiff.]—TREFUSIS v. COTTON, No. 1917, ante.

Judgment in default.]—See Sub-sect. 5, ante.

1920. Application to set aside judgment—Terms imposed.]—Where an appearance had been entered for a minor, & interlocutory judgment obtained against him by default, pltf. having no knowledge of the fact of minority, the ct. will set aside the proceedings on terms.—JAMES v. ASWELL (1847) 11 Jur. 562.

1921. — Sufficiency of merits.]—The ct. will set aside a judgment if deft. shows merits, & will treat a plea of infancy as a defence upon the legal merits, sufficient to induce it to interfere. Terms of interference.—CAVALLIER v. MICHAEL (1867), 17 L. T. 290.

Order for specific performance against infants.]—See SPECIFIC PERFORMANCE.

Judgment for foreclosure against infant mortgagor.]—See Nos. 1922–1928, post.

Liability to committal.]—See CONTEMPT OF COURT, Vol. XVI., p. 48, No. 507.

Liability to execution—Infant's estate in remainder.]—See EXECUTION, Vol. XXI., p. 560, Nos. 1371, 1372.

Judgment against partnership—Infant member of partnership.]—See PARTNERSHIP.

Judgment in respect of trading debts.]—See Nos. 345, 346, ante.

B. Judgment of Foreclosure.

1922. Infant may show cause against decree.]—An infant cannot be foreclosed without a day to show cause. The proper way is to decree a sale, & that binds the infant.—BOOTH v. RICH (1684), 1 Vern. 295; 23 E. R. 478.

Annotation:—Refd. Goodier v. Ashton (1811), 18 Ves. 83.

1923. —.]—In a foreclosure against an infant, though the infant has six months after he comes of

age to show cause, etc., yet he cannot ravel into the account, nor even redeem, but only show an error in the decree.—MALLACK v. GALTON (1735), 3 P. Wms. 352; 2 Eq. Cas. Abr. 11; 24 E. R. 1097, L. C.

Annotation:—Refd. Kelsall v. Kelsall (1834), 2 My. & K. 409.

1924. —.]—Decree of foreclosure against an infant, with a day to show cause.—GOODIER v. ASHTON (1811), 18 Ves. 83; 34 E. R. 249.

1925. —.]—A decree of foreclosure against an infant must give the infant a day to show cause against the decree after he attains twenty-one, notwithstanding Debts Recovery Act, 1830 (c. 47), ss. 10, 11.—PRICE v. CARVER (1837), 3 My. & Cr. 157; 40 E. R. 884, L. C.

Annotations:—Folld. Mellor v. Porter (1883), 25 Ch. D. 158.

Mentd. Tuckley v. Thompson (1860), 1 John. & H. 126.

1926. —.]—The former practice of giving an infant a day to show cause against a foreclosure decree, after attaining his majority, is not affected by Trustee Act, 1850 (c. 60).—GRAY v. BELL (1882), 46 L. T. 521; 30 W. R. 606.

1927. — Equitable mortgage.]—In a decree for sale against the infant heir of an estate subject to an equitable mtge., the infant ought not to be allowed a day to show cause against the decree, on coming of age: but, in a decree of foreclosure, the day ought to be allowed.—SCHOLEFIELD v. HEAFIELD (1837), 7 Sim. 667; 7 L. J. Ch. 4; 58 E. R. 993; subsequent proceedings (1838), 8 Sim. 470.

1928. —.]—In an action by an equitable mtgee., without any memorandum of deposit of title deeds, against the widow & infant heir-at-law, of the mtgor. for foreclosure:—Held: on motion for judgment, defts. not having appeared, the infant heir must be ordered to convey the estate when he attained the age of twenty-one years & he must have a day to show cause in the usual way.—MELLOR v. PORTER (1883), 25 Ch. D. 158; 53 L. J. Ch. 178; 50 L. T. 49; 32 W. R. 271.

1929. — Six months after attaining full age.]—Foreclosure against an infant. The decree absolute repeats the clause nisi, as in the original decree, giving six months after age to show cause, which can only be error.—WILLIAMSON v. GORDON (1812), 19 Ves. 114; 34 E. R. 461, L. C.

Annotations:—Refd. Kelsall v. Kelsall (1834), 2 My. & K. 409; Powys v. Mansfield (1836), 6 Sim. 637; Mellor v. Porter (1883), 25 Ch. D. 158.

1930. —.]—In a foreclosure suit the infant heir is still entitled to a day to show cause against the decree six months after coming of age, notwithstanding Trustee Act, 1850 (c. 60), s. 30.—NEWBURGH (EARL) v. MORTON (1850), 16 L. T. O. S. 482; 15 Jur. 166.

Annotation:—Refd. Mellor v. Porter (1883), 25 Ch. D. 158.

1931. On what grounds decree may be impeached—Only error in decree.]—MALLACK v. GALTON, No. 1923, ante.

to the appointment of a guardian *ad litem* for a minor deft. are imperative, & where those provisions are not substantially complied with, the minor is not properly represented, & any decree which may be passed against him is a nullity.—HANUMAN PRASAD v. MUHAMMAD ISHAQ (1906), I. L. R. 28 All. 137.—IND.

f. —.]—In a suit for the recovery of money against a father & his minor son, the father refused to act as guardian *ad litem* of his minor, whereupon the ct. appointed its head clerk as guardian on the affidavit of pltf. that there was no fit & proper person alive to act as the guardian of the minor, while as a matter of fact pltf. knew that the minor was living under the protection of his maternal grandfather. The decree passed in this suit was sought to be set aside by the minor on the ground of fraud:—

Held: the statement in the affidavit could not be held to be deliberately false so as to constitute fraud, in the absence of any allegation of collusion between pltf. & the head clerk, & the decree could not be set aside unless there was no appointment of a guardian *ad litem* or the appointment was induced by fraud or what the ct. would regard as tantamount to fraud.—MARUTHAMALAI v. PALANI (1912), I. L. R. 37 Mad. 535.—IND.

g. —.]—If a minor has a guardian appointed for him, by a competent authority, he alone can represent the minor in any litigation; hence a decree obtained against such a minor represented not by such guardian, but by another, though the ct. acted in ignorance of the existence of such appointed guardian is not binding on the minor.—PUJARI BHIMAJI

v. RAJABHAI HUSSAIN SAHEB (1920), I. L. R. 43 Mad. 808.—IND.

PART XIV. SECT. 2, SUB-SECT. 7.—B.

1922 i. Infant may show cause against decree.]—Where a decree of foreclosure against an infant deft. does not reserve a day after his attaining twenty-one to show cause, & upon his attaining his majority the infant applies upon affidavits to put in a new answer & raise a fresh defence, the relief asked cannot be obtained without a rehearing of the cause. Upon the rehearing of a cause, where the decree of foreclosure did not reserve a day to the infant:—Held: in decrees of foreclosure against infant defts. a day to show cause after attaining twenty-one must be reserved to defts.—MAIR v. KERR (1850), 2 Gr. 223.—CAN.

Sect. 2.—Against infants: Sub-sect. 7, B. & C.; sub-sects. 8, 9 & 10, A. & B.]

1932. ———.]—WILLIAMSON v. GORDON, No. 1929, *ante*.

1933. When absolute in first instance—Whether where any defendants do not admit title of plaintiff.]—The ct. will not make an immediate decree of foreclosure under 7 Geo. 2, c. 20, where any of defts. do not admit pltf.'s title. *Qu.*: whether the ct. will make such a decree against an infant.—ROE v. WARDLE (1838), 3 Y. & C. Ex. 70; 2 Jur. 640; 160 E. R. 618.

1934. ——— Where for infant's benefit.]—BILLSON v. SCOTT (1856), Seton's Judgments & Orders, 3rd ed., Vol. 2, p. 686.

Annotation:—*Folld.* Croxon v. Lever (1863), 3 New Rep. 238.

1935. ———.]—In a foreclosure suit, where the value of the mortgaged property is clearly less than the amount owing to the mtge., the ct. will make an absolute decree for foreclosure against an infant, in consideration of pltf.'s paying the infant's costs.—CROXON v. LEVER (1863), 3 New Rep. 238; 9 L. T. 597; 10 Jur. N. S. 87; 12 W. R. 237.

Annotation:—*Folld.* Bennett v. Harfoot (1871), 24 L. T. 86.

1936. ———.]—Where, at the hearing of a foreclosure suit against the infant heiress-at-law of the mtgor., it appeared that the mortgaged property was not worth the money due on the mtge., & pltf. offered to pay the costs of the infant debt., the ct. made a decree for foreclosure absolute in the first instance.—BENNETT v. HARFOOT (1871), 24 L. T. 86; 19 W. R. 428.

1937. ———.]—Judgment for an immediate foreclosure absolute against an infant granted, pltf. offering to pay debt.'s costs of the action as between solr. & client, & defendant's counsel not asking for liberty to redeem, or that an account should be taken of what was due to pltf., upon the ct. being satisfied by evidence that the value of the property was not sufficient to pay the amount of the principal sum due on the mtge., together with interest & the costs of the action, & that it would be for the benefit of the infant to give judgment in that form.—WOLVERHAMPTON & STAFFORDSHIRE BANKING CO. v. GEORGE (1883), 24 Ch. D. 707.

1938. ———.]—Judgment for foreclosure made absolute against an infant without giving time to show cause, the mtgee. offering to pay the infant's costs as between solr. & client, & the guardian of the infant being of opinion that it was for the benefit of the infant that the order should be made, & there being evidence that the mtge. debt greatly exceeded the value of the property.—YOUNGE v. COCKER (1884), 32 W. R. 359.

As to foreclosure generally, *see* MORTGAGE.

As to costs in foreclosure actions, *see* MORTGAGE.

C. Decree of Sale against Infant Mortgagor.

1939. Whether immediately binding.]—BOOTH v. RICH, No. 1922, *ante*.

1940. ——— Equitable mortgage.]—SCHOLEFIELD v. HEAFIELD, No. 1927, *ante*.

SUB-SECT. 8.—INJUNCTION.

See, generally, INJUNCTION.

Whether granted against infants—To restrain waste—Cutting down timber.]—*See* AGRICULTURE, Vol. II., p. 70, No. 476.

To restrain sale of goods—Obtained

PART XIV. SECT. 2, SUB-SECT. 10.—A.

h. Liability for plaintiff's costs—*Infant wrongly appearing by attorney.*]

WADE v. KEEFE (1888), 22 L. R. Ir. 154.—IR.

k. Liability for own costs—*Payable out of infant's share of property.*]

by misrepresentation.]—LEMPRIERE v. LANGE, No. 566, *ante*.

1942. ——— To restrain breach of contract—Where no action at law would lie.]—An indenture of apprenticeship entered into between pltf., a teacher of stage-dancing, & an infant & her mother, contained covenants that during the term of the apprenticeship the services of the apprentice should be at pltf.'s disposal, that the apprentice should not enter into any professional engagement without the written consent of pltf., & that pltf. should have the right to make professional engagements for the apprentice, & pay her for such services at rates mentioned. The infant having, without pltf.'s consent, entered into a professional engagement, pltf. applied for an interim injunction:—*Held*: the application must be refused, as no action at law could lie against an apprentice.—DE FRANCESCO v. BARNUM (1889), 43 Ch. D. 165; 59 L. J. Ch. 151; 6 T. L. R. 59; *sub nom.* FRANCESCO v. BARNUM, 62 L. T. 40; 54 J. P. 420; 38 W. R. 187.

Annotation:—*Refd.* Evans v. Ware, [1892] 3 Ch. 502.

1943. ——— Contract for infant's benefit.]—Deft., an infant, in consideration of being employed by pltf., as a milk carrier, at a salary of 21s. per week, agreed not to carry on or serve in the business of a seller of milk, within five miles of pltf.'s place of business for two years after leaving pltf.'s service. The agreement was terminable at a week's notice on either side. Deft. left pltf.'s service a few days after he came of age:—*Held*: the agreement, as a whole, was an agreement for the benefit of debt., & an injunction granted to restrain a breach of it.—EVANS v. WARE, [1892] 3 Ch. 502; 62 L. J. Ch. 256; 67 L. T. 285; 36 Sol. Jo. 731; 3 R. 32.

Annotations:—*Folld.* Merriott v. Martin (1899), 43 Sol. Jo. 717. *Refd.* Farmers & Cleveland Dairies Co. v. Riley (1893), 9 T. L. R. 260; Green v. Thompson (1899), 80 L. T. 691; Morrison, Fleet v. Fletcher (1900), 17 T. L. R. 95.

1944. ———.]—MERRIOTT v. MARTIN (1899), 43 Sol. Jo. 717.

1945. ——— Where specific performance would not be decreed.]—LUMLEY v. RAVENSCROFT, No. 199, *ante*.

——— To restrain solicitation of customers—After termination of contract.]—*See* Nos. 136, 138, *ante*.

See, also, No. 1951, *post*.

SUB-SECT. 9.—APPEAL.

Time for appeal.]—*See* R. S. C., Ord. 58, r. 15.

1946. ——— Extension—Whether mere infancy sufficient ground.]—The discretion given to the ct. by R. S. C., Ord. 58, r. 15, ought to be exercised on the principles stated by COTTON, L.J., in *Re Manchester Economic Building Society* (1883), 24 Ch. D. 488, 499, & leave ought not to be granted except upon very special terms. Here appct. had been properly represented by counsel in the ct. below, & it would be mischievous to hold the mere fact of her infancy a ground for extending the time for appealing (COLLINS, M.R.).—*Re* BRADSHAW, BRADSHAW v. BRADSHAW (1906), 50 Sol. Jo. 439, C. A.

SUB-SECT. 10.—COSTS.

A. Liability of Infant.

1947. Liability for plaintiff's costs.]—Where an infant is a debt. he certainly pays costs (*per*

Where there is a residue & a share of that residue not severed from the corpus, & the share is bequeathed to a class, if there is a conflict as to who

CUR.).—GARDINER v. HOLT (1744), 2 Stra. 1217; 93 E. R. 1140.

Annotation:—Reid. Dow v. Clark (1833), 1 Cr. & M. 860.

1948. — Infant wrongly appearing by attorney—Costs of application to strike out.]—An infant deft. having appeared by attorney, the ct. ordered the appearance to be struck out of the flacer's book, & that, if deft. should appear by guardian, his plea should be made conformable thereto; & that deft. should pay pltf.'s costs.—PAGET v. THOMPSON (1826), 3 Bing. 609; 11 Moore, C. P. 504; 130 E. R. 648.

1949. — False representation by infant.]—CHUBB v. GRIFFITHS, No. 407, ante.

1950. — Misrepresentation as to age.]—v. LANGE, No. 566, ante.

1951. — Injunction granted to restrain.]—Where an injunction was granted to restrain an infant deft. from representing that the business carried on by him was connected with the business carried on by pltf.:—Held: the ct. had jurisdiction to order the infant deft. to pay the costs of the action.—WOOLF v. WOOLF, [1899] 1 Ch. 343; 68 L. J. Ch. 82; 79 L. T. 725; 47 W. R. 181; 43 Sol. Jo. 127.

Annotation:—Consd. Leslie v. Sheill, [1914] 3 K. B. 607.

1952. — Agreement to pay such costs—Legality.]—Pltf. in a probate action sought to establish the validity of a will as residuary legatee, & H., one of defts. as exor. & the trustee of an infant beneficiary under a will of testator earlier in date, sought to establish the validity of that will. During the course of the proceedings in the action a contract was made between pltf. of the one part & H. & the infant, who was also a deft., of the other part, whereby it was agreed that, whichever of the two wills was upheld by the ct., the costs of pltf. & of deft. H. & the infant should be paid out of the estate whether the ct. so ordered or not. The ct. pronounced in favour of the earlier will, & on application made refused to sanction the contract on behalf of the infant, & directed that pltf. should pay the costs of H. & the infant in the probate action. In an action by pltf. to recover his costs against deft. H. under the contract:—Held: the contract was not illegal, & deft. was personally liable upon it.—PRINCE v. HAWORTH, [1905] 2 K. B. 768; 75 L. J. K. B. 92; 92 L. T. 773; 54 W. R. 249; 21 T. L. R. 402; previous proceedings (1904), 20 T. L. R. 313.

1953. — Infant co-respondent.]—Petitioner obtained a decree of divorce against resp. & co- resp.:—Held: the fact that co- resp. was an infant & had not appeared was no reason for not making an order against him for costs.—BROCKELBANK v. BROCKELBANK & BORLASE (1911), 27 T. L. R. 569; 55 Sol. Jo. 717.

1954. Liability for own costs—Payable out of infant's share of property—Construction of will.]—Construction of a will & settlement, as not comprehending great grandchildren under the description of children & grandchildren. Interest decreed to the full amount produced by a fund wrongfully withheld from the proprietor, at 4 per cent. upon a demand, established as a debt against the funds of others. Costs of the unsuccessful defence of an infant charged, not upon the general fund, but upon his own share.—ORFORD (EARL)

are the members of a class, there being strong presumptions in favour of certain infants, & such infants have been added as defts. at the suggestion of the ct., & the guardian *ad litem* of the infants has attended the proceedings, the guardian *ad litem* is entitled to receive out of the estate the reasonable costs incurred by his

being made a party & his taking part in the proceedings.—BRADLEY v. REID (1907), 26 N. Z. L. R. 925.—N.Z.

1. — Promise not to plead infancy.]—Costs refused where the defence of infancy was successfully set up, on the ground that a representation had been made that the defence

v. CHURCHILL (1814), 3 Ves. & B. 59; 35 E. R. 401.

Annotation:—Mentd. Sanderson v. Bayley (1838), 4 My. & Cr. 56.

1955. — Partition action.]—To a bill for a partition, filed by the mtgee. of the life estate, & an undivided reversionary share in freehold premises, an infant deft., tenant in tail of an undivided share, did not appear; & on the application of pltf., under the 28th of the orders of October, 1842, the solr. to the suitors' fee fund was appointed the infant's guardian *ad litem*. At the hearing of the cause, the ct. directed pltf. to pay the infant's costs, & charge them on his share.—ROBINSON v. ASTON (1845), 5 L. T. O. S. 36; 9 Jur. 224.

1956. — Settlement set aside as against infant.]—On setting aside a voluntary settlement, made by a trader while insolvent, in favour of his wife & an infant child:—Held: as to the costs of the trustees & infant, the utmost the ct. could do was to make the decree without costs.—ELSEY v. COX (1858), 26 Beav. 95; 53 E. R. 832.

Annotation:—Reid. Ideal Bedding Co. v. Holland, [1907] 2 Ch. 157.

1957. — Specific performance against infant.]—A. having agreed to grant a lease to B. died before granting it, leaving an infant heir. B. filed a bill against the infant for specific performance, which was decreed:—Held: each party should bear his own costs.—LONGINOTTO v. MORSS (1872), 26 L. T. 828.

— On originating summons.]—See, further, TRUSTS & TRUSTEES; WILLS.

1958. Infant necessary but unwilling party—Costs payable by plaintiff.]—SHORT v. RIDGE, [1876] W. N. 47.

1959. — Whether added to plaintiff's costs.]—A person contracted for the purchase of a freehold estate, paid £100 deposit, & died intestate. On a claim by the vendor against the heir-at-law, an infant, & also against the administratrix of the intestate, a resale of the estate was directed, & the proceeds & deposit were ordered to be applied in payment of the purchase-money & interest & his costs to pltf. Pltf. was directed to pay the costs of the infant deft., & add them to his own.—POPPLER v. HENSON (1852), 5 De G. & Sm. 318; 21 L. J. Ch. 311; 19 L. T. O. S. 44; 64 E. R. 1134.

]—The ct. has no jurisdiction to order payment out of the suitors' fund of the costs incurred by the solr. of the suitors' fund as guardian *ad litem* of an infant deft.—FRASER v. THOMPSON (1859), 4 De G. & J. 659; 45 E. R. 256; sub nom. FRAZER v. THOMPSON, 34 L. T. O. S. 20; 7 W. R. 678, L. O. & L. JJ.; subsequent proceedings, sub nom. FRAZER v. THOMPSON (1860), 1 Giff. 337.

Annotation:—Mentd. Whelan v. Palmer (1888), 36 W. R. 587.

Costs on petition for nullity of child's marriage.]—See HUSBAND & WIFE, Vol. XXVII., p. 465, No. 4865.

Costs in foreclosure actions.]—See MORTGAGE.

B. Liability of Guardian *ad litem*.

1961. General rule—No liability except in case of misconduct.]—The guardian *ad litem* of an infant

would not be set up, thus prejudicing pltf.—SIMMON v. GULLIVAN (1900), 40 N. S. R. 587.—CAN.

PART XIV. SECT. 2, SUB-SECT. 10.—B.

m. Jointly & severally with infant.]—Infant action of filiations & alimentis against a minor, defender's father

Sect. 2.—Against infants: Sub-sect. 10, B. Sect 3:
Sub-sect. 1, A. & B. (a) &

deft. raising an unsuccessful defence, will not be ordered to pay the costs of the suit unless it is a case of gross misconduct on his part.—**MORGAN v. MORGAN** (1865), 5 New Rep. 427; 12 L. T. 199; 11 Jur. N. S. 233.

See, also, **EXECUTORS**, Vol. XXIII., p. 272, No. 3356.

Costs of solicitor appointed by court to be guardian ad litem.]—See R. S. C., Ord. 65, r. 13.

1962. — On application of plaintiff.]—In a foreclosure suit, some of defts. being infants, the solr. to the suitors' fund was, upon pltf.'s application, appointed their guardian & it was held that pltf. should pay the guardian's costs.—HARRIS v. HAMLYN (1849), 3 De G. & Sm. 470; 18 L. J. Ch. 403; 13 L. T. O. S. 399; 14 Jur. 55; 64 E. R. 566.

1963. — Apportionment as between several defendants—Separate set.]—Where, upon the application of pltf., the solr. of the suitors' fund, who also acted for other defts. appearing in *formâ pauperis*, was appointed guardian *ad litem* of an infant deft., & pltf. was ordered to pay the infant's costs, the ct. refused to apportion the costs between the several defts., & allowed the solr. of the suitors' fund the infant's full costs.—FRAZER v. THOMPSON (1860), 1 Giff. 337; 29 L. J. Ch. 402; 65 E. R. 945.

1964. Whether taxed as between solicitor & client—Or party & party.]—An action for a tort having been brought against an infant, no appearance was entered for him, & on pltf.'s application the official solr. was assigned guardian *ad litem* to deft., & he delivered a defence on behalf of deft. At the trial the issues were found by the jury in favour of pltf. with £450 damages, & judgment was entered for him accordingly; & it was ordered that pltf., should pay the costs of the official solr., as guardian *ad litem* of deft., to be taxed by the master:—Held: there being in the order no special direction to the contrary, R. S. C., Ord. 65, r. 13, did not apply & the costs must be taxed as between party & party.—EADY v. ELSDON, [1901] 2 K. B. 460; 70 L. J. K. B. 701; 84 L. T. 615; 49 W. R. 595; 45 Sol. Jo. 520, C. A.

1965. — — —.]—GOATLY v. JONES, [1907] W. N. 161.

Annotation:—Refd. Jackson v. Jackson, [1908] P. 308.

also called as his curator in law & entered appearance. Before the summons was served defender's father wrote to pursuer espousing his son's cause & stating that he was prepared to furnish him with means to enable him to go to the highest ct. in the land. After a proof decree was granted by the sheriff substitute against defender who appealed to the sheriff & afterwards to the Ct. of Session but in both cts. the sheriff substitute's decision was upheld. The father took an active part in the conduct of his son's defence:—Held: the father as curator was liable jointly & severally with his son in the whole expenses of the cause.—**RODGER v. WEIR**, [1917] S. C. 300; 54 Sc. L. R. 254.—SCOT.

PART XIV. SECT. 3, SUB-SECT. 1.—A.

1966 i. Whether binding on infant.]—One of the parties executing an agreement to submit to the provisions of a will, was, to the knowledge of all interested, under age at the time of the agreement:—Held: no answer to a bill by the infant after attaining twenty-one, against parties who had

obtained the benefits of the will intended for them, notwithstanding the want of mutuality at the time of the agreement.—**MELVILLE v. STRATHERNE** (1878), 26 Gr. 52.—CAN.

1966 ii. —.]—Where a compromise was alleged to have been entered into by a mother on behalf of her two minor sons on the one hand & an adult member of the family on the other, agreeing to give the latter more than had been awarded by a judicial decision:—Held: the compromise was not binding on the minors.—DHARMAJI VAMAN v. GURRAY SHRINIBAS (1873), 10 Bom. 311.—IND.

1966 iii. —.]—The compromise of a suit on behalf of a minor without the leave of the ct. is voidable under Civil Procedure Code, s. 462, & can be avoided by the minor on his attaining majority. It can be avoided before that time. The sect. applies to a compromise of execution proceedings.—VIRUPAKSHAPA v. SHIDAPPA & BASAPPA (1901), I. L. R. 26 Bom. 109.—IND.

1966 iv. —.]—In some cases in which an award by arbitrators cannot be

SECT. 3.—COMPROMISES AND CONSENTS.

SUB-SECT. 1.—COMPROMISES.

A. In General.

See, generally, R. S. C., Ord. 22, r. 15.

Power of court to sanction.]—See Sub-sect. 1, B. (b), post.

1966. Whether binding on infant.]—Although an infant agree not to bring a writ of error, it binds him not; but he may assign his infancy for error.—STERN v. BERN (1735), Lee temp. Hard. 104; 95 E. R. 65.

1967. — Agreement to settle action.]—Pltf., an infant, commenced an action by his next friend for wages & damages for assault, false imprisonment, & malicious prosecution. He voluntarily came to deft. & offered to take 30s. in respect of all his claims as he wished to go abroad, which was paid him, & he signed an acknowledgment that all his wages had been paid, & that he had brought the other claims out of vengeance. The next friend continued the action, & pltf. came over to give evidence. Deft. pleaded the agreement in bar to the action. The jury found for deft. as to the wages & malicious prosecution, but for pltf. upon the false imprisonment with £20 damages. The infant never ratified the agreement:—Held: the infant was not bound by the agreement, so as to make it a bar to the action.—MATTEI v. VAUTRO (1898), 78 L. T. 682.

1968. — Acceptance of compensation for accident—While in employment.]—An apprentice who was an infant, met with an accident in the course of his employment, & he agreed with his employers to accept a weekly payment amounting to half his wages in compensation, & signed a receipt, which stated that he elected to accept this sum under Workmen's Compensation Act, 1897 (c. 37), in full satisfaction & discharge of all claims for compensation. Subsequently he brought an action against his employers at common law for damages in respect of the same injuries, based on their negligence in not having fenced the machine plane:—Held: the Act by including an apprentice in the general word "workman" did not alter the law applicable to contracts made by infants, & it not being for the infant's benefit to accept compensation under the Act, his election to accept the same did not bind him, & his claim under the Act was therefore no bar to his common law right to sue.—STEPHENS v. DUDBRIDGE IRONWORKS

supported as such, it is still capable of support on the ground that the award represents what is in effect the outcome of a family compromise. But such a compromise, if it has the effect of postponing indefinitely the rights of minor reversionary heirs, is not binding on the minors even though they were sufficiently represented in the proceedings resulting in the award.—**RAM BAHADIN SEN v. MAHANATH GANESH BHAGAT** (1923), I. L. R. 2 Pat. 554.—IND.

1966 v. —.]—MURPHY v. SMITH, [1920] S. C. 104.—SCOT.

1967 i. — Agreement to settle action.]—COLLIER v. UNION TRUST CO., Re LESLIE (1913), 24 O. W. R. 761; 4 O. W. N. 1465; 12 D. L. R. 4.—CAN.

n. What amounts to—Abandonment.]—The abandonment of an issue does not amount to a compromise, & if the suit is being conducted by a guardian on behalf of a minor, leave of the ct. is not necessary under Code of Civil Procedure, s. 462, for such abandonment.—VENKATA NARASIMHA NAIDU v. BHASHYAKARLU NAIDU (1899), I. L. R. 22 Mad. 538.—IND.

Co., [1904] 2 K. B. 225 ; 73 L. J. K. B. 739 ; 90 L. T. 838 ; 68 J. P. 437 ; 52 W. R. 644 ; 20 T. L. R. 492 ; 48 Sol. Jo. 474 ; 6 W. C. C. 48, C. A. Annotation :—*Expld.* Cribb v. Kynoch (No. 2), [1908] 2 K. B. 551.

See, generally, MASTER & SERVANT.

1969. Power of court to compel.]—NORTON v. STEINKOPF, No. 1982, *post*.

1970. —.] — *Re* BIRCHALL, WILSON v. BIRCHALL, No. 1984, *post*.

1971. Pleading—Benefit to infant must be averred.]—In an action by an infant, for negligence, it is not sufficient in an equitable plea to allege that defts. paid a sum of money to a third person at pltf.'s request in discharge of the cause of action, unless there is a distinct averment that such payment was beneficial to pltf.—ATKINSON v. LONDON, BRIGHTON & SOUTH COAST RY. CO. (1863), 2 New Rep. 126.

B. Sanction of Court.

(a) Necessity for.

See R. S. C., Ord. 22, r. 15.

1972. General rule.]—A bill was filed to establish the right of an infant to a moiety of an estate. At the hearing of the cause an issue was directed to ascertain the legitimacy of pltf., upon which his right depended. Before the trial commenced an agreement for a compromise was entered into, & signed by the counsel both of pltf. & deft., by which the estate was to be divided equally between their respective clients, each of whom was to pay his own costs. Deft. consented to carry the agreement into effect, but he subsequently refused to abide by it:—*Held*: from the want of reciprocity the ct. would not interfere unless it were for the benefit of the infant ; but that, as this agreement was beneficial to the infant, the ct. would have given its sanction to it ; but, in consequence of the want of reciprocity arising from pltf.'s infancy, the ct. refused to enforce the agreement upon the withdrawal of the consent of deft. : the counsel of deft. had an implied authority to enter into the agreement ; an order of ct. to give effect to it was not necessary ; & deft. must pay so much of pltf.'s costs of preparing for the trial as became useless by the refusal of deft. to carry out the agreement ; the former order must be continued & the trial proceeded with ; & the costs of the petition on which the order was made must be costs in the cause.

[The agreement] would not be sanctioned by the ct. unless the agreement were considered

beneficial to the infant (LORD LANGDALE, M.R.).—HARGRAVE v. HARGRAVE (1850), 12 Beav. 408 ; 19 L. J. Ch. 261 ; 15 L. T. O. S. 540 ; 14 Jur. 212 ; 50 E. R. 1117.

Annotation :—*Reid.* Swinfen v. Swinfen (1857), 1 C. B. N. S. 364.

See, also, No. 1967, *ante*.

(b) Power of Court to Sanction.

See, generally, R. S. C., Ord. 22, r. 15.

1973. Where compromise for benefit of infant.]—DOE d. MILLER v. NODEN, No. 590, *ante*.

1974. —.]—A proposed compromise of a suit appearing to be for the benefit of an infant deft., the ct. sanctioned it, without a reference to the master.—LIPPIAT v. HOLLEY (1839), 1 Beav. 423 ; 48 E. R. 1004.

1975. — Power discretionary.]—Where an arrangement had been entered into as to a contingent interest which was subject to the trusts of a settlement in which infants were concerned, the ct. refused to carry it out, though the arrangement was clearly beneficial for the infants.—DAY v. DAY (1845), 1 Holt, Eq. 223 ; 5 L. T. O. S. 143 ; 9 Jur. 785 ; 71 E. R. 729.

Annotation :—*N.F.* *Re* Wells, Boyer v. Maclean, [1903] 1 Ch. 848.

1976. — Benefit of infant.]—HARGRAVE v. HARGRAVE, No. 1972, *ante*.

1977. —.]—The ct. in sanctioning an arrangement on behalf of infants considers not only their pecuniary interest but its effect as a family arrangement.—MICHOLLS v. CORBETT (1865), 34 Beav. 376 ; 55 E. R. 680 ; *on appeal*, 3 De G. J. & Sm. 18, L. JJ.

1978. —.]—The expediency of a compromise between the owners of an estate, & other parties, one of whom was an infant, depended on the value of the estate. The information & evidence as to the value upon which the other parties consented to, & the Ct. of Ch. sanctioned the compromise, was all furnished by the owners. The owners had at the time in their possession other more detailed information ; which would probably have put the ct. upon inquiry, & led to its discovery that the value had been under-estimated :—*Held*: this was a sufficient ground for setting aside the compromise at the suit of the infant.

This ct. has power to compromise the rights & claims of infants & persons under disabilities, where those rights & claims are merely equitable, has not been & cannot be disputed. It is a power which has been continually exercised by the ct.

PART XIV. SECT. 3, SUB-SECT. 1.— B. (a).

1972 i. General rule.]—Where a compromise of a suit is entered into on behalf of an infant deft., the approval of the ct. to such compromise must be express, & will not be inferred from the subsequent passing of a decree in terms of such compromise. Without such approval, the compromise will not bind the infant & will be set aside at his instance.—SHARAT CHUNDER GHOSE v. KARTIK CHUNDER MITTER (1883), 1 L. R. 9 Calc. 810 ; 12 C. L. R. 455.—IND.

1972 ii. —.]—ARUNACHALAM CHETTY v. MEYYAPPA CHETTY (1897), 1 L. R. 21 Mad. 91.—IND.

1972 iii. —.]—Where the guardian *ad litem* of certain minors assented on their behalf to a compromise, which compromise was accepted by the ct. & a decree passed thereon, & was found not to be prejudicial to the interests of the minors:—*Held*: the minors could not, after the decree based upon the compromise had become

final, succeed in a suit to set aside on the sole ground that the ct. had not previously given leave to the guardian to enter into the compromise.—AMAN SINGH v. NARAIN SINGH (1897), 1 L. R. 20 All. 98.—IND.

1972 iv. —.]—The compromise of a suit on behalf of a minor without the leave of the ct. is voidable.—VIRUPAKSHAPA v. SHIDAPPA & BASAPPA (1901), 1 L. R. 26 Bom. 109.—IND.

1972 v. —.]—MANOHAR LAL v. JADUNATH SINGH (1906), 1 L. R. 28 All. 585 ; L. R. 33 Ind. App. 128 ; 10 C. W. N. 898.—IND.

o. Compromise by guardian appointed under Court of Wards Act, 1879.]—A guardian appointed under above Act, on behalf of minors, has power to compromise proceedings in a civil ct., to which the minors are defts. ; upon the guardian assenting to an agreement of compromise it is necessarily recorded by the civil ct. under Civil Procedure Code, 1882, s. 375 ; & its validity does not depend upon its terms having been examined &

approved by the civil ct.—NAKIMO DEWANI v. PEMBA DICLEN (1920), 1 L. R. 48 Ind. App. 27.—IND.

PART XIV. SECT. 3, SUB-SECT. 1.— B. (b).

1973 i. Where compromise for benefit of infant.]—In sanctioning compromises on behalf of minors, the order should state in terms that the question whether the compromise was for the benefit of the minors was considered.—GOVINDASAMI NAIDU v. ALAGIRISAMI NAIDU (1906), 1 L. R. 29 Mad. 104.—IND.

1973 ii. —.]—BLAIR v. CRAWFORD, [1906] 1 L. R. 578.—IR.

p. Where guardian *ad litem* objects.]—The guardian *ad litem* of three minors having agreed to compromise a suit & having signed a petition embodying the terms arrived at, undertook to present the petition at the next sitting of the ct. Leave of the ct. had not been obtained ; & at the time appointed the guardian declined to present the petition &

Sect. 3.—Compromises and consents: Sub-sect. 1, B. (b), (c) & (d), & C.]

& results almost necessarily from the jurisdiction which the ct. exercises over trustees. In the exercise of that jurisdiction the ct. may in general order the trustees to deal with the trust property in whatever mode it may consider to be for the benefit of *cestius que trust* who are infants or under disabilities (TURNER, L.J.).—BROOKE v. MOSTYN (LORD) (1864), 2 De G. J. & Sm. 373; 5 New Rep. 206; 34 L. J. Ch. 65; 11 L. T. 392; 10 Jur. N. S. 1114; 13 W. R. 115; 46 E. R. 419, L. JJ., *revsd.* on other grounds, *sub nom.* MOSTYN v. BROOKE (1866), L. R. 4 H. L. 304, H. L.

Annotations:—Consd. Fadelle v. Bernard (1871), 19 W. R. 555; *Re Wells*, Boyer v. Maclean, [1903] 1 Ch. 848. **Refd.** Micholls v. Corbett (1865), 3 De G. J. & Sm. 18. **Mentd.** Coaks v. Boswell (1886), 11 App. Cas. 232.

1979. ——Pltf., an infant, brought an action by her next friend in the county ct. to recover for personal injuries sustained by her through the alleged negligence of deft. At the trial a judgment of nonsuit was pronounced, & it was suggested that if there was no appeal deft. would not ask for costs. Pltf.'s counsel agreed to this, & the judgment was entered without costs. Pltf. was without means. On an application on her behalf for a new trial:—**Held:** the agreement was of no benefit to the infant, & was not binding on her.

This is an action by an infant by means of her next friend, who, undoubtedly has the conduct of the action in his hands. If, however, the next friend does anything in the action beyond the mere conduct of it, whatever is so done must be for the benefit of the infant & if in the opinion of the ct. it is not so, the infant is not bound. . . . The position of the infant is such that no costs can be recovered from her either directly or indirectly for she has no estate. . . . The next friend alone is liable for costs (LORD ESHER, M.R.).

The only reason that the next friend of an infant is entitled to bind the infant in matters connected with the cause is that he is the officer of the ct. to take all measures for the benefit of the infant in the litigation in which he appears as next friend (BOWEN, L.J.).

A next friend has no power to enter into a compromise by which the infant gives up a right & the next friend obtains a benefit (FRY, L.J.).—RHODES v. SWITHEBANK (1889), 22 Q. B. D. 577; 58 L. J. Q. B. 287; 60 L. T. 856; 37 W. R. 457; 5 T. L. R. 352, C. A.

1980. ——*Re WELLS*, BOYER v. MACLEAN, No. 446, *ante*.

1981. Only in pending litigation.]—PETO v. GARDNER, No. 1989, *post*.

1982. Where other adult parties insist on strict rights.]—By indenture of settlement A. assigned to H. & N. a debt due to her by H. & Co., upon trust, after the marriage to permit the sum to remain in the hands of H. & Co., until request was made by her to have it called in, & thereupon or upon her death upon trust to call it in, with power to the trustees at any time, with A.'s consent, to call in the money, giving three month's notice to H. & Co. H. & Co. stopped payment, & made a compromise with their creditors, & A. then gave notice to H. & N. to call in the money. N. accordingly called on H. & Co. to pay, & they not doing so, filed a bill against H. & the *cestius que trust* (not making the other partners in the firm parties) praying that the trusts might be carried out under the

direction of the ct., & that he might be indemnified, & gave notice of motion for a decree according to the prayer of the bill:—**Held:** under this notice pltf. was entitled to all the relief he could have had at the hearing; if the adult *cestius que trust* insisted on their strict rights, the ct. could exercise no discretion on behalf of the infant *cestius que trust*, as to accepting the compromise offered; & H. must be considered either as having neglected his duty in not getting in the money, or else that at the expiration of three months from the receipt of the notice he had the money in his hands, & in either case would be liable to have a decree made against him for payment of it.—NORTON v. STEINKOPF (1853), Kay, 45; Kay App. 10; 2 Eq. Rep. 777; 23 L. J. Ch. 35; 22 L. T. O. S. 169; 2 W. R. 34; 69 E. R. 20.

1983. Equitable claims.]—BROOKE v. MOSTYN (LORD), No. 1978, *ante*.

1984. Consent of legal advisers—Necessity for.]—The ct. cannot make a compromise of an action binding on infant parties without the consent of their legal advisers.

The ct. can approve of a compromise on behalf of infants, but it cannot force one upon them against the opinion of their advisers. The practice has been . . . to require not only that the compromise should be assented to by the next friend or guardian of the infant, but that his solr. should make an affidavit that he believes the compromise to be beneficial to the infant & that his counsel should give an opinion that he considers it to be so (JESSEL, M.R.).—*Re BIRCHALL*, WILSON v. BIRCHALL (1880), 16 Ch. D. 41; 44 L. T. 113; 29 W. R. 27, C. A.

Annotation:—Folld. *Re Allan*, Havelock v. Havelock (1881), 44 L. T. 168.

1985. Exercise of power—So as to charge infant's estate.]—CHERWYND v. FLEETWOOD (1742), 1 Bro. Parl. Cas. 300; 1 E. R. 580, H. L.

Annotation:—Mentd. Codrington v. Lindsay (1873), 8 Ch. App. 578.

(c) What Compromises will be sanctioned.

Compromises for infant's benefit.]—See Nos. 1973–1980, *ante*.

1986. Compromise of suit against trustees—To recover lost trust funds.]—HOPGOOD v. PARKIN (1870), as reported in L. R. 11 Eq. 74, L. JJ.

Annotations:—Refd. *Re Speight*, Speight v. Gaunt (1883), 22 Ch. D. 727. **Mentd.** *Re Pearson*, Oxley v. Scarth (1884), 51 L. T. 692; *Re Partington*, Partington v. Allen (1887), 57 L. T. 654.

1987. ——*MACLAREN v. STANTON* (1871), L. R. 11 Eq. 382.

Annotation:—Mentd. *Re Foster*, Lloyd v. Carr (1890), 45 Ch. D. 629.

1988. ——*One of several cestius que trust* brought an action against the trustees of a settlement claiming execution of the trusts, & that the trustees might be charged with any loss on alleged improper investments. Judgment was given for execution of the trusts & inquiries as to investments. Certain other *cestius que trust* (infants) were served with the judgment, & had leave to attend. Before certificate a compromise was effected which on a petition in the action was sanctioned on behalf of the infants. The petition did not refer to the alleged improper investments, but the fact of the investment complained of having been made appeared in the answers of the trustees to interrogatories administered to them in that action. After the infants came of age they

opposed a decree being passed in its terms. Upon pltf. seeking to have the compromise enforced:—**Held:** inasmuch as leave of the ct. had not

been asked for, & the guardian had objected to the ct. passing a decree in terms of the compromise, the ct. had no power to enforce the compro-

mise, even though the terms of it might appear to be beneficial to the minors.—RANGA RAO v. RAJAGOPALA L. R. 22 Mad. 378.—IND.

brought an action against the trustees on the same grounds as those relied upon by pltf. in the former action:—*Held*: the question as to the breach of trust was not *res judicata* & pltf. in the second action were not estopped by the former proceedings.—*WORMAN v. WORMAN* (1889), 43 Ch. D. 296; 61 L. T. 637; 38 W. R. 442.

1989. Compromise affecting infant's contingent interests.]—(1) A ct. of equity has not authority, where there are no litigated rights, to withdraw personal property settled by deed on infants, & give it to others, in consideration of other property to be brought into settlement; even though the arrangement be beneficial for the infants.

Infants were entitled, under a settlement, to personal property, subject to the contingency of five persons dying in the lifetime of A., & subject also to other contingencies; & were also entitled to other personal property subject to various contingencies. It was proposed to withdraw the last-mentioned property from the settlement; & instead thereof, to remove all the contingencies from the first-mentioned property, except that of the five persons dying in the lifetime of A. The master reported in favour of the arrangement, & the ct. was of opinion that it would be beneficial for the infants:—*Held*: the ct. had not authority to direct the arrangement to be carried into effect.

(2) Where there is a matter in dispute it is consistent both with principle & practice for a ct. of equity to compromise it on behalf of infants on reasonable grounds.—*PETO v. GARDNER* (1843), 2 Y. & C. Ch. Cas. 312; 12 L. J. Ch. 371; 7 Jur. 969; 63 E. R. 137.

Annotations:—As to (1) *Folld. Day v. Day* (1845), 5 L. T. O. S. 143. *N.F. Re Wells, Boyer v. Maclean*, [1903] 1 Ch. 848.

1990. —.]—*DAY v. DAY*, No. 1975, *ante*.

1991. —. Conversion of contingent rights—Into rights in possession.]—*Re WELLS, BOYER v. MACLEAN*, No. 446, *ante*.

1992. Compromise on validity of will.]—*Semble*: In an action as to the validity of a will when terms of compromise are agreed to by the parties who are *sui juris* the Ct. of Probate will not make an

order binding married women or infants to the terms of a compromise.—*NORMAN v. STRAINS* (1880), 6 P. D. 219; 50 L. J. P. 39; 45 L. T. 191; 29 W. R. 744.

1993. Release of life interest—In consideration of annuity.]—Where there was an equitable tenant for life of a house, valued at £320 a year, subject to a condition requiring residence, & some of the remaindermen were infants, the ct. being of opinion that the condition was not void under Settled Land Act, 1882 (c. 38), s. 51:—*Held*: the ct. could sanction an agreement between the tenant for life & the trustees whereby the tenant for life should release to the trustees her life estate in the house in consideration of their paying to her out of the general trust estate an annuity of £275.—*Re TRENCHARD, TRENCHARD v. TRENCHARD*, [1902] 1 Ch. 378; 71 L. J. Ch. 178; 86 L. T. 196; 50 W. R. 266; 46 Sol. Jo. 231.

Annotation:—*Mentd. Re Simpson, Clarke v. Simpson*, [1913] 1 Ch. 277.

(d) Requirements Prior to Sanction.

1994. Affidavit—That compromise for infant's benefit—Counsel's opinion.]—A compromise on behalf of infants is to be obtained upon petition, supported by an affidavit of a solr. that counsel's opinion has been given that the compromise is for the benefit of the infants.—*GRAY v. PAUL* (1877), 46 L. J. Ch. 818; 25 W. R. 874.

1995. —. —.]—*Re BIRCHALL, WILSON v. BIRCHALL*, No. 1984, *ante*.

1996. —. —. Affidavit of guardian ad litem.]—*Re SWAIN, BRETT v. WARD*, [1918] 1 Ch. 574, C. A.

1997. Separate representation of infants required—Where conflicting interests.]—*HOWE v. ROBINSON* (1890), *Times*, July 7.

C. Setting Aside Compromise.

1998. General rule.]—*BROOKE v. MOSTYN* (LORD), No. 1978, *ante*.

1999. Grounds for—Fraud on part of person claiming benefit of compromise.]—*BROOKE v. MOSTYN* (LORD), No. 1978, *ante*.

PART XIV. SECT. 3, SUB-SECT. 1.—B. (c).

1989 i. Compromise affecting infant's contingent interests.]—It cannot be assumed that a ct. in sanctioning a compromise & passing a decree in pursuance of it, intended to do what was unlawful. Where such a decree directs the sale of a minor's property in which the minor had only a *spes successionis* as reversioner, it must be assumed that it directed the sale only of such interest as the minor then possessed in the property, which in the eye of law, was nil.—*BHOGARAJU VENKATARAMA JOGIRAJU v. ADDEPAILI SESHAYYA* (1912), I. L. R. 35 Mad. 560.—IND.

PART XIV. SECT. 3, SUB-SECT. 1.—C.

1998 i. General rule.]—A compromise by a guardian under proper advice when sanctioned by the ct. cannot be set aside on any ground which would be insufficient to set aside a compromise between persons *sui juris*.—*KACHAYI KUTTIALI HAJI v. UDUMPUMTHALA KUNHI PUTHA* (1906), I. L. R. 29 Mad. 58.—IND.

1999 i. Grounds for—Fraud on part of person claiming benefit of compromise.]—The ct. refused to set aside a compromise by the former guardian of pltf. of a claim against his estate for debt after sixteen years, pltf. having failed to prove that the suit was fictitious, & the compromise fraudulent & collusive.—*BABOO LEKRAJ ROY v. BABOO MAHTABCHUND* (1871), 10

B. L. R. 35; 14 Moo. Ind. App. 393; 17 W. R. 117.—IND.

q. —. Party subsequently found legally entitled to nothing.]—When parties enter into a compromise, or family arrangement, in order to avoid litigating the question as to whether one of the parties is entitled to certain property or not, such compromise will not be set aside, although it should eventually turn out that the party taking something under the compromise was in reality legally entitled to nothing.—*DHARMAJI VAMAN v. GURRAY SHINIBAS* (1873), 10 Bom. 311.—IND.

r. —. Misapprehension of material facts.]—A compromise had been entered into by the parties & sanctioned by the ct. under a misapprehension of material facts:—*Held*: pltf. was entitled to have the compromise set aside, & the parties restored to their rights in a former suit at the time it was effected.—*BIBER SOLOMON v. ABDOL AZEEZ* (1881), I. L. R. 6 Calc. 687; 8 C. L. R. 169.—IND.

t. —. Minor given less than entitled to.]—Where a decree to which a minor is a party has been compromised, with leave of the ct. the compromise cannot be subsequently re-opened by the ct. *proprio motu* on the ground that it gave the minor less property than he was entitled to under the decree. The modes in which such an order can be impeached are by review or by suit.—*VIRUPAKSHAPPA v. SHIDAPPA & BASAPPA*

(1901), I. L. R. 23 Bom. 620.—IND.

a. Effect of—On right of appeal.]—In a suit brought on behalf of an infant daughter by her mother as guardian, a decision was given partly for & partly against deft., who thereupon filed an appeal, which he afterwards withdrew in accordance with the terms of a compromise purporting to have been made with the mother & daughter. Subsequently, at the suit of the daughter, the compromise was set aside as fraudulent & collusive, & a review of the original decision, in so far as it was adverse to pltf.'s interest, was allowed. Deft. then applied that his appeal might be revived, but his application was rejected by the High Ct., on the ground that he had deprived himself of his opportunity of appeal by his own fraudulent conduct:—*Held*: the effect of setting aside the compromise was to remit both parties to their original rights, & if pltf. was to be allowed to be heard against so much of the original judgment as was unfavourable to her, deft. must similarly be heard against so much of the same judgment as was unfavourable to him.—*KHAJOORONISSA v. ROWSHAN JEHAN* (1876), I. L. R. 2 Calc. 184; 26 W. R. 36; L. R. 3 Ind. App. 291.—IND.

b. Modes of impeaching decree.]—*KARMALI RAHIMBOY v. RAHIMBOY HABIBBOY* (1888), I. L. R. 13 Bom. 137.—IND.

c. —.]—*VIRUPAKSHAPPA v. SHIDAPPA & BASAPPA* (1901), I. L. R. 23 Bom. 620.—IND.

Sect. 3.—Compromises and consents: Sub-sect. 1, C.; sub-sect. 2. Sects. 4 & 5.]

2000. Misstatement as to age of plaintiff—Already sanctioned by court in respect of other infants.]—An order was made on a petition, which was expressed to be made by consent of one of resps., who was throughout the proceedings treated as an adult, although in fact she was under age, & the order was enrolled. On attaining her majority, resp. filed her bill to set aside the order. It appearing that another infant in the same interest as pltf. had been a party to the petition, on whose behalf the ct. had ascertained that the order was one which ought properly to be made, having regard to the interests of the latter infant, the ct. refused to set aside the order, on the ground of the misstatement as to the age of pltf.—*FADELLE v. BERNARD* (1871), 19 W. R. 555.

SUB-SECT. 2.—CONSENTS.

2001. Whether valid.]—If an infant suffer a decree by consent, it is for ever reversible; otherwise of an adversary bill.—*ANON.* (1667), *Freem. Ch.* 127; 22 E. R. 1103.

2002. —.]—If an infant suffer a decree against him by consent, he may at any time reverse it for that error of his being an infant; otherwise, if he be deft. by an adversary bill & decree pronounced.—*ANON.* (1666), 3 Rep. Ch. 21; 21 E. R. 716.

2003. —.]—A decree cannot be taken in a cause which has been set down in the paper of consent causes, if any of the parties be infants.—*WILCOX v. VINCENT* (1835), 4 L. J. Ch. 280.

2004. —.]—An order, directing an issue “with the consent of all parties in the cause,” is erroneous, so far as it purports to be with the consent of an infant party. *Qu.*: whether it is clear on the authorities, that an infant deft., in a case such as this, is entitled, after coming of age, to put in a new answer & make a new defence.—*MALONE v. MALONE* (1841), 8 Cl. & Fin. 179; West, 637; 6 Jur. 177; 8 E. R. 71, II. L.

Annotation:—Mentd. Phillipson v. Gatty (1848), 6 Hare, 26.

2005. Effect of consent to which infant a party—Whether consent of other parties invalidated.]—A party to a suit, who, knowing that certain other

parties are infants, agrees that a certain course should be taken in the suit, cannot afterwards object that his consent does not bind him because the other parties were infants & could not consent.—*PISANI v. A.-G. FOR GIBRALTAR* (1874), L. R. 5 P. C. 516; 30 L. T. 729; 22 W. R. 900, P. C.
Annotations:—Refd. Ware v. Whitlock, [1923] 2 K. B. 418.
Mentd. Readdy v. Pendergast (1886), 55 L. T. 767;
Moody v. Cox & Hatt (1917), 116 L. T. 740.

SECT. 4.—PRESCRIPTION AND LIMITATION.

Prescription—Effect of infancy on prescriptive rights.]—See Prescription Act, 1832 (c. 71), s. 7.
—.]—See, generally, EASEMENTS, Vol. XIX., pp. 53 *et seq.*

Limitation of actions.]—See LIMITATION OF ACTIONS.

SECT. 5.—ACQUIESCENCE AND LACHES.

2006. Acquiescence—In violation of right—Whether infant barred from asserting right.]—*ADYE v. FEUILLETEAU* (1783), 3 Swan. 90; 1 Cox Eq. Cas. 24; 36 E. R. 784, L. C.

2007. —.]—Where a settlement requires that a retiring trustee should assign the trust property to the continuing trustee, & that a new trustee should be chosen in the place of the retiring trustee, & there is no power to appoint a sole trustee, then, if a retiring trustee assign the trust property to the continuing trustee alone, & he, in abuse of his trust, dispose of it, the retiring trustee is answerable.

By the terms of the trust deed under which [deft.] has acted, he was bound, upon declining the trust, to transfer the trust property to the continuing trustee & a new trustee to be appointed in his place; & nothing could relieve him from that obligation but the consent of all parties interested under the trust. It was not possible to obtain such consent here, because there were infants, who were not capable of consenting, & therefore, could not be deprived of that security which they derived from having the trust property, upon deft.'s declining the trust, confided to the care & integrity of two trustees instead of one

PART XIV. SECT. 3, SUB-SECT. 2.

2001 i. Whether valid.]—A suit instituted in 1879 against a minor was compromised by pltf. & the guardian *ad litem*, & a decree for pltf. was passed by consent. In 1882 the minor sued by his next friend to have the consent decree set aside on the ground that it had been obtained by fraud practised on the guardian *ad litem*. That suit was dismissed. In 1884 an application was unsuccessfully made in the original suit objecting that the compromise had been entered into without the sanction of the ct. The minor having attained majority now sued to have the consent decree set aside on the ground that it had not been sanctioned by the ct. under Civil Procedure Code, s. 462:—*Held*: the ct. by passing the consent decree had not, *ipso facto*, sanctioned the compromise under Civil Procedure Code, s. 462, & the present suit was not barred by the order dismissing the application in 1884.—*ARUNACHALAM CHETTY v. MEYYAPPA CHETTY* (1897), I. L. R. 21 Mad. 91.—IND.

PART XIV. SECT. 5.

2006 i. Acquiescence—In violation of right—Whether infant barred from asserting right.]—D.'s father died in

1847, having made his will purporting to devise all his real estate to his wife in fee, but this will was not executed in the proper form, & therefore D. became entitled to the land as heir-at-law. Three months before D. became of age he agreed with P. for the sale to him of the real estate for valuable consideration. A conveyance to P. was prepared by D. & executed by his mother, the devisee under his father's will, D. being the witness to it. P. afterwards sold & conveyed his interest, & D. brought ejectment against the purchaser. On a bill filed to restrain this action, it was shown that D. had at various times acquiesced in the sale after he became of age:—*Held*: D.'s conduct with reference to the sale to P. was fraudulent, & was to be considered as an assertion that his mother was entitled as devisee in fee, although he was then not of age; such conduct, & his subsequent acquiescence after his attaining majority, estopped him from denying the validity of the sale; & he was enjoined from proceeding with the ejectment, & ordered to execute a conveyance to pltf., the vendee of P.—*LEARY v. ROSE* (1863), 10 Gr. 346.—CAN.

2006 ii.

—.]—A tenant

in tail, who was supposed to have the fee simple, sold the property a few weeks before the passing of the Act respecting assurance of estates tail. The purchaser accepted the conveyance, & paid the purchase money, without seeing the will or having the title investigated. The eldest son of the vendor was not quite twenty-one at the time; he was aware of his interest, but was anxious that the sale should be effected, urged the purchaser to buy, & was privy to the completion of the purchase without giving any notice of title or of the defect in the father's right to convey. The purchaser went into possession & improved the premises, & had no notice of the defect in his title until after the death of the vendor:—*Held*: he was entitled to hold the property in equity against the issue in tail.—*Re SHAVER* (1871), 3 Ch. Ch. 379.—CAN.

2006 iii. —.]—Apparent acquiescence (in a compromise not binding on minors) by one of the minors after arriving at majority, though evidence against him is not evidence of a conclusive character when not continued for any considerable time.—*DHARMAJI VAMAN v. GURRAY SHRINIBAS* (1873), 10 Bom. 311.—IND.

(LEACH, M.R.).—WILKINSON v. PARRY (1828), 4 Russ. 272; 38 E. R. 808.

Annotations:—Mentd. Munch v. Cockerell (1836), 8 Sim. 219; Davies v. Quarterman (1841), 4 Y. & C. Ex. 257; Anderson v. Wallis (1842), 12 L. J. Ch. 291.

2008. ———.]—A remainderman, on attaining twenty-one, may repudiate an agreement which does not bind him made by a previous owner of the estate, although both he & his guardian acquiesce in it up to the time of his attaining his majority, & although the other party has expended money on the faith of the agreement.—LANDED ESTATES CO., LTD. v. WEEDING (1869), 21 L. T. 384; 18 W. R. 35.

Estoppel by acquiescence, *see, generally*, ESTOPPEL, Vol. XXI., pp. 333 *et seq.*

2009. Laches—Whether infant bound—Laches of trustee.]—A. devised lands to trustees until debts paid, & then to an infant & his heirs. Deft. entered & levied a fine & five years passed. Infant when of age brought an ejectment but was barred because the trustees should have entered. Equity will relieve & not suffer an infant to be barred by laches of trustees; nor to be barred of a trust estate during infancy. The infant in this case shall recover the mean profits.—ALLEN v. SAYER (1699), 2 Vern. 368; 1 Eq. Cas. Abr. 281; 23 E. R. 832.

2010. ———.]—In a suit of C. v. M., instituted in 1858 for the administration of the estate of J. C., who died in 1836, J. B. C. & H. C., the trustees of testator's will, were, by an interlocutory order made in 1860, ordered to transfer into ct. a sum of £4,100 Consols, to answer breaches of trust committed by J. B. C. This order was never obeyed, & process of contempt was issued, which H. C. avoided by leaving England. By an order made upon the further consideration of C. v. M. in 1863, the beneficial interests of J. B. C. & H. C., who were children of testator, were ordered to be impounded, to make good *pro tanto* the breaches of trust; but no personal order was made for payment, either then or on the subsequent further consideration in 1866. In 1870, H. C. returned to England & resided in the neighbourhood of London, apparently in comfortable circumstances, until her death in 1880. This was known to pltf. in the present action, who was the then acting trustee of the will of J. C., & also to the *cestuis que trust*. They, however, took no further steps against H. C. in her lifetime; but after her death the trustee commenced the present action against her exors., on behalf of himself & all her other creditors, seeking to make her estate liable in respect of the unsatisfied balance of the £4,100 Consols. Some of the *cestuis que trust* were still infants. The action was dismissed on the ground that the claim was a stale demand. On appeal:—Held: the *cestuis que trust* were not barred of their rights by any laches which they or their trustee had committed, but their trustee was the proper person to sue.—Re CROSS, HARSTON v. TENISON (1882), 20 Ch. D. 109; 51 L. J. Ch. 645; 45 L. T. 777; 30 W. R. 376, C. A.

Annotations:—Mentd. Soar v. Ashwell, [1893] 2 Q. B. 390; Rochefoucauld v. Boustead, [1897] 1 Ch. 196.

2012 i. Laches — Whether infant bound.]—Where deft., during nonage, conveyed land in fee to the grantor of pltf., & though fifteen years had elapsed since his majority, took no steps to repudiate his deed, until he defended on this ground an action of ejectment brought against him for the land, a conveyance of which had in the interim, & after the conveyance to pltf., been made to deft. by the person entitled:—Held: it might be assumed, under the power given to

the ct. to draw inferences of fact, that deft. had confirmed the deed, & he could not now set up in this suit the defence of infancy.—FEATHERSTON v. McDONELL (1865), 15 C. P. 162.—CAN.

2012 ii. ———.]—An infant entitled to real estate was brought up principally in the family of her uncle, from the age of eleven months until her marriage after attaining her majority. Previous to her attaining twenty-one the uncle had obtained

2011. ———.]—Real estate was held in undivided shares by several persons as tenants in common in fee, & all of such tenants in common, except the holders of one share, were *sui juris*, & owners of the legal & equitable estates & interest in their respective shares in their own right. The remaining share was vested in trustees upon trusts to apply the income or such part thereof as they should think expedient for the benefit of two infants during minority, & for them absolutely upon their attaining twenty-one. In 1868 the property was by a deed, to which all the owners who were *sui juris* were parties, as were also nominally the infants, conveyed to a purchaser for value, with notice of the infants' interest; & the deed contained a declaration that N., who was a party thereto for that purpose, should stand possessed of a sum representing the infants' share of the purchase money upon trusts for their benefit during their infancy, & if within one month after coming of age they should execute the deed or otherwise convey their interest to the purchaser, then in trust for them absolutely, but if not, then in trust for the purchaser absolutely. The infants came of age in 1884 & 1885 respectively, but did not execute the deed or otherwise convey their interest as aforesaid. The purchaser & his assigns having been in possession since the date of the deed, an action was brought in 1889 by a person claiming under one of the infants to recover her share from assigns of the purchaser. Defts. contended that, at the time of the conveyance of 1868, the infants had no estate, the share in dispute being vested in trustees, with discretionary powers for their benefit merely; that those trustees were barred by lapse of time under Real Property Limitation Act, 1874 (c. 57), & that consequently the infants, & those claiming under them, were also barred, & could not recover the share:—Held: the purchaser under the deed of 1868 having entered into possession, with full notice & knowledge of the infants' rights, the claim was not barred by the statute.

Semle: he would also be treated as not being in adverse possession at all, but merely in right of the infants, & not, therefore, as in a position to set up the statute against them or their assigns.

Qu.: whether the purchaser did not also take the property subject to an actual trust for the benefit of the infants of their shares therein, in the event of their failing to execute the conveyance, or take their shares of the purchase money on attaining twenty-one.

The purchaser of those rights & those claiming under him with knowledge cannot set up for their protection the laches of the trustees; & I think that on the infant attaining twenty-one she or those claiming under her were entitled to possession (ROMER, J.).—YOUNG v. HARRIS (1891), 65 L. T. 45.

2012. ———.]—In the year 1810 a sum of stock was transferred into the names of A. & B., in trust for a father & mother, in certain proportions, for their respective lives, with remainder to their children. Shortly afterwards, the stock

from her a promise to convey to him one of two lots of land left by her father, the uncle asserting that he had advanced the money to complete the purchase of both lots. After her marriage the niece, feeling herself bound by this promise, conveyed the lot selected by her uncle, which was much more valuable than the other. The money, if any, paid was much less than the value of the lot conveyed. The conveyance was set aside, as having been obtained by

Sect. 5.—Acquiescence and laches. Sect. 6. Part XV. Sects. 1 & 2: Sub-sect. 1.]

was transferred by A. & B. into the name of B. only, who appropriated it to his own use. In the year 1818, the father & mother filed a bill against A. & B., to have the stock replaced; & the children, two in number, were co-pltfs., & being infants, sued by their father, as their next friend; but that suit was soon afterwards compromised, upon B. giving security for the payment of interest for the time past & for the time to come. A. subsequently died, & his personal estate was distributed among his legatees; & two of those legatees then died, having received their legacies, & the residuary personal estate of one of them was paid over to her residuary legatee. These distributions were made in ignorance of any demand arising out of the breach of trust in which A. had concurred. The eldest of the two children attained twenty-one in 1821, & the other in 1823. In 1833 they filed a bill alone against B. & the personal representative of A. & his surviving legatees, & the personal representatives of his deceased legatees & the residuary legatee of one of those deceased legatees, & against the father & mother of pltfs., praying to have the fund replaced:—*Held*: pltfs. were entitled to call upon the surviving legatees of A., & the personal representatives & legatees of his deceased legatees to refund; & that, without any previous inquiry, as to whether pltfs. had known of or acquiesced in the breach of trust, or the compromise of the suit of 1818.

Whatever may have taken place before the year 1821 is immaterial inasmuch as up to that period they were both under age. . . . It is not contended that the lapse of time will bar their right to the remedy to which, according to the practice of this ct., they are entitled (*LORD COTTENHAM, C.*).—*MARCH v. RUSSELL* (1837), 3 My. & Cr. 31; 6 L. J. Ch. 303; 1 Jur. 588; 40 E. R. 836, L. C.

Annotations:—*Consd Partington v. Carrington* (1859), 34 L. T. O. S. 69. *Refd. Life Assn. of Scotland v. Siddal, Cooper v. Greene* (1861), 3 De G. F. & J. 58. *Mentd. Waller v. Barrett* (1857), 24 Beav. 413; *Ridgway v. Newstead* (1861), 3 De G. F. & J. 474; *Williams v. Headland* (1864), 3 New Rep. 412; *Re King, Mellor v. South Australian Land Mortgage & Agency Co.*, [1907] 1 Ch. 72; *Re Blow, St. Bartholomew's Hospital v. Camden*, [1914] 1 Ch. 233.

—*See, generally*, EQUITY, Vol. XX., pp. 524 et seq.

undue influence, although six years had elapsed between the execution of the deed & the suit impeaching the transaction.—*McGONIGAL v. STOREY* (1867), 14 Gr. 94.—CAN.

2012 iii. —*Where debt. was shown to have been an infant when the note pro confesso was entered, such noting & all subsequent proceedings were set aside; but as debt. was tardy in applying, & his conduct censurable, the order was made without costs, & he, being now of age, was ordered to answer in a fortnight.*—*ADAMS v. GUILLOTT* (1869), 2 Ch. Ch. 427.—CAN.

2012 iv. —*P., the owner of a farm held under a yearly tenancy, died intestate in 1864, leaving a widow & four children, minors, in possession. In 1866 the widow married T., who was accepted as tenant of the farm by the landlord. No administration was ever taken out to P. All the children of P.*

left the farm prior to 1883; none of them ever returned, or asserted a claim to a share in P.'s assets, & no acknowledgment of title was ever made to any of them from the time they left. T. died in 1901, having bequeathed the farm to his widow for life, & after her death to his son, the vendor. In 1902 the widow assigned the farm to the vendor freed from her life estate, & in 1907 the vendor entered into a contract for sale of the farm to the purchaser, who required the interests of the children of P. to be accounted for. This the vendor refused to do:—Held: on the hearing of a vendor & purchaser's summons, although the widow of P., & subsequently T., entered into possession of the farm, as to two-thirds thereof, as bailiffs for the minor children, their position as such was changed by the departure of the children without making any claims to their shares;

SECT. 6.—BIRTH OF INFANT AFTER ACTION COMMENCED.

See R. S. C., Ord. 17, r. 4.

2013. Birth after judgment—Joinder as party—R. S. C., Ord. 17, r. 4—Form of order.]—Where proceedings have been taken in an action after it has become defective by the birth of an infant who is a necessary party thereto, the infant should be made a party by the common order under R. S. C., 1883, Ord. 17, r. 4, to carry on proceedings between the continuing parties & such infant; & the order should go on to direct an inquiry whether any proceedings affecting the interest of the infant have been taken in the action since his birth, & if so, whether it will be fit & proper & for the benefit of the infant that he should be bound thereby; & if so certified the infant to be bound accordingly. If such inquiry be answered in the negative pltf. or person having the conduct can still proceed by supplemental action.—*PETER v. THOMAS-PETER* (1884), 26 Ch. D. 181; 53 L. J. Ch. 514; 50 L. T. 176; 32 W. R. 515.

Annotation:—*Mentd. Re Somerset, Thynne v. St. Maur* (1887), 34 Ch. D. 465.

2014. ——— Plaintiffs refusing to add.]—WICKS v. WICKS, [1887] W. N. 15.

2015. Birth after special case set down—If infant necessary party—Amendment of special case.]—When, after a special case has been set down for hearing, a child is born, who is a necessary party to the case, the order for setting down the original case should be discharged, & the child brought before the ct. by amendment of the special case.—*SAVAGE v. SNELL* (1871), L. R. 11 Eq. 264; 40 L. J. Ch. 216; 23 L. T. 801; 19 W. R. 382.

Annotation:—*Reid. Atty v. Etough* (1876), 26 L. T. 274.

2016. ——— Infant's presence dispensed with—Other parties in same interest represented.]—The ct. will dispense with the presence of infants who have come into existence since a special case has been set down, where there are other persons in the same interest who are represented.—*PALMER v. FLOWER* (1871), L. R. 13 Eq. 250; 41 L. J. Ch. 193; 25 L. T. 816; 20 W. R. 174; *previous proceedings* (1870), 18 W. R. 887.

Annotation:—*Mentd. Re Ward's Trusts* (1872), 7 Ch. App. 727.

See, generally, R. S. C., Ord. 34, r. 4.

Stat. Limitations began to run against each child who left the farm on his or her attaining twenty-one years of age; & on proof that no claim had ever been made by, or acknowledgment given to, any of the children, a good title would be shown.—*Re MAGUIRE & M'CLELLAND'S CONTRACT*, [1907] 1 I. R. 393; 41 I. L. T. 182.—IR.

d. ——— Laches of guardian.]—Where two majors & the guardian of two minors jointly preferred an appeal in which they were jointly interested, & on the death of the sole resp. the appeal was allowed to abate:—Held: the minor appls. could not, on the application of another guardian, have the appeal restored & proceeded with.—*PARU v. VARIAN GATTIL RAMAN MENON* (1905), I. L. R. 28 Mad. 359.—IND.

Part XV.—Wards of Court.

SECT. 1.—IN GENERAL.

2017. Meaning of—Infants entitled to or interested in fund administered by court.]—A fund was carried over in an administration action to a separate account intituled "The account of A. B. & of X. Y. & his issue" to answer a settled legacy under the will of testator wherein A. B. & X. Y. had life interests. X. Y. was a domiciled Frenchman & he died leaving issue three daughters only, who were all French & married to Frenchmen, two of them having married under age & one being still an infant. A. B. having also died, these three daughters & their husbands petitioned for payment out to them of their respective shares:—*Held*: the ct. would not in the exercise of its discretion treat the two daughters who had married under age as wards of ct. *Semble*: the carrying of a fund to separate account of an infant in an action to which the infant is not a party will not constitute such infant a ward of ct., & even if such carrying over would have constituted a natural born British subject a ward of ct. it would not have that effect in the case of an alien not resident in this country.

If a petition was presented to the Ct. of Ch. under its parental jurisdiction & an order made on that petition for the appointment of a guardian of the infant, although the infant was not a party to any action, he would be a ward of ct. in the more special sense of the words.

If there be a fund in ct. under its administration standing to the account of an infant, or to an account under which an infant is entitled, then, inasmuch as the ct. is bound to administer that fund, the infant will be treated as a ward of ct. to the same extent as an infant who is a party to an action for the administration of the property belonging to that infant. Undoubtedly, we use the words "ward of ct." in such a case in rather a special sense. In one sense all British subjects who are infants are wards of the ct., because they are subject to that sort of parental jurisdiction which is intrusted to the ct. in this country & which has been administered continually by the cts. of the Ch. Div. (KAY, J.).—*BROWN v. COLLINS* (1883), 25 Ch. D. 56; 53 L. J. Ch. 368; 49 L. T. 329.

Annotation:—*Consd. Re McGrath*, [1892] 2 Ch. 496.

SECT. 2.—JURISDICTION OF COURT.

SUB-SECT. 1.—IN GENERAL.

See Judicature Act, 1925 (c. 49), s. 53 (1), (6).

2018. Origin of—On dissolution of court of wards & liveries.]—The power of this ct. over infants resulted back to them again, upon the dissolution of the ct. of wards & liveries, by 12 Car. 2, c. 24.

Though a ward of the ct. is married with the consent of his friends, yet there must be an application here for an increase of maintenance.—*HILL v. TURNER* (1737), 1 Atk. 515; *West temp. Hard.* 195; 26 E. R. 326, L. C.

Annotations:—*Mentd. Duncombe v. Greenacre* (1860), 2 De G. F. & J. 509; *Hunt v. Hunt* (1862), 4 De G. F. & J. 221; *Marshall v. Marshall* (1879), 5 P. D. 19.

2019. ———.]—*SMITH v. SMITH*, No. 15, *ante*.

2020. Nature of—Benefit to infant.]—*CLAYTON v. CLARKE*, No. 1780, *ante*.

2021. ——— Not dependent on property.]—*Re PLOMLEY, VIDLER v. COLLYER*, No. 1156, *ante*.

2022. Exercise of—For benefit of infant.]—*STUART v. BUTE (MARQUIS), STUART v. MOORE*, No. 2045, *post*.

2023. ——— In camera.]—The consent of both parties is not necessary to a private hearing. Case relating to custody of ward of ct., where disclosures were of a distressing kind.—*OGLE v. BRANDLING* (1831), 2 Russ. & M. 688; 39 E. R. 557, L. C.

Annotations:—*Distd. Andrew v. Raeburn* (1874), 31 L. T. 73. *Refd. Re Martindale*, [1894] 3 Ch. 193.

2024. ———.]—It is contrary to the practice of the ct. to hear causes in private without the consent of both parties, except in cases which affect lunatics or wards of ct. *Qu.*: whether the ct. would not hear a cause in private without the consent of one of the parties, if the whole object of the suit would be defeated by a hearing in public.—*ANDREW v. RAEBURN* (1874), 9 Ch. App. 522; 31 L. T. 73; 22 W. R. 564, L. C. & L. JJ.; *previous proceedings, sub nom. ANON.*, 30 L. T. 153.

Annotations:—*Consd. Nagle-Gillman v. Christopher* (1876), 4 Ch. D. 173; *Scott v. Scott*, [1913] A. C. 417. *Refd. Re Martindale*, [1894] 3 Ch. 193.

2025. ———.]—The High Ct. of Justice has no power to hear cases in private even with the consent of the parties, except cases affecting lunatics or wards of ct., or where a public trial would defeat the object of an action, or in those cases where the practice of the old ecclesiastical cts. as to hearing *in camera* is continued.—*NAGLE-GILLMAN v. CHRISTOPHER* (1876), 4 Ch. D. 173; 46 L. J. Ch. 60.

Annotation:—*Consd. Scott v. Scott*, [1913] A. C. 417.

2026. ———.]—*Re MARTINDALE*, [1894] 3 Ch. 193; 64 L. J. Ch. 9; 71 L. T. 468; 43 W. R. 53; 10 T. L. R. 670; 8 R. 729.

Annotation:—*Consd. Scott v. Scott*, [1913] A. C. 417.

2027. ———.]—It is not contempt of ct. to disclose the details of a nullity suit heard *in camera*.

The ct. has no jurisdiction to hear a nullity suit *in camera*. The only exceptions to the general rule prescribing the publicity of ct. of Justice are first, suits, affecting wards, secondly, those in relation to lunatics, & thirdly, those where secrecy as, for instance, the secrecy of a process of manufacture or discovery, is of the essence of the cause (*LORD SHAW*).—*SCOTT v. SCOTT*, [1913] A. C. 417; 82 L. J. P. 74; 109 L. T. 1; 29 T. L. R. 520; 57 Sol. Jo. 498, H. L.

Annotations:—*Refd. Cleland v. Cleland, Cleland v. Cleland & McLeod* (1913), 109 L. T. 744; *Moosbrugger v. Moosbrugger, Moosbrugger v. Moosbrugger & Martin* (1913), 29 T. L. R. 658; *Ex p. Norman* (1915), 85 L. J. K. B. 203; *Norman v. Mathews* (1916), 85 L. J. K. B. 857; *R. v. Lewes Prison, Ex p. Doyle*, [1917] 2 K. B. 254; *Re Stevenson*, [1918-19] B. & C. R. 106. *Mentd. R. v. Manchester Local Profiteering Committee, Ex p. L. & Y. Ry.* (1920), 89 L. J. K. B. 1089; *Russell v. Russell* (1924), 93 L. J. P. 97.

Power of ct. to hear causes *in camera* generally, *see* COURTS, Vol. XVI., pp. 128 *et seq.*

2028. ——— Interference with rights of father—In extreme cases.]—This ct. whatever be its jurisdiction or authority has no right to interfere with the sacred right of a father over his own children . . . unless the conduct of the father himself has been such as to give the ct. that authority (*BACON, V.-C.*).—*Re PLOMLEY, VIDLER v. COLLYER* (1882), 47 L. T. 283; *on appeal*, 47 L. T. 284, C. A.

Re Agar-Ellis, Agar-Ellis v.
317.

Sect. 2.—Jurisdiction of court: Sub-sects. 1 & 2. Sects. 3 & 4.]

2029. —*Re AGAR-ELLIS, AGAR-ELLIS v. LASCELLES*, No. 1118, *ante*.

— *In respect of marriage settlements.*]—*See Sect. 8, sub-sect. 1, post.*

2030. Interference with court's discretion—Conditional gift in will.]—Three-fourths of testatrix's residuary estate were given upon trust to pay the income to her two grandchildren up to Dec. 31, 1927, & then to divide the corpus between them. In case either grandchild should die before that date without leaving lawful issue his or her share was given to other persons, & the will then contained a declaration that if at any time on or before Dec. 31, 1927, either one or both of the grandchildren should "live with or be or continue under the custody, guardianship or control of their father . . . or be in any way directly under his control, all benefits, profits & income provided to be given under this my will to both or either one of them, as the case may be, shall thereby cease & determine, & it shall be at all times & under all circumstances an absolute condition of either one or both of them receiving any income, benefit or legacy under this my will that he or she or both of them shall separately & individually continue to live free from his direct influence & control." In case of forfeiture of the interest of a grandchild under this condition his or her forfeited share was to be held upon the trusts declared on the happening of the death of the grandchild before Dec. 31, 1927, without leaving lawful issue:—*Held*: (1) the clause was a condition in defeasance of an interest previously given; (2) it was void as being contrary to public policy, because it was inserted with the object of deterring the father from performing his parental duties, & also because it was an attempt to interfere with the discretion of the ct. as to the custody & maintenance of its wards; (3) the condition was bad on the ground of uncertainty.—*Re SANDBROOK, NOEL v. SANDBROOK*, [1912] 2 Ch. 471; 81 L. J. Ch. 800; 107 L. T. 148; 56 Sol. Jo. 721.

SUB-SECT. 2.—DURATION OF JURISDICTION.

2031. Whether confined to minority.—*In respect of property remaining in court.*]—The ct. retains its jurisdiction over the property of a ward of the ct. after the ward attains twenty-one, so long as the property remains in ct.; & if the ward marries, will order a proper settlement to be made, or reform an improper one, unless the ward consents to the settlement either in ct. or under a commission.—*AUSTEN v. HALSEY* (1802), 2 Sim. & St. 123, n.; 57 E. R. 292, L. C.

Annotations:—*Apld.* *Long v. Long* (1824), 2 Sim. & St. 119; *Martin v. Foster* (1855), 7 De G. M. & G. 98; *Money v. Money* (1855), 3 Drew. 256; *Re Hoare's Trusts* (1863), 4 Giff. 254.

2032. — Minority.]—The period during which the Ch. Div. has jurisdiction over infants is strictly confined to that of their minority.—*SUMNER v. KINGSCOTE* (1885), 1 T. L. R. 351.

2033. — Marriage after attaining twenty-one.]—A. obtained leave of the ct. to pay his addresses to a ward of ct. on an undertaking that he would

abide by the directions & orders of the ct. No directions were given or applied for. Immediately after the ward came of age she made a settlement of her property, giving a joint power of appointment to husband & wife in priority to the other trusts, & the marriage was arranged to take place without the consent of the ct.:—*Held*: A.'s undertaking operated only so long as the lady continued to be a ward of ct., & A. would not be committing a contempt in marrying, & the ct. had no jurisdiction to restrain the parties from marrying, or the ward from disposing of her property, as she pleased.—*BOLTON v. BOLTON*, [1891] 3 Ch. 270; 60 L. J. Ch. 689; 65 L. T. 698; 7 T. L. R. 703, C. A.

Where marriage constitutes contempt of court.]—*See Sect. 7, sub-sect. 2, A., post.*

2034. Ward becoming of unsound mind.]—The jurisdiction of the Lancaster Palatine Ct. & of the High Ct. of Justice over its infant wards is not ousted by the fact that the wards during their infancy may become of unsound mind. In such cases, therefore, such cts. have jurisdiction to entertain applications respecting the custody & education of the infants, although they may be of unsound mind, & although the question of their sanity may be the principal point in dispute.—*Re EDWARDS, M'NEILE v. CHAMBERS* (1879), 10 Ch. D. 605; 48 L. J. Ch. 233; 40 L. T. 113; 27 W. R. 611, C. A.

Assignee of proceedings relating to wards to Chancery Division.]—*See Judicature Act, 1925 (c. 49), s. 56 (1), (6).*

Applications on behalf of wards of court.]—*See R. S. C., Ord. 55, r. 2 (a).*

SECT. 3.—WHO MAY BE WARDS OF COURT.

2035. Infant domiciled in Scotland.—*Property in Scotland.*]—*BEATTIE v. JOHNSTONE*, No. 1477, *ante*.

2036. Infant born & resident abroad.]—In 1836, H., a British subject, intermarried with E., a native of France, & the parties resided in Paris. There were five children of the marriage, who were all born in France. In 1853 the husband & wife separated, & the former came to reside in England. The wife continued in France, & retained two of the children, against the wishes of the husband; & in 1853 she instituted, in this country, a suit for divorce. In Nov. 1853, a bill was filed, in the name of the infant children, against the father & mother, to make the children wards of ct. A motion was made that the mother might be ordered to deliver up the two children to the custody of the father:—*Held*: the ct. had jurisdiction to make the order, notwithstanding the children were born abroad, & they & their mother were resident abroad.—*HOPE v. HOPE* (1854), 4 De G. M. & G. 328; 2 Eq. Rep. 1047; 26 L. J. Ch. 682; 24 L. T. 29; 2 W. R. 698; 43 E. R. 534, L. C.

Annotations:—*Apld.* *Re Willoughby* (1885), 30 Ch. D. 324. *Refd.* *Brown v. Collins* (1883), 25 Ch. D. 56. *Mentd.* *Kendall v. Wilkinson* (1855), 4 E. & B. 680; *Cookney v. Anderson* (1863), 1 De G. J. & Sm. 365; *Drummond v. Drummond* (1866), 2 Ch. App. 32; *Re Slade, Slade v. Hulme* (1881), 45 L. T. 276.

PART XV. SECT. 2, SUB-SECT. 2.

a. Whether confined to minority.—*Completion of treaty entered into during minority.*]—Although the ct. has no jurisdiction generally over the acts of persons of full age who however recently have been wards of ct. yet if the act is the completion of a treaty

entered into during minority without the sanction of the ct. the ct. has power to control that.—*Re DONNE* (1825), 2 Mol. 490.—*IR.*

PART XV. SECT. 3.

i. Infant resident abroad.]—Although an infant whose parents

are domiciled & resident in Alberta is residing in another province of Canada, whither it has been sent by the father, the Supreme Ct. of Alberta has jurisdiction, if the case be shown to be a proper one in which to do so, to set aside the natural & legal guardianship of the father & to appoint the mother

2037. Infant alien—Not domiciled or resident in
v. COLLINS, No. 2017, *ante*.

SECT. 4.—HOW CONSTITUTED.

2038. Pendency of suit—With respect to infant's estate.]—*HUGHES v. SCIENCE* (1740), 2 Eq. Cas. Abr. 756; 22 E. R. 642.

Annotation:—Reid. Butler v. Freeman (1756), Amb. 301.

2039. ——— For administration.]—When a suit is instituted for the administration of an infant's estate, the ct. has jurisdiction over the infant; & on the petition of the guardians, may order him to be delivered to them.—*WRIGHT v. NAYLOR* (1820), 5 Madd. 77; 56 E. R. 824.

2040. Application under Infants' Settlement Act, 1855 (c. 43).]—*Re DALTON*, No. 735, *ante*.

2041. Payment into court under Trustee Relief Acts, 1847 (c. 96), 1849 (c. 74)—Petition for payment of dividends to guardian.]—Money belonging absolutely to a young lady under age having been paid into ct. under the Trustee Relief Act, & an order made upon petition under that Act for payment of part of the dividends to her testamentary guardian for her maintenance, in pursuance of an order for an allowance for her maintenance made upon an application at chambers:—*Held*: the infant was thereby made a ward of ct.—*Re HODGES' SETTLEMENT, Re COGGAN'S WILL, Re HODGES (AN INFANT)* (1857), 3 K. & J. 213; 3 Jur. N. S. 860; 69 E. R. 1086, L. C.

Annotations:—Consd. Re Hillary (1865), 2 Drew. & Sm. 461; *De Pereda v. De Mancha* (1881), 19 Ch. D. 451; *Brown v. Collins* (1883), 25 Ch. D. 56. *Mentd. Re Rye's Trust* (1855), 3 Eq. Rep. 368.

2042. ———.]—The payment into ct. under the Trustee Relief Act, to the account of an infant, a female, makes her a ward of this ct.

A ward of ct., although married & domiciled in Scotland, where the doctrine of a wife's equity to a settlement does not exist, may, where funds belonging to her are in this ct., oblige her husband to make a proper provision for her, before such funds are paid out.—*Re TWEEDALE'S SETTLEMENT* (1859), John. 109; 33 L. T. O. S. 283; 70 E. R. 359.

Annotation:—Mentd. Mackintosh v. Pogoso, [1895] 1 Ch. 505.

2043. ———.]—The payment into ct., under the Trustee Relief Act, of money belonging to an infant, renders the infant a ward of ct.—*Re BENAND* (1868), 16 W. R. 538.

See, now, Trustee Act, 1925 (c. 19).

2044. Infant plaintiff.]—(1) Where a ward of ct. who was entitled to a fund on attaining twenty-one, married without the consent of the ct., & no settlement was made on the marriage; & afterwards, having attained twenty-one, together with her husband, petitioned the ct. for the payment of the fund to her husband; the ct. refused to make an order for payment to the husband, but directed a reference as to a settlement.

guardian. The child would on the exercise of such jurisdiction become a ward of the ct.—*Re M.*, [1918] 1 W. W. R. 579; 13 Alta. L. R. 196.—CAN.

PART XV. SECT. 4.

2038 i. Pendency of suit—With respect to infant's estate.]—A suit relating to the estate of the person of an infant & for his benefit has the effect of making him a ward of ct., & no act can be done affecting the property of the minor, unless under the express or implied direction of the ct. itself.—*DORASWAMI*

J.—VOL.

PILLAI v. THUNGASAMI PILLAI (1904), I. L. R. 27 Mad. 377.—IND.

2042 i. Payment into court under Trustee Relief Acts, 1847 (c. 96), 1849 (c. 74).]—An annuity was bequeathed to the separate use of an unmarried minor & some gales of the annuity having been lodged by trustees under above Acts, the ct. on the petition of the minor's father, directed the trustees to lodge the future gales of the annuity as they should accrue to the credit of the matter, & that they should be paid to petitioner's solr., on his personal undertaking to transmit them to

(2) An infant pltf. is a ward of ct. without any order to that effect.—*GYNN v. GILBARD* (1860), 1 Drew. & Sm. 356; 7 Jur. N. S. 91; 62 E. R. 415. *Annotation:—As to* (1) *Folld. Shipway v. Ball* (1881), 50 L. J. Ch. 263.

2045. Order constituting a guardian.]—An order in Chancery, on petition, constituting a guardian of an infant, makes that infant a ward of ct. In cases relating to the care of infants, the benefit of the infant is the foundation of the jurisdiction, & the test of its proper exercise.—*STUART v. BUTE (MARQUIS), STUART v. MOORE* (1861), 9 H. L. Cas. 440; 4 L. T. 382; 7 Jur. N. S. 1129; 9 W. R. 722; 11 E. R. 799, H. L.; *revsq. S. C. sub nom. BUTE (MARQUESS) v. STUART*, 2 Giff. 582.

Annotations:—Reid. Nugent v. Vetzera (1866), L. R. 2 Eq. 704; *Brown v. Collins* (1883), 25 Ch. D. 56.

2046. ———.]—A summons was taken out in the matter of an infant, who was illegitimate, by her mother to be appointed guardian. On the hearing of the summons the ct. merely gave a direction that the mother should have access to the infant, but no order was drawn up. An action was afterwards instituted for the administration of an estate in which the infant was interested, & two sums of money were paid into ct., one to an account in which the infant was interested in remainder, & the other to her contingent account:—*Held*: both the proceedings on the summons & the payment into ct. were sufficient to constitute the infant a ward of the ct.—*DE PEREDA v. DE MANCHA* (1881), 19 Ch. D. 451; 51 L. J. Ch. 204; *sub nom. Re DE PEREDA*, 30 W. R. 226.

Annotation:—Expld. Brown v. Collins (1883), 25 Ch. D. 56.

2047. Payment into court under Legacy Duty Act, 1796 (c. 52).]—The payment into ct. under above Act, s. 32, of a legacy bequeathed to an infant does not constitute such infant a ward of ct.—*Re HILLARY* (1865), 2 Drew. & Sm. 461; 6 New Rep. 350; 12 L. T. 840; 62 E. R. 695; *sub nom. Re HILARY*, 13 W. R. 959.

Annotation:—Reid. Brown v. Collins (1853), 53 L. J. Ch. 368.

2048. Payment into court on compulsory purchase.]—Where land belonging to a female infant is taken by a railway co., who pay the purchase-money into ct., & the infant petitions for investment & payment of dividends, that does not constitute her a ward of ct.—*Re WILTS, SOMERSET & WEYMOUTH RY. CO., Ex p. BREWER* (1865), 2 Drew. & Sm. 552; 13 L. T. 207; 13 W. R. 959; 62 E. R. 729.

Annotation:—Reid. Brown v. Collins (1883), 53 L. J. Ch. 368.

2049. Order for maintenance—Without suit.]—An order for the maintenance of an infant made without suit constitutes the infant a ward of ct.—*Re GRAHAM* (1870), L. R. 10 Eq. 530; 39 L. J. Ch. 724; 22 L. T. 904; 18 W. R. 988.

2050. Payment into court to infant's account—Infant not party to action.]—*DE PEREDA v. DE MANCHA*, No. 2046, *ante*.

2051. ——— Carrying over to separate account.]—*BROWN v. COLLINS*, No. 2017, *ante*.

petitioner, who also undertook to account yearly for their due application to the minor's education.—*Re LLOYD'S TRUSTS, Ex p. COLLINS* (1868), 2 I. R. Eq. 507.—IR.

*g. Without change of guardian—By order of court.]—*Minors may be made wards of ct. on petition, without changing the guardians, where there are testamentary guardians, & although no bill has been filed, nor any misconduct imputed to the testamentary guardians.—*Re M'OLLOCHS* (1844), 6 E. R. 393, 396.—IR.

SECT. 5.—RESIDENCE.

SUB-SECT. 1.—REMOVAL OUT OF JURISDICTION.

A. *Whether Removal Allowed.*

2052. General rule—Removal not permitted.]—The ct. never makes an order for taking an infant out of its jurisdiction.—*MOUNTSTUART v. MOUNTSTUART* (1801), 6 Ves. 363 ; 31 E. R. 1095, L. C.

*Annotations:—*Consd. *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42. *Refd.* *Anon.* (1821), Jac. 264, n. ; *Campbell v. Mackay* (1837), 2 My. & Cr. 31.

2053. ———.]—*DE MANNEVILLE v. DE MANNEVILLE*, No. 2069, *post*.

2054. ———.]—*Semble*: it is not proper that a profession should be chosen for an infant ward of ct., or that he should be allowed to reside abroad, without previous communication with the ct.—*CLEMENTS v. BERESFORD* (1843), 2 L. T. O. S. 116.

2055. ———.]—*Enlistment for foreign service.]—*It is a contempt of ct. to remove an infant ward of ct. out of the jurisdiction, even where he has enlisted in the army without leave of the ct., by sending him with the regiment on foreign service.

A ward of ct. having so enlisted & having been sent to Ireland, upon the petition of his guardian for discharge of the infant, the ct. concurring with the guardian in thinking that, under all the circumstances of the case, it was better for the infant to remain in the army, ordered the petition, as to that part of it, to stand over, with liberty to apply ; & that the guardian should continue as such ; but that the allowance previously made for the infant's maintenance should be discontinued, & provided for the expenses of the guardian in the matter out of the income, which had been till then applied for the infant's maintenance.—*HARRISON v. GOODALL* (1852), Kay, 310 ; 69 E. R. 131.

*Annotation:—**Folld. Rochford v. Hackman* (1854), Kay, 308.

2056. ———.]—*ROCHFORD v. HACKMAN, Re ROCHFORD*, No. 2070, *post*.

2057. ———.]—Although the ct. will under special circumstances allow an infant ward to go out of the jurisdiction, yet it will not compel the removal of an infant ward out of the jurisdiction.

An infant, being a British subject, & also an American citizen & having lost both father & mother, was brought over to England from the United States, where her property was situated, by a paternal aunt with whom she resided : an application was then made by a maternal aunt, who had been appointed her guardian by the ct. in America, to have the custody of the infant delivered to her with the view of taking the infant back to America. The Lord Chancellor refused to interfere, being of opinion that he had no right to make such an order, even if on other grounds he had thought proper to accede to the application.—*DAWSON v. JAY, Re DAWSON* (1854), 3 De G. M. & G. 764 ; 23 L. T. O. S. 53 ; 2 W. R. 366 ; 43 E. R. 300, L. C.

*Annotations:—**Distd.* *Stuart v. Moore, Re Bute* (1861), 4 L. T. 382. *Consd.* *Nugent v. Vetzera* (1866), L. R. 2 Eq. 704. *Refd.* *Hope v. Hope* (1854), 4 De G. M. & G. 328.

2058. In what cases permitted—To visit relations—Upon security given to return.]—Here are two young ladies that desire to go & make a visit to their aunts at Dantzic. But should they be suffered to do this without any security given,

they themselves would be out of the reach of the process of the ct. ; & the persons in whose hands they were would be out of the power of the ct. likewise. They might be married during their absence abroad, without any possibility of this ct.'s punishing the parties concerned in it, & their fortunes by that means absolutely disposed of. It is necessary therefore, that before these ladies are suffered to go there, a recognisance should be entered into for their returning. It is necessary likewise, that part of this recognisance should be, that they do not marry whilst they are abroad, without the leave of the ct. Anciently, when wards of the ct. stayed even in England, recognisances of this sort were entered into, that they should not marry without leave of the ct. That practice has of late years been discontinued. But to this day their doing so is judged a contempt (*LORD HARDWICKE, C.*).—*JEFFREYS v. VANTE-SWARSTWARTH* (1740), Barn. Ch. 141 ; 27 E. R. 588, L. C.

*Annotation:—**Refd.* *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42.

2059. ———.]—Order made that an infant ward of ct. might be at liberty to go abroad for a short period to visit his father, on satisfactory security being given that he would be restored to the jurisdiction within a limited time.—*BIGGS v. TERRY* (1836), 1 My. & Cr. 675 ; 40 E. R. 535.

2060. ———.]—*CLOGSTOUN v. WALCOT* (1845), 6 L. T. O. S. 42 ; 9 Jur. 649.

2061. ———.]—*Security for obedience to further orders.]—*A resident in Jamaica died leaving two children, who were born there, & resided there with their mother till 1875, when the elder, a daughter, was sent to England to be educated. The mother came to England in 1876 to place her son at school, & returned to Jamaica in 1878. In 1880 she came to England to see her children, & had remained there, the daughter, upon leaving school, living with her. With the above exceptions the mother had always lived in Jamaica, & regarded it as her home. She now wished to return thither permanently, & to take with her the daughter aged twenty years & three months, the son, who was apprenticed to an engineer, remaining in England. The children were wards of ct., & the mother had been appointed by the ct. sole guardian :—*Held*: leave may be given to take a ward out of the jurisdiction without a case of necessity being shown, the ct. having only to be satisfied that the step is for the benefit of the ward, & that there is sufficient security that future orders will be obeyed. Leave was accordingly given upon a relative resident in England being appointed guardian along with the mother.—*Re CALLAGHAN, ELLIOTT v. LAMBERT* (1884), 28 Ch. D. 186 ; 54 L. J. Ch. 292 ; 52 L. T. 7 ; 33 W. R. 157 ; 1 T. L. R. 105, C. A.

2062. ———.]—*For reasons of health—Upon security given to return.]—*The ct. will not make an order, permitting its infant wards to be removed out of the jurisdiction, with a view to their residing permanently abroad, except in a case of imperative necessity ; as, where it is clearly proved that a constant residence in a warmer climate is absolutely essential to their health.

Such an order, if made, ought to comprise a scheme for the education of the infants, as well as a provision for informing the ct. from time to

PART XV. SECT. 5, SUB-SECT. 1.—A.

2052 i. General rule—Removal not permitted.]—The ct. will not suffer its ward to be carried beyond its jurisdiction, so that as regards its education,

religious training, or personal safety, it should be out of reach of the ct.—*Re RUTHERFORD* (1861), 4 Nfld. L. R. 589.—*NFLD.*

h. In what cases permitted—For infant's benefit—Upon recognisance of

*guardian.]—*An infant allowed to be taken out of the jurisdiction, upon the guardian entering into a recognisance, it being for the benefit of the infant that this should be done.—*Re MEDLEY* (1871), 6 I. R. Eq. 339.—*IR.*

time of their progress & condition, & an undertaking to bring them within the jurisdiction when required.

It is needless to observe that the law, which permits the father to appoint the guardians of his children, will pay the highest respect to the expression of his wishes as to the mode of their education. Every attention ought to be paid to the opinions & to the wishes of a mother; but in point of authority she is upon an equality with the three other guardians.

The ct. will be desirous as far as possible, to consult the feelings & wishes of the mother, but that desire will not induce it in any particular to depart from the course which it may think most conducive to the interests of its wards (LORD COTTENHAM, C.).—CAMPBELL v. MACKAY (1837), 2 My. & Cr. 31; 40 E. R. 552, L. C.; *subsequent proceedings, sub nom.* CAMPBELL v. CAMPBELL, 1 Jur. 540, L. C.

2063. ———.]—CARNSEW v. CARNSEW, *Re* CARNSEW (1871), 15 Sol. Jo. 492.

2064. ———.]—It appearing that an infant ward of the ct. had been sent abroad in consequence of the advice of medical men that the infant's removal to a milder climate was necessary for his health, the ct. granted a reference to approve of a plan for the infant's maintenance & education out of the jurisdiction, but limited the allowance to be made to one year.—WYNDHAM v. ENNISMORE (LORD) (1837), 1 Keen, 467; 48 E. R. 386.

2065. ——— To attend foreign school.—Upon security given to return.]—Testator constituted his widow guardian of his two children then living with him, one, a boy, being the child of another woman, & he gave her £4,000 "to be used for her own & the children's benefit, as she should, in her judgment & conscience, think fit." This (as was held) gave the widow a discretion as to the application of the income between the three objects, which this ct. would not control, if *bond fide* exercised. Soon after testator's death, the maternal relations of the boy removed him from the widow's custody. The widow married again, & appointed one-eighth of the capital to the boy & the remainder to her own child. The ct., notwithstanding the opposition of the widow, who offered to take the boy back, directed £30 a year to be allowed, out of the income of the £4,000 for his education.

I think that in this case, an order may be made to allow the boy to remain at the school in France; upon an undertaking being given to bring him within the jurisdiction when required (ROMILLY, M.R.).—HART v. TRIBE (1854), 19 Beav. 149; 52 E. R. 306.

2066. To emigrate with father.]—An undischarged bkpt. about to emigrate to Manitoba where he would obtain an allotment of prairie land, proposed to take his six sons with him. The eldest who was between seventeen & eighteen years old, was an apprentice engineer in the Govt. dockyard at Devonport, & had been there about two years. The infants having been made wards of ct. an injunction was applied for to restrain the father from taking them out of the jurisdiction of the ct.:—*Held*: an uncle having undertaken to provide for the maintenance of the eldest son, so long as he remained in the Govt. employment & was unable to earn sufficient to maintain himself it would not be for his benefit to accompany his father, & leave to take him out of the jurisdiction of the ct. was refused. Leave was, however,

given to the father to take the other five sons with him, & to apply for leave to remove the eldest after the lapse of a year if he was successful in Manitoba.

The action having been commenced for the purpose of making the infants wards of ct. in order to prevent their removal by their father, the *onus* of satisfying the ct. of the impropriety of so removing them was on the persons who sought to restrain their removal.—*Re* PLOMLEY, VIDLER v. COLLYER (1882), 47 L. T. 283, C. A. *Annotation*:—*Reid*. *Re* Agar-Ellis, Agar-Ellis v. Lascelles (1883), 24 Ch. D. 317.

B. Proceedings in respect of Actual or Threatened Removal.

2067. Order for return of ward.]—Where there is a guardianship by the common law, this ct. will intermeddle & order; but being here a guardian by Act of Parliament, I cannot remove him or her; but in this & all other the like cases, they shall give security not to marry the child *infra annos nobiles*, or consent, or be aiding to the marriage of such *post annos nobiles*, during minority, without acquainting this ct. therewith; but I cannot restrain the infant from marriage *ad annos nobiles* (LORD NOTTINGHAM, C.).—FOSTER v. DENNY (1677), 2 Cas. in Ch. 237; cited in 1 Eq. Cas. Abr. 260; 3 Salk. 177; 22 E. R. 925, L. C.

Annotations:—*Consd.* Morgan v. Dillon (1724), 9 Mod. Rep. 135. *Reid*. Reynolds v. Tenham (1722), 9 Mod. Rep. 40.

2068. ———.]—HOPE v. HOPE, No. 2036, *ante*.

2069. Injunction—Father threatening removal.]—Jurisdiction of the Ct. of Ch., representing the King, as *parens patriæ*, to control the right of a father to the possession of his child under circumstances. Order, restraining him from removing the child, or doing any act towards, or for the purpose of, removing it, out of the jurisdiction. The ct. would not give the possession to the mother, having withdrawn from her husband.

No affidavit necessary to obtain an order that a child, a word of ct., shall not be taken out of the jurisdiction even to Scotland.—DE MANNEVILLE v. DE MANNEVILLE (1804), 10 Ves. 52; 32 E. R. 762, L. C.

Annotations:—*Folld.* Campbell v. Mackay (1837), 2 My. & Cr. 31. *Consd.* R. v. Gyngall, [1893] 2 Q. B. 232. *Reid*. Whitfield v. Hales (1806), 12 Ves. 492; Wellesley v. Beaufort (1827), 2 Russ. 1; Johnstone v. Beattie (1843), 10 Cl. & Fin. 42; *Re* Newton, [1896] 1 Ch. 740.

2070. Habeas corpus—Ward enlisted for service overseas.]—Where an infant ward of ct. enlisted in the East India Co.'s service, & was about to be sent to the East Indies, the ct. ordered a *habeas corpus* to be issued, directed to the sergeant in whose charge he was, to bring up the body of the ward; &, on the return of the writ, upon a motion for the infant's discharge, made an order that he should not be removed out of the jurisdiction without leave of the ct.; & directed that this order should be served upon the East India Co. & on their officer in command at the depot where the recruits were stationed; & that the motion should stand over until the next motion day; & upon that day, the former order having been duly served ordered that the infant should be discharged & delivered over to his guardian.—ROCHFORD v. HACKMAN, *Re* ROCKFORD (1854), Kay, 308; 2 Eq. Rep. 223; 23 L. J. Ch. 261; 22 L. T. O. S. 302; 2 W. R. 205; 69 E. R. 131.

2071. Order transferring custody.]—The ct., in compliance with an order for access to a child left in the custody of one of the parents, will, if

Sect. 5.—Residence: Sub-sect. 1, B.; sub-sect. 2. | **Sects. 6 & 7: Sub-sect. 1, A. & B.]**

there is reason to apprehend that the person having the custody is about to quit the jurisdiction & take the child with him or her, order the custody to be transferred to the person in whose favour the order of access is made.

Notwithstanding an instance of disobedience to an order for access, the ct. will vacate an order for transfer of custody made in consequence of such disobedience, provided the person primarily entitled to the custody give sufficient guarantee for future obedience to the order of the ct.—**PORTUGAL v. PORTUGAL** (1866), 35 L. J. P. & M. 103; 15 W. R. 9.

2072. Examination as to whereabouts of ward—Privilege of solicitor.]—B., being made a ward of ct. on bill filed, & a guardian appointed, the mother resisted the order, & removed B. to Spain. The mother subsequently came to England & an order was made for delivery up of the ward in a limited time, & her former solr. was examined in ct. as to her residence & other matters, & claimed professional privilege:—**Held:** he was bound to answer such questions; & generally, that no solr. or officer of the ct., or other person, can refuse to answer any questions, or do, or abstain from doing anything, whereby the ct. is prevented from discovering the residence of its ward.—**BURTON v. DARNLEY (LORD)** (1869), L. R. 8 Eq. 576, n.; 21 L. T. 292; 17 W. R. 1057.

Annotations:—Folld. Ramsbotham v. Senior (1869), L. R. 8 Eq. 575. **Consd.** Heath v. Crealock (1873), L. R. 15 Eq. 257.

2073. Committal—Ignorance that infant ward of court.]—It is no answer to a motion for committal to prison for contempt of ct. in removing a ward of ct. out of the jurisdiction to say that the act was done on the solicitation of the ward & that, although there was knowledge that the girl was a ward of ct., there was not full knowledge of the meaning of that status.

Where there was no knowledge that the girl was a ward of ct. such ignorance of the fact did not altogether exonerate the ignorant parties, but constituted an alleviation of their contempt.—**Re J.** (1913), 108 L. T. 554; 29 T. L. R. 456; 57 Sol. Jo. 500.

SUB-SECT. 2.—REMOVAL FROM CUSTODY OF GUARDIAN.

2074. Committal.]—TODD v. LYNES (1873), *Times*, July 26; *sub nom.* TODD v. TODD, Seton's Judgments & Orders, 7th ed., p. 1002.

Annotations:—Consd. Thomasset v. Thomasset, [1894] P. 295. **Refd.** *Re* Agar-Ellis, Agar-Ellis v. Lascelles (1883), 50 L. T. 161; G. v. L. (1891), 60 L. J. Ch. 705.

2075. — Refusal to state whereabouts.]—The clandestine removal of a ward of ct. from the custody of the person with whom such ward has been residing under the authority of the ct., is in its nature a criminal contempt. A member of the House of Commons, who had carried off his infant daughter, a ward of the ct., from the house of the ladies under whose care she had been placed by the guardians appointed by the ct., & who, on being personally examined by the ct., admitted the fact & refused to state the present residence of his daughter, was ordered to be committed to the Fleet, although he was not a party to the suit.—**WELLESLEY v. BEAUFORT (DUKE)**,

LONG WELLESLEY'S CASE (1831), 2 Russ. & M. 639; 2 State Tr. N. S. 911; 39 E. R. 538, L. C.

Annotations:—Mentd. *Re* Ludlow Charities, Lechmere Charlton's Case (1837), 2 My. & Cr. 316; Stockdale v. Hansard (1839), 9 Ad. & El. 1; *Re* Martin, *Ex p.* Van Sandau (1844), De G. 55; *Re* Martin, *Ex p.* Van Sandau, *Re* Martin, *Ex p.* Turner & Hensman (1846), De G. 303; Roberts v. Gower (1846), 8 L. T. O. S. 125; Gosset v. Howard (1847), 11 Jur. 750; *Re* Charity Comrs. of England, *Ex p.* Tamworth School (1868), 18 L. T. 233; R. v. Castro, Onslow's & Whalley's Case, Skipworth's Case (1873), L. R. 9 Q. B. 219; *Re* Anglo-French Co-op. Soc. (1880), 49 L. J. Ch. 388; *Re* Freston (1883), 11 Q. B. D. 545; *Re* Armstrong, *Ex p.* Lindsay, [1892] 1 Q. B. 327; Seldon v. Wilde, [1911] 1 K. B. 701.

—.]—**See, generally,** CONTEMPT OF COURT, Vol. XVI., pp. 46 *et seq.*

2076. Order for production of ward—Enforced by sergeant-at-arms.]—Notwithstanding the changes made by the Judicature Acts there still is such an officer as the "Sergeant-at-arms, attending the ct." & he is the proper officer to execute & enforce all orders for the production or custody of a ward of ct.—**G— v. L—**, [1891] 3 Ch. 126; 60 L. J. Ch. 705; 40 W. R. 10; *sub nom.* *Re* AN INFANT, G. v. L., 64 L. T. 732; 7 T. L. R. 589.

2077. Injunction—Against allowing ward to take monastic vows.]—TODD v. LYNES (1873), *Times*, July 26; *sub nom.* TODD v. TODD, Seton's Judgments & Orders, 7th ed., p. 1002.

Annotations:—Refd. *Re* Agar-Ellis, Agar-Ellis v. Lascelles (1883), 50 L. T. 161; G. v. L. (1891), 60 L. J. Ch. 705; Thomasset v. Thomasset, [1894] P. 295.

2078. Habeas corpus—Ward imprisoned for debt—Writ directed to sheriff.]—A habeas corpus issued to bring up the body of a ward of ct. who had been taken in execution in an action by a tradesman for necessaries, & the tradesman was ordered to attend at the bar of the ct. at the same time.—**BOND v. ROBERTS** (1843), 13 Sim. 400; 60 E. R. 155; *subsequent proceedings*, 1 L. T. O. S. 166.

Annotation:—Refd. Rochfort v. Hackman (1854), 2 Eq. Rep. 223.

—.]—**See, generally,** CROWN PRACTICE, Vol. XVI., pp. 248 *et seq.*

2079. Discovery of ward's whereabouts—By examination—Of father.]—HOCKLY v. LUKIN (1762), 1 Dick. 353; 21 E. R. 305.

2080. — Privilege of solicitor.]—A solr. is bound to give to the ct. any information which may lead to the discovery of the residence of a ward of the ct. whose residence is being concealed from the ct., although such information may have been communicated to him by his client in the course of his professional employment. Therefore, where the mother of wards of the ct. had absconded with the wards, her solr. was ordered to produce the envelopes of letters which he had received from her as her solr. with the object of discovering her residence from the postmarks.—**RAMSBOTHAM v. SENIOR** (1869), L. R. 8 Eq. 575; 21 L. T. 293; 34 J. P. 85; 17 W. R. 1057.

Annotations:—Consd. Heath v. Crealock (1873), L. R. 15 Eq. 257. **Apld.** Rosenberg v. Lindo (1883), 48 L. T. 478. **Mentd.** Crawcour v. Salter (1881), 18 Ch. D. 30.

2081. Of any person able to give information.]—The ct. has jurisdiction summarily to order the personal attendance before it of any persons, who are supposed to be in a position to give information sought as to the place of concealment of wards of ct. Such jurisdiction is not based on any part of the law of contempt, but on the law which relates to the custody of infants. The practice of the ct. is in such cases to proceed

there

of the infant

being removed out of the jurisdiction, although no suit is pending respecting

the infant's estate.—**Re GILLRIE** (1852), 3 Gr. 279.—**CAN.**

by order & not by subpoena.—**ROSENBERG v. LANDO** (1883), 48 L. T. 478.
Annotation :—**Mentd.** **Hyde v. Hyde** (1888), 13 P. D. 166.

SECT. 6.—EDUCATION.

Education generally.]—See Part XII., Sect. 2, ante.

2082. Rights of father—Interference with.]—The Ct. of Ch. will under circumstances of improper conduct interfere to prevent a father from interfering in the education, etc., of his son, being a ward of the ct.—**CREUZE v. HUNTER** (1790), 2 Cox, Eq. Cas. 242; 30 E. R. 113; *sub nom.* **CRUISE v. HUNTER**, 2 Bro. C. C. 500, n., L. C.

Annotations :—**Expld.** **De Manneville v. De Manneville** (1804), 10 Ves. 52. **Refd.** **Wellesley v. Beaufort** (1827), 2 Russ. 1; **Re Agar-Ellis, Agar-Ellis v. Lascelles** (1883), 24 Ch. D. 317; **R. v. Gyngall**, [1893] 2 Q. B. 232.

2083. ———.]—Re PLOMLEY, VIDLER v. COLLYER, No. 1156, *ante*.

2084. ——— Not affected by children being wards of court.]—Re AGAR-ELLIS, AGAR-ELLIS v. LASCELLES, No. 1118, *ante*.

2085. Religious education—Choice of faith—Discretion of testamentary guardian.]—TALBOT v. SHREWSBURY (EARL), DOYLE v. WRIGHT, TALBOT v. BERKELEY, No. 1306, *ante*.

2086. ——— Pecuniary advantage of ward not considered.]—TALBOT v. SHREWSBURY (EARL), DOYLE v. WRIGHT, TALBOT v. BERKELEY, No. 1306, *ante*.

2087. ——— Father's faith followed.]—Re RACE (1857), 1 Hem. & M. 420, n.; 71 E. R. 183.

Annotations :—**Consd.** **Gurney v. Gurney** (1863), 1 Hem. & M. 413; **Re Scanlan** (1888), 40 Ch. D. 200. **Refd.** **Re Meade** (1871), 19 W. R. 313.

2088. ——— Child removed from mother's influence.]—By a covenant in a separation deed executed after the passing of the Infants Custody Act, 1873 (c. 12), a father agreed that his infant daughter should remain in her mother's custody during eleven months in each year. The mother held & promulgated atheistical opinions, & refused to allow the child to receive any religious instruction. She also published & circulated an obscene book. The child was made a ward of ct., being then about eight years old :—**Held** : to bring up the child in the religion of her father was a duty which the ct. owed to its ward, & was unaffected by the covenant in the separation deed; & also the refusal of religious instruction to the child & the publication of the obscene book were in themselves sufficient grounds for removing her from the custody of the mother.—**Re BESANT** (1879), 11 Ch. D. 508; 48 L. J. Ch. 497; 40 L. T. 469; 43 J. P. 301; 27 W. R. 741, C. A.; *subsequent proceedings, sub nom.* **BESANT v. WOOD**, 12 Ch. D. 605.

Annotations :—**Refd.** **Hart v. Hart** (1881), 18 Ch. D. 670; **F. v. F.**, [1902] 1 Ch. 688.

2089. ———.]—Re MONTAGU, Re WROUGHTON, MONTAGU v. FESTING, No. 1290, *ante*.

2090. ——— Unless he has abdicated his rights.]—Re NEWTON (INFANTS), No. 1189, *ante*.

2091. ——— Infant's benefit paramount.]—Re W., W. v. M., No. 1305, *ante*.

2092. Tampering with ward's faith—Right of court to restrain communications.]—Where persons of a certain religious faith attempt to induce a ward of ct. to disobey her father, & have secret interviews with her with a view to induce her to adopt their religion instead of her father's, the ct. will grant an injunction restraining such persons from having any further communication with the ward.—**IREDELL v. IREDELL** (1885), 1 T. L. R. 260.

2093. Duty of guardian—To inform court as to progress of ward.]—CAMPBELL v. MACKAY, No. 2062, *ante*.

2094. ———.]—Here is a young man, a ward of ct., possessed of a very large fortune, for he had a life interest in real estate of £8,000 a year, & he had the interest of about £120,000, producing together something like £10,000 a year. The guardians seek, & obtain for him, an allowance of £1,300 a year, which was not an undue allowance, having regard to the extent of his fortune, if he had been kept under proper control. But during the last two years of his minority, as far as I can make out, he seems to have had complete power to go where he liked & to do whatever he pleased, no species of control of any sort was exercised over him, & in all these proceedings at Paris there does not appear to me to be any trace of intervention, or even of advice. It is obviously impossible for this ct., with the number of wards which it has under its care, to be aware of their conduct, but it does what it can, & requires the guardian from time to time, to give general information of what is taking place. But there are wards possessed of large fortunes, & of very extravagant habits, who get into difficulties during their infancy (**ROMILLY, M.R.**).—**KAY v. JOHNSTON** (1856), 21 Beav. 536; 52 E. R. 967.

Annotations :—**Mentd.** **Re Leslie, Leslie v. French** (1883), 23 Ch. D. 552; **Re Jones, Farrington v. Forrester** (1893), 62 L. J. Ch. 996.

SECT. 7.—MARRIAGE.

SUB-SECT. 1.—CONTROL OF COURT OVER.

A. In General.

2095. Form of order giving leave to marry.]—The form of an order giving leave to a male infant to marry after a reference to the master, to consider if the match proposed were proper & to approve of articles.—**PLYMOUTH (EARL) v. LEWIS** (1749), 2 Dick. 801; 21 E. R. 482, L. C.

2096. ———.]—BROOK v. BROOK (1789), 2 Dick. 801; 21 E. R. 482, L. C.

2097. Whether court will sanction—Where settlement impossible.]—Disinclination of the ct. to sanction the marriage of an infant ward, where it is impossible for him, by reason of his infancy, to settle his real estate so as to go along with his title & to make provision for younger children.—**HONYWOOD v. HONYWOOD** (1855), 20 Beav. 451; 52 E. R. 677.

Annotation :—**Dbtd.** **Trowell v. Shenton** (1878), 8 Ch. D. 318.

B. Jurisdiction to Restrain.

2098. General rule.]—(1) A father, when resident abroad, has no right to the custody of his children.

PART XV. SECT. 7, SUB-SECT. 1.—A.

k. Marriage without consent—Re-celebration ordered.]—A male minor who was entitled absolutely to real estate, & was a ward of the ct., married without the consent of the ct.; the

ct. directed the marriage ceremony to be celebrated a second time, in order to remove doubts as to the validity of the first marriage, which was accordingly done.—**Re MURRAY (A MINOR)** (1842), 5 L. Eq. R. 266; 3 Dr. & War. 3; 2 Con. & Law. 136.—**IR.**

PART XV. SECT. 7, SUB-SECT. 1.—B.

2098 i. General rule.]—A ward of ct. cannot marry without the consent of the ct.—**MANJAN BIBI v. DISTRICT JUDGE, BIRBHUM** (1914), 1 L. R. 42 Calo. 351.—**IND.**

Sect. 7.—Marriage: Sub-sect. 1, B.; sub-sect. 2, A. (a), (b), (c), (d) & (e).]

(2) As to wards of this ct. There being a father who consents to the marriage of a lady with a gentleman who is old enough to make a contract according to law, there is no doubt that, the banns being published, or a licence being obtained, they may marry according to law; but what does the ct. do? It says, "you shall not marry; if, during your infancy, you are about to enter a contract which will be injurious to you, although it may be otherwise lawful for you to enter into it, we will restrain you" (LORD ELDON, C.).

(3) This ct. has not the means of acting except where it has property to act upon. It is not, however, from any want of jurisdiction that it does not act, but from a want of means to exercise its jurisdiction; because the ct. cannot take on itself the maintenance of all the children in the kingdom (LORD ELDON, C.).

(4) Whilst the ct. looks at the duties of the father, it considers those duties as duties that impose upon him thus much, that if he be himself of ability to maintain the children, be their fortunes what they may, & to provide for them according to their expectations, it says "you shall provide for them out of your own means, & not encroach upon the property of the children" (LORD ELDON, C.).

(5) I am not aware of any case, in which the ct., where it has taken away from the father the care & custody of the children, has called in aid of their own means the property of the father (LORD ELDON, C.).

(6) In many great families, the eldest infant is in possession of a large property; the younger infants have some little property; & in such a case, the ct. does not measure the duty of maintaining the eldest child by looking at him only, but it considers that it is for his interest that his brothers & sisters should be brought up in respectable stations; & it says, "we will go the length of giving them maintenance, or a part of maintenance, out of his provision, as a part of the maintenance made for him, though to be applied to them," & upon this ground, that it is for his benefit, not that this portion of his fortune should be saved, but that it should be applied to bringing up his brothers & sisters to such situations as to reflect honour upon him (LORD ELDON, C.).—*WELLESLEY v. BEAUFORT* (DUKE) (1827), 2 Russ. 1; 5 L. J. O. S. Ch. 85; 38 E. R. 236, L. C.; *affd. sub nom. WELLESLEY v. WELLESLEY* (1828), 2 Bli. N. S. 124, H. L.; *subsequent proceedings, sub nom. WELLESLEY v. BEAUFORT* (DUKE), *LONG WELLESLEY'S CASE* (1831), 2 Russ. & M. 639, L. C.

Annotations:—As to (1) Reffd. Ex p. McClellan (1831), 1 Dowl. 81; *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42; *Re Spence* (1847), 2 Ph. 247; *Warde v. Warde* (1849), 2 Ph. 786; *Re Meade* (1871), 19 W. R. 313; *Re Goldsworthy* (1876), 2 Q. B. D. 75; *Re Agar-Ellis, Agar-Ellis v. Lascelles* (1878), 10 Ch. D. 49; *R. v. Barnardo, Jones's Case*, [1891] 1 Q. B. 194. *As to (3) Reffd. Re Fynn* (1848), 2 De G. & Sm. 457; *Re A. B.* (1885), 1 T. L. R. 657. *As to (4) Reffd. Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42. *As Smart v. Smart*, [1892] A. C. 425. *Generally, Hakewill* (1852), 12 C. B. 223; *Swift v. Swift* (1865), 34 Beav. 266.

2099. — Restraint of proposed marriage—Guardian ordered not to permit marriage.]—*SMITH v. SMITH*, No. 15, *ante*.

2100. —.]—*TOMBES v. ELLERS*, No. 1499, *ante*.

2101. —.]—*ROACH v. GARVAN*, No. 1494, *ante*.

2102. — Mother ordered not to consent.]—
(LORD)

2103. —.]—An infant being about to contract an improper marriage, his parent, in order to give jurisdiction to the ct., settled a small sum of money for his benefit, & on a bill filed for execution of the trusts of the settlement, an injunction was granted to restrain the marriage.—*DAWSON v. THOMPSON* (1865), 12 L. T. 178.

2104. — Until further order.]—*NORRIS v. ORMOND*, [1883] W. N. 58.

2105. Restraint of communication with ward—By letter or otherwise.]—*ROACH v. GARVAN* (1748), 1 Ves. Sen. 157; 1 Dick. 88; 27 E. R. 954, L. C. *Annotations:—Folld. Shipbrook v. Hinchinbrook* (1778), 2 Dick. 547. *Reffd. Mendes v. Mendes* (1747), 3 Atk. 619. *Mentd. Brook v. Brook* (1858), 3 Sm. & G. 481.

2106. —.]—*BEARD v. TRAVERS* (1749), 1 Ves. Sen. 313; 27 E. R. 1052, L. C.

2107. —.]—*SHIPBROOK (LORD) v. HINCHINBROOK (LORD)* (1778), 2 Dick. 547; 21 E. R. 383, L. C.

2108. —.]—*PEARCE v. CRUTCHFIELD*, No. 129, *ante*.

2109. —.]—Abortive endeavour to marry a ward of the ct. a contempt. Parties concerned in the marriage of a male infant ward of the ct., attending by order, the clergyman, appearing exculpated, was discharged, with costs out of pocket from the infant's estate. The others ordered to attend the master on an inquiry, whether the marriage, by false names, was valid; & upon the report a suit for nullity of marriage at the expense of the infant's estate was ordered; & all the parties were restrained by injunction from all intercourse, personal, by correspondence, or otherwise, with the infant.—*WARTER v. YORKE* (1815), 19 Ves. 451; 34 E. R. 584, L. C.

Annotation:—Mentd. Wynn v. Davies & Weever (1835), 1 Curt. 69.

2110. Control of guardian's consent.]—Under what circumstances the Ct. of Ch. will control the consent of a guardian to the marriage of an infant ward of that ct.; & will refuse to confirm a master's report, approving of proposals for a settlement on the marriage.—*GORDON (LORD) v. IRWIN (LADY)* (1781), 4 Bro. Parl. Cas. 355; 2 E. R. 241, H. L.

SUB-SECT. 2.—EFFECT OF MARRIAGE WITHOUT LEAVE OF COURT.

A. Contempt of Court.

(a) In General.

Contempt of court generally.]—See *CONTEMPT OF COURT*, Vol. XVI., pp. 6 *et seq.*

2111. Contempt if no consent.]—*TOTHERBY v. PRESTON* (1748), cited in De G. at p. 312, L. C.

Annotation:—Reffd. Re Martin, Ex p. Van Sandau, Ex p. Turner (1846), De G. 303.

2112. — Though father living.]—It is contempt to marry a ward of the ct. without leave, though the father of the infant be living.—*BUTLER v. FREEMAN* (1756), Amb. 301; 27 E. R. 204, L. C. *Annotations:—Reffd. R. v. Gyngall*, [1893] 2 Q. B. 232. *Mentd. Middleton v. Janverin* (1802), 2 Hag. Con. 437; *De Manneville v. De Manneville* (1804), 10 Ves. 52; *Wellesley v. Beaufort* (1827), 2 Russ. 1; *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42; *Brook v. Brook* (1861), 9 H. L. Cas. 193.

2113. —.]—In the case of a ward of the ct. a marriage in fact is sufficient to ground the contempt. Upon the marriage of a ward of the ct., both parties being foreigners, & the property abroad, & the marriage in Scotland on the day the bill was filed, the ct. took jurisdiction; but did not commit the husband; ordering him to attend from time to time & to be at liberty to make a

proposal.—*SALLES v. SAVIGNON* (1801), 6 Ves. 572; 31 E. R. 1201, L. C.

Annotation.—*Consd. Johnston v. Beattie* (1843), 10 Cl. & Fin. 42.

2114. ———.]—*MARTIN v. FOSTER*, No. 2171, *post*.

2115. Effect of lapse of long time.]—*BALL v. COURTS*, No. 2170, *post*.

2116. ———.]—*CAVE v. CAVE*, No. 179, *ante*.

2117. Abortive attempt.]—*WARTER v. YORKE*, No. 2109, *ante*.

2118. Motion to commit—Not made unless for infant's benefit.]—A motion to commit a person for contempt of ct. in marrying an infant ward ought not to be made until the matter has been brought before the judge in chambers, that he may consider whether it is for the infant's benefit that such a motion should be made.—*BROWN v. BARROW* (1883), 48 L. T. 357.

(b) *Who may be Guilty.*

2119. Mother—Procuring marriage without consent of testamentary guardians.]—*SHAFTSBURY (EARL) v. SHAFTSBURY*, No. 14, *ante*.

2120. All parties conniving—Though strangers to order.]—All who were parties, & privies to this wedding, are guilty of a contempt of this ct., though they were strangers to the decretal order (*LORD KING, C.*).—*LONG v. ELWAYS* (1729), Mos. 249; 25 E. R. 378, L. C.

2121. ——— Position of clergyman.]—An infant was inveigled from B. her guardian & married to W. Though the infant was not taken from a guardian assigned by the ct., yet both W. & the parson & the agents were all committed.—*HANNES v. WOUGH* (1713), 2 Eq. Cas. Abr. 754; 22 E. R. 639, L. C.

2122. ———.]—*MOOR v. MOOR* (1741), Barn. Ch. 404; 27 E. R. 697, L. C.; *sub nom. MORE v. MORE*, 2 Atk. 157.

Annotations.—*Mentd. Wynn v. Davies & Weever* (1835), 1 Curt. 69; *Marshall v. Exeter (Bp.)* (1860), 7 C. B. N. S. 653.

2123. ———.]—Upon a marriage of a ward of the ct. under flagrant circumstances the clergyman & clerk were ordered to attend: the husband was committed; & the LORD CHANCELLOR directed the proceedings to be laid before the A.-G.; expressing his opinion, that contriving a marriage without a due publication of banns is a conspiracy at common law.—*PRIESTLEY v. LAMB* (1801), 6 Ves. 421; 31 E. R. 1124, L. C.

Annotations.—*Mentd. Wynn v. Davies & Weever* (1835), 1 Curt. 69; *Ex p. Van Sandau* (1846), 1 Ph. 605.

2124. ———.]—*MILLET v. ROWSE*, No. 2147, *post*.

2125. ——— No banns—No inquiry.]—*NICHOLSON v. SQUIRE*, No. 2130, *post*.

2126. ———.]—*WARTER v. YORKE*, No. 2109, *ante*.

2127. Ward.]—The ct. has jurisdiction to commit a ward of ct. to prison for contempt of ct. will in a proper case exercise such jurisdiction.—*Re H.'s SETTLEMENT, H. v. H.*, [1909] 2 Ch. 260; 78 L. J. Ch. 745.

(c) *Whether Knowledge of Wardship Essential.*

2128. Knowledge immaterial.]—Marrying an infant ward of the ct. is a contempt, though the parties concerned in such marriage had no notice, that the infant was a ward of the ct.—*HERBERT'S CASE* (1731), 3 P. Wms. 116; 2 Eq. Cas. Abr. 222 pl. 7; 24 E. R. 992.

Annotations.—*Refd. Metropolitan Music Hall Co. v. Lake* (1889), 58 L. J. Ch. 513. *Mentd. Payne v. Drew* (1804), 4 East, 523.

2129. ———.]—Persons concerned in the marriage of a ward of ct. committed, though they were

ignorant of her being a ward of ct.—*EDES v. BRERETON* (1738), West temp. Hard. 348; 25 E. R. 974.

2130. ———.]—Commitment for eloping with a ward of the ct.; & against another person for assisting; ignorance, that she was a ward of ct. not admitted as an excuse. The parties under commitment cannot be heard except on petition. Clergyman, celebrating marriage by banns without making the inquiry, directed by the Marriage Act, liable to ecclesiastical censure, at least: perhaps to other consequences.—*NICHOLSON v. SQUIRE* (1809), 16 Ves. 259; 33 E. R. 983.

Annotations.—*Mentd. Wynn v. Davies & Weever* (1835), 1 Curt. 69; *Tuckness v. Alexander* (1863), 2 Drew. & Sim. 614.

Compare Sub-sect. 2, A. (b), ante.

(d) *Marriage after Majority.*

2131. Whether contempt of court—Marriage to avoid execution of settlement approved by court.]—Observations as to the course to be taken where to avoid executing the marriage settlements approved of by the ct., on behalf of one of its wards, the parties waited until the ward attained her majority, & then, after the execution of other settlements, the marriage took place.—*HOBSON v. FERRABY* (1846), 2 Coll. 412; 63 E. R. 794; *sub nom. HOBSON v. EVERETT*, 6 L. T. O. S. 519.

Annotation.—*Refd. Field v. Moore, Field v. Brown* (1855), 7 De G. M. & G. 691.

2132. ——— Marriage immediately after majority.]—*Longbottom v. Pearce* (1858), 3 De G. & J. 545, n.; 44 E. R. 1379, L. C. & L. JJ.

Annotations.—*Consd. Biddles v. Jackson* (1859), 28 L. J. Ch. 290. *Follid. White v. Herrick* (1869), 4 Ch. App. 345.

2133. ———.]—A female ward of the ct. received proposals of marriage before twenty-one, & married a few days after she had attained that age. She then petitioned that the whole fund might be paid to her husband, & expressed her readiness to be examined apart from him in the usual way. But their Lordships refused to examine her and ordered only that the dividends should be paid to the husband during the joint lives of himself & his wife, without prejudice to any question.

The Master of the Rolls had refused to make the order for payment to the husband, on the ground that a marriage under these circumstances was a contempt of ct.; on which point the Lords Justices expressed no opinion.—*BIDDLES v. JACKSON* (1859), 3 De G. & J. 544; 28 L. J. Ch. 290; 32 L. T. O. S. 362; 5 Jur. N. S. 901; 7 W. R. 248; 44 E. R. 1378, L. JJ.

(e) *Purging Contempt.*

Marriage settlements on wards of court.]—*See Sect. 8, post.*

2134. By general pardon.]—A general act of pardon, though with an exception of contempts, extends to pardon contempts in marrying infant wards of a ct. of equity.—*PHIPPS v. ANGLESEA (EARL)* (1721), 1 P. Wms. 696; 24 E. R. 576, L. C.

Annotations.—*Mentd. Lansdowne v. Lansdowne* (1820), 2 Bli. 60; *Noel v. Rochfort* (1836), 10 Bli. N. S. 483.

2135. Undertaking to execute settlement.]—Personal attendance of a person running off with a ward of the ct. dispensed with, on offering to go before the master & settle.—*GREEN v. PRITZLER* (1763), Amb. 602; 27 E. R. 391.

2136. ———.]—Husband committed for marrying a ward of the ct., & discharged under particular circumstances on undertaking to make a settlement, was held to that, & not permitted upon her consent to receive her whole fortune—viz., a

Sect. 7.—Marriage: Sub-sect. 2, A. (e), & B.
Sect. 8: Sub-sects. 1 & 2, A. & B.]

rentcharge for life.—**STACKPOLE v. BEAUMONT** (1796), 3 Ves. 89; 30 E. R. 909, L. C.

Annotations:—Refd. Winch v. James (1798), 4 Ves. 386. *Mentd. Clifford v. Beaumont* (1828), 4 Russ. 325; *Morley v. Rennoldson*, *Morley v. Linkson* (1843), 2 Hare, 570; *Godfrey v. Hughes* (1847), 5 Notes of Cases 499; *Beaumont v. Squire* (1852), 17 Q. B. 905; *Parker v. Hodgson* (1861), 1 Drew. & Sm. 568; *Newton v. Marsden* (1862), 2 John. & H. 356; *Re Whittings Settlement*, *Whiting v. De Rutzen*, [1905] 1 Ch. 96; *Re Hewett*, *Eldridge v. Iles*, [1918] 1 Ch. 458.

2137. — By counsel.]—WINCH v. JAMES, No. 2173, *post*.

2138. —.]—BATHURST v. MURRAY (1802), 8 Ves. 74; 32 E. R. 279, L. C.

Annotation:—Refd. Birkett v. Hibbert (1834), 3 My. & K. 227.

2139. —.]—Generally, upon the marriage of a ward of ct., without leave, the marriage being found valid, & the party in contempt having executed the settlement & paid the costs, is discharged.

A. was committed for contempt for marrying a ward. After the marriage had been found valid, but before a settlement had been executed, he was discharged, upon his undertaking to abstain from any intercourse. After the settlement had been executed, the ct. held that it would be contrary to principle, either to compel the continuance of the undertaking or to make an order to the same effect.—**FIELD v. BROWN** (1853), 17 Beav. 146; 51 E. R. 988.

2140. —.]—The ct. will give no direction as to dividends of separate property to which a ward of ct. is entitled, who is under age, & has married without consent, until the husband has executed the settlement.—**CATOR v. MASON** (1854), 2 W. R. 667.

2141. Reference to master for proper settlement.]—There must be a reference to the master for a proper settlement, before contempt for marrying a ward of ct. can be cleared. In such case settlement of her personal property to husband for life, then to wife for life, then to children according to appointment of survivor, varied, so as to vest a moiety in the children at her death, if before his; but still subject to his appointment.—**STEVENS v. SAVAGE** (1790), 1 Ves. 154; 30 E. R. 277, L. C.

Annotation:—Refd. Stackpole v. Beaumont (1796), 3 Ves. 89.

2142. Execution of settlement—& proof of valid marriage.]—The ct. refused to discharge a person who had been committed for contempt for marrying an infant ward of ct. until the certificate of the due solemnisation of the marriage had been produced, & a proper settlement of the wife's property had been approved.—**COX v. BENNETT** (1874), 31 L. T. 83; 22 W. R. 819.

2143. Attempted marriage—Undertaking to pay costs.]—C., having been committed for a contempt in attempting to marry a ward of ct., was liberated upon an undertaking to pay the costs occasioned by the contempt:—*Held*: the costs of affidavits filed on a previous occasion of a motion to restrain all intercourse with the ward, & used on the motion to commit, were part of the costs occasioned by the contempt.—**THORNHILL v. THORNHILL** (1855), 25 L. T. O. S. 36; 1 Jur. N. S. 73; 3 W. R. 151, L. C.

B. Criminal Proceedings.

2144. Procuring marriage of ward—Information.]—Information granted against all persons

concerned in inveigling a young lady, a ward of Chancery about sixteen years of age, to marry a man much beneath her. Though the Ct. of Ch. had punished them for the contempt.—**R. v. PIERSON** (1738), Andr. 310; 95 E. R. 412; *sub nom. R. v. OSSULSTON* (LORD) 2 Stra. 1107.

Annotation:—Refd. R. v. Green (1781), 3 Doug. K. B. 36.

2145. — May amount to conspiracy.]—Contempt on marrying a ward by commitment not sufficient, held to be a conspiracy, & an information recommended.—**SCHREIBER v. LATEWARD** (1781), 2 Dick. 592; 21 E. R. 401, L. C.

2146. —.]—**PRIESTLEY v. LAMB**, No. 2123, *ante*.

2147. — Indictment.]—Upon a marriage of a ward of the ct., under flagrant circumstances, the husband obtaining a licence upon a false oath, that she was of age, the clergyman was ordered to attend, & reprimanded: the husband was committed, & ordered to be indicted.—**MILLET v. ROWSE** (1802), 7 Ves. 419; 32 E. R. 169, L. C.

Annotations:—Distd. Ball v. Coutts (1812), 1 Ves. & B. 292. *Refd. Birkett v. Hibbert* (1834), Coop. temp. Brough. 459.

2148. —.]—Marriage of a ward of the ct. under gross circumstances punishable, beyond commitment, by indictment, as a conspiracy.—**WADE v. BROUGHTON** (1814), 3 Ves. & B. 172; 35 E. R. 444, L. C.

SECT. 8.—SETTLEMENTS ON MARRIAGE.

SUB-SECT. 1.—JURISDICTION OF COURT.

Settlements generally, *see* SETTLEMENTS.

2149. Whether power to compel settlement of ward's own property.]—**SIMSON v. JONES**, No. 655, *ante*.

2150. —.]—**BLOOD v. BRANFILL** (1834), cited in 7 De G. M. & G. p. 711; 25 L. J. Ch. p. 70; 2 Jur. N. S. p. 150; 44 E. R. 276, L. C.

Annotation:—Consd. Field v. Moore (1855), 7 De G. M. & G. 691.

2151. — After attaining majority.]—**MARTIN v. FOSTER**, No. 2171, *post*.

2152. —.]—The Infants' Settlements Act, 1855 (c. 43), removed the disability of infancy only, leaving unaffected the disability of coverture. In 1862 an infant ward of ct. married without the sanction of the ct. An inquiry as to her fortune having been shortly afterwards directed by the ct. a post-nuptial settlement was executed by her in 1863 with the approval of the Vice-Chancellor, whereby she settled her property, a reversionary interest in personalty under a will, upon trusts for herself for life with remainder for the children of the marriage. Testator having died before Malins' Act [20 & 21 Vict. c. 57] came into force, that Act had no application. There was issue of the marriage. During coverture the wife recognised the settlement by various acts, & after a dissolution of the marriage had been decreed on her petition, she successfully petitioned the Probate, Divorce & Admlty. Div. to vary the terms of the settlement. The reversionary interest having fallen into possession after the dissolution of the marriage:—*Held*: (1) neither the sanction of the ct. nor the effect of that Act could make the settlement of the wife's reversionary interest in personalty binding upon her; (2) no acts of acquiescence & confirmation could have that effect unless they amounted, which these acts did not, to an actual disposition by her of the property,

PART XV. SECT. 8, SUB-SECT. 1.

2151 i. Whether power to compel settlement of ward's own property—After attaining majority.]—The ct. has not

jurisdiction to compel a male ward, with whom a marriage has been solemnised, without its consent on attaining his full age, to execute a

settlement of his estate so as to exclude his wife from all participation in the property.—*Re MURRAY* (1842), 3 Dr. & War. 83.—*IR.*

while *discoverte*, to the trustees of the settlement, & she was entitled to a transfer of the property.—*SEATON v. SEATON* (1888), 13 App. Cas. 61; 57 L. J. Ch. 661; 58 L. T. 565; 36 W. R. 865, H. L.; *affg. S. C. sub nom. BUCKMASTER v. BUCKMASTER* (1887), 35 Ch. D. 21, C. A.

Annotations:—As to (1) *Folld. Re Leigh, Leigh v. Leigh* (1888), 40 Ch. D. 290. *Distd. Viditz v. O'Hagan*, [1899] 2 Ch. 569. *Reid. Mills v. Fox* (1887), 37 Ch. D. 153; *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461. *Generally, Mentd. Greenhill v. North British & Mercantile Insc.*, [1893] 3 Ch. 474; *Harle v. Jarman*, [1895] 2 Ch. 419.

2153. —.]—The ct. has no jurisdiction to compel an infant ward of ct. to make a settlement of his own property because he has been guilty of contempt in marrying without leave. Deft. to an action in which he was made a ward of ct. married without leave, being in the twentieth year of his age. About eight months afterwards, he having in the meantime attained the age of twenty, an order was made on the application of his testamentary guardian in the action & in the matter of the Infants' Settlements Act, that a proper settlement of his property should be settled by the judge, & that he should execute the settlement when so settled. He accordingly executed a settlement approved by the judge. As soon as he attained twenty-one he brought his action to set aside the settlement, & also appealed against the order directing it. He deposed that he had always objected to the settlement, & executed it only because he thought he should get into trouble if he did not:—*Held*: the order for a settlement must be discharged, for that the ct. had no jurisdiction to compel the ward to make a settlement, & the order was in form & substance an order *in invitum*, & could not be construed as merely authorising him to execute a settlement which he was willing to make. *Qu.*: whether, after such a lapse of time, the settlement could be treated as "made upon the marriage" within the meaning of the Infants' Settlements Act, & whether the Act can be resorted to after a male infant who marries under the age of twenty attains that age.—*Re LEIGH, LEIGH v. LEIGH* (1888), 40 Ch. D. 290; 58 L. J. Ch. 306; 60 L. T. 404; 37 W. R. 241; 5 T. L. R. 138, C. A.

Annotations:—*Re H.'s Settlmt., H. v. H.*, [1909] 2 Ch. 260; *Scott v. Scott*, [1921] P. 107.

SUB-SECT. 2.—MARRIAGES WITH LEAVE OF COURT.

A. In General.

2154. Inquiries dispensed with—Marriage approved of by ward's friends.]—*Re STRONG*, No. 736, *ante*.

2155. — Urgency.]—Where the intended husband was about to return to a post abroad, the ct., on evidence of the desirability of the marriage, sanctioned the marriage & an advance for outfit, but directed a reference to chambers to approve the settlement with a direction that it should be proceeded with forthwith.—*Ex p. SMITH* (1874), 22 W. R. 294.

2156. Whether settlement dispensed with—Agreement between husband & infant wife—Husband cannot receive money under agreement.]—Where there is a fund in ct. belonging to a married female infant ward, the ct. will refuse to grant an order for paying out the same to her husband even with her consent, but will direct the usual reference to the master to approve of a proper settlement, with leave for the husband to make such proposals before the master as he may deem advisable.—*RUSSELL v. NICHOLLS* (1847), 8 L. T. O. S. 550.

2157. Wife's property small.]—The property of a ward of ct. being small, a declaration by the ct. was made instead of a formal settlement.—*WRIGHT v. KING* (1854), 18 Beav. 461; 2 W. R. 405; 52 E. R. 181.

2158. — Marriage immediately after majority.]—A female ward of ct. was entitled to an income of more than £200 a year for her life for her separate use, but she was not restrained from anticipation. An allowance was made for her maintenance, & the surplus was accumulated in ct. She attained twenty-one, & the next day married. She then, by her next friend, petitioned for payment of the accumulations to herself on her separate receipt. The judge directed the fund to be settled:—*Held*: the fund must be paid out to the wife on her separate receipt, but, though the fund was under £200, she was required to attend & be examined separately as to her consent.—*WHITE v. HERRICK* (1869), 4 Ch. App. 345; 38 L. J. Ch. 679; 20 L. T. 386; 17 W. R. 522, L. JJ.

2159. — —.]—A ward of ct., in contemplation of marriage, presented a petition for the settlement of property to which she was entitled, on attaining twenty-one to her separate use. An order for a reference to chambers to approve a settlement was made, but nothing further was done under the petition. The marriage was postponed until immediately after the ward had attained twenty-one, & she then petitioned the ct. for payment to her of the fund:—*Held*: she was entitled to the order.—*SAMS v. CRONIN, Ex p. REED* (1873), 29 L. T. 885; 22 W. R. 204.

Marriage on attaining majority a contempt of court.]—*See Sect. 7, sub-sect. 2, A. (d), ante*.

2160. What is proper settlement—Settlement of wife's own fortune on her.]—A widower, with three children, having a life income of £3,000 & being about to marry a ward of ct. having an income of £700, proposed to settle her own fortune on her, but nothing more. Proposal approved of.—*BLAIR v. CUTHBERTSON* (1849), 13 Jur. 442.

Special provisions in settlement.]—*See Sub-sect. 2, B., post*.

B. Special Clauses.

2161. Provision for future husband & family of ward—Husband without means.]—Upon a settlement of the fortune of a ward of the ct., who had married a man of no property, the ct. took care to secure a provision for a future marriage.—*WELLS v. PRICE* (1800), 5 Ves. 398; 31 E. R. 649.

2162. — —.]—Proposal for a settlement on the marriage of a female ward of the ct. disapproved; as not providing sufficiently for the event of a future husband & children; viz. only by powers over her real estate, which during infancy she could not exercise; & all the property being hers.—*HALSEY v. HALSEY* (1804), 9 Ves. 471; 32 E. R. 685, L. C.

2163. — Power of appointment.]—Upon a reference to the master respecting a proposed marriage with a ward of ct., whose fortune consisted of a sum of £2,000, invested in the mtge. of an estate, the master approved of the terms of a settlement whereby it was proposed to assign the £2,000 to trustees, in trust for the intended wife for life for her separate use without power of anticipation, & after her decease in trust for the husband for his life, or until bkpcy. or insolvency & afterwards in trust for such of the children of the intended marriage as the intended husband & wife should appoint & in default of appointment then equally among all the children. The Master

Sect. 8.—Settlements on marriage: Sub-sect. 2, B. C.; sub-sects. 3 & 4.]

of the Rolls varied the proposed terms of the intended settlement, by giving the intended wife a power to appoint any part, not exceeding one-half part of the principal of the trust money, in favour of the issue of any subsequent marriage of the intended wife.—*RUDGE v. WINNALL* (1848), 11 Beav. 98; 17 L. J. Ch. 215; 11 L. T. O. S. 346; 50 E. R. 753.

2164. —.]—A lady entitled to a fund in ct. married the day after she came of age. After the marriage a settlement of her property was made on her & her husband for their lives, & on the children of the marriage absolutely; but the wife never consented in ct. to a transfer of the fund to the trustees. After the husband's death & the birth of a child the settlement was, at the suit of the wife, declared void, because it contained no provision for a second marriage, & because the rights acquired by the husband were, on account of the precipitation of the marriage, a surprise on the wife.

It is not the habit of the ct. upon the marriage of a female ward, to settle the whole of the property in remainder, after an estate for life, to her, upon the child or children of that marriage; because it may happen that she may be left a very young widow & ought, therefore, to have the means of making some provision, in that case, for a second family (*LEACH, V.C.*).—*LONG v. LONG* (1824), 2 Sim. & St. 119; 57 E. R. 290.

Annotations:—Consd. Money v. Money (1855), 3 Drew. 256. *Follid. Re Hoare's Trusts* (1862), 4 Giff. 254.

Compare No. 2173, post.

2165. Restraint against anticipation.]—On the settlement of a ward, no clause against anticipation was attached to her separate life estate. She incumbered her interest:—*Held*: the settlement could not be rectified to the prejudice of her incumbrancers.—*BLACKIE v. CLARK, COCK v. CLARK* (1852), 15 Beav. 595; *sub nom. BLAIE v. CLARK, COCK v. CLARK*, 22 L. J. Ch. 377; 51 E. R. 669.

Annotation:—Consd. Field v. Moore, Field v. Brown (1855), 7 De G. M. & G. 691.

2166. After acquired property clause.]—An infant for whom an order for maintenance had been made married without any settlement having been executed, but a draft had been prepared which contained a covenant to settle her future property. On payment out of ct. of the trust fund to the trustees of a post-nuptial settlement the ct. directed that a covenant similar to that in the draft should be endorsed on the post-nuptial settlement.—*Re HOARE'S TRUSTS* (1862), 4 Giff. 254; 1 New Rep. 161; 7 L. T. 523; 9 Jur. N. S. 167; 11 W. R. 181; 66 E. R. 700.

Annotations:—Reid. Re Wall (1883), 50 L. T. 435. *Mentd. Re Bird's Trusts* (1876), 3 Ch. D. 214.

C. Application for Approval.

2167. How application made—Petition.]—*Semble*: on the proposed marriage of an infant ward of ct. entitled to a reversionary interest, which it is proposed to settle on her, the proper mode for her & her guardians to obtain the sanction of the ct. to a proposed settlement, is by presenting a petition for a reference to chambers to approve of the settlement, & then to present a second petition entitled in the matter of 18 & 19 Vict. c. 43, & in the suit, to sanction her execution of the settlement when so approved of.—*Re YATES* (1859), 7 W. R. 711.

See, now, R. S. C., Ord. 55, rr. 2 (10), 26.

2168. Costs of settlement—Payable out of corpus.]—*DE STACPOOLE v. DE STACPOOLE, DE STACPOOLE v. STAPLETON, Re DE STACPOOLE, DE STACPOOLE v. SEYMOUR*, No. 755, *ante*.

SUB-SECT. 3.—MARRIAGES IN CONTEMPT OF COURT.

2169. Necessity for settlement.]—Whenever a man marries a ward of the ct. without the consent of the ct., the ct. will let the husband have no benefit of the portion, till he makes a suitable settlement.—*PHIPPS v. SHELDON* (1738), 1 Eq. Cas. Abr. 64; 21 E. R. 877.

2170. —.]—Punishment for contempt by marrying a ward of ct. by commitment, or in a flagrant case by directing a criminal prosecution for conspiracy, etc., the subject of sound discretion; & though the right to interpose, without complaint, is not affected by time, the exercise of it was dispensed with upon circumstances; no complaint made for eight years; the husband, though his conduct would have justified punishment on a recent application, not being a needy adventurer, but of equal family & fortune; having actually made a considerable settlement; under which the children had vested interests; & alleging misconduct by the wife. The interests of the children not to be affected: but the settlement varied as between the husband & wife by increasing the pin-money, giving her some interest in future property, etc.

When a lady, having property in this ct., marries after she is of age, the ct. does what it can to obtain a proper provision for her: having, as there is no contempt committed, no means of enforcing a settlement, if the husband does not seek to lay his hands upon the property; but if the marriage is a contempt, the ct. vindicating its jurisdiction, is enabled by imprisonment to compel the husband to make a proper settlement. In this case the ct. was not informed for eight years of the contempt, that was committed; considering the case with the view to determine how far it ought to interpose on that ground the ct. always has regard to the subsequent conduct (*LORD ELDON, C.*).—*BALL v. COURTTS* (1812), 1 Ves. & B. 292; 35 E. R. 114, L. C.

Annotation:—Mentd. Coster v. Coster (1839), 9 Sim. 597.

—.]—*See Sect. 7, sub-sect. 2, A. (e), ante.*

2171. Funds in court—Not paid out without a settlement.]—The marriage of a female infant who is a ward of ct. by being party to a suit concerning property in which she is interested, is a contempt on the part of the husband if contracted without leave, & such contempt gives the ct. jurisdiction over both parties, & it may refuse to part with any portion of the property of the wife during the joint lives even upon the application of both, & whether the wife at the time of consent is of age or not. In cases of this description the ct. exercises its jurisdiction with a view to what is most for the benefit of the ward & her children.

Qu.: whether in such a case it would be in the power of the ct. or correct to enforce a settlement against the wishes both of the wife & husband.—*MARTIN v. FOSTER* (1855), 7 De G. M. & G. 98; 3 Eq. Rep. 555; 24 L. J. Ch. 519; 25 L. T. O. S. 5; 1 Jur. N. S. 337; 3 W. R. 339; 44 E. R. 39, L. JJ. *Annotations:—Consd. Re Sampson & Wall* (1884), 25 Ch. D. 482. *Reid. Gynn v. Gilbard* (1860), 1 Drew. & Sm. 356.

2172. —.]—*GYNN v. GILBARD*, No. 2044, *ante*.

2173. Form of settlement—Provision for future husband & family of ward.]—Upon a proposal for

a settlement under a commitment for marrying a ward of the ct. a power was directed to be inserted, enabling the wife to settle the interest of a moiety of her fortune upon any future husband for life. The husband on undertaking by his counsel to execute the settlement was discharged.—*WINCH v. JAMES* (1798), 4 Ves. 386; 31 E. R. 196.

2174. ———.]—Where a husband has married a ward without the consent of the ct., the ward's interest, & that alone, is to be consulted in framing the settlement; unless the subordinate purpose of protection against the husband can be accomplished without prejudice to the ward.

A settlement approved by the master, where no power of appointment in default of issue was given to the wife, but the property was given over to her next of kin, was reformed by giving to the wife such a power by will only, with provisions, that the property, upon failure of children, & in default of such appointment, should go to her next of kin; & in the event of her surviving her husband & having no children, that it should be at her own disposal; & in the event of her marrying a second time & having children of the first marriage, that she should have a power of appointing to each child of the second marriage a sum not exceeding that given to each child of the first.—*BIRKETT v. HIBBERT* (1834), 3 My. & K. 227; *Coop. temp. Brough.* 459; 3 L. J. Ch. 158; 40 E. R. 86, L. C.

See, also, Sub-sect. 2, B., ante.

2175. ——— **Husband deprived of interest.]**—Upon a marriage with a ward of the ct. under gross circumstances a proposal for a settlement of the wife's fortune, giving the husband in the event of his surviving her, a life interest, was rejected; & the ct. refused even to pay out of the accumulation his debts, chiefly contracted in the maintenance of his wife & children.—*CHASSAING v. PARSONAGE* (1799), 5 Ves. 15; 31 E. R. 448.

Annotations:—Mentd. Hood Barrs v. Heriot, [1896] A. C. 174; Re Rush, Warre v. Rush, [1922] 1 Ch. 302.

2176. ———.]—A. married a female ward of ct. without consent of the ct., & had been guilty of great contumacy in other respects. The ct. directed the ward's fortune to be settled so as to exclude A. from taking any interest in it.—*KENT v. BURGESS, WINKWORTH v. BURGESS* (1840), 11 Sim. 361; 10 L. J. Ch. 100; 5 Jur. 166; 59 E. R. 913.

Annotation:—Mentd. Roskell v. Whitworth (1870), 5 Ch. App. 459.

2177. ———.]—The almost invariable modern practice, in the case of a marriage with a ward of ct. without consent, is to exclude the husband altogether from taking any interest in her property.—*WADE v. HOPKINSON* (1855), 19 Beav. 613; 52 E. R. 488.

2178. ———.]—*POWELL v. OAKLEY* (1865), 34 Beav. 575; 6 New Rep. 375; 55 E. R. 757.

Annotations:—Consd. Re Sampson & Wall (1884), 25 Ch. D. 482. *Reid. Re Potter* (1869), L. R. 7 Eq. 484.

2179. ——— **Ignorance of wife being ward of court—Life interest to husband on wife's death.]**—Where a ward of ct., whose fortune was £3,700, had married without leave having been previously obtained, but the husband was at the time of the marriage ignorant of the existence of the suit, & that the infant was a ward of ct., the ct. approved of a settlement of the infant's property, under which the husband took a life interest after the wife's death in a moiety of her property, determinable on his marrying again, bkpcy. or insolvency, & directed £500 of the above sum to be advanced to the husband on his bond.—*RICHARD-*

SON v. MERRIFIELD (1850), 4 De G. & Sm. 161; 64 E. R. 779.

Annotation:—Reid. Re J. (1913), 108 L. T. 554.

2180. ——— **But power to wife to appoint by will to husband for life.]**—The ct., on a petition presented in an administration suit by a ward of ct. & her husband, who had married without its consent while the wife was a minor & in ignorance that she was a ward of ct., settled her property on her for life, with remainder to her children: & with a power for the wife to appoint the property by will to her husband for his life.—*WILKINSON v. JOUGHIN* (1872), 41 L. J. Ch. 234.

2181. ——— **Power to wife to appoint by will to husband.]**—*Re SAMPSON & WALL*, No. 739, *ante*.

2182. ——— **Of after acquired property—Settled on wife for separate use.]**—Where a ward of ct. married without consent, & subsequently became entitled to property in the hands of the ct., the ct. will order it to be carried to a separate account, & with a view to save expense, may direct it to be inserted in the order that the fund shall be settled on the wife for her separate use.—*THORP v. OWEN* (1854), as reported in 2 W. R. 208.

Annotations:—Mentd. Polley v. Polley (No. 2) (1862), 31 Beav. 363; *Garland v. Beverley* (1878), 9 Ch. D. 213.

2183. Marriage & settlement with parents' consent—Without sanction of court—Transfer of property to trustees on wife attaining twenty-one.]—*LEEDS v. BARNARDISTON*, No. 696, *ante*.

2184. Costs of settlement—Husband's costs allowed out of fund—Contempt not aggravated.]—The husband's costs of the proceedings in making a settlement for the fortune of a ward, whom he had married without the leave of the ct., were allowed to him out of the fund, he having no property of his own, & there being no circumstances of aggravation in his conduct.—*ANON.* (1828), 4 Russ. 473; 38 E. R. 883.

Annotations:—Apld. De Staapool v. De Staapool, De Staapool v. Stapleton, Re De Staapool, De Staapool v. Seymour (1887), 37 Ch. D. 139. *Mentd. Hearn v. Wells* (1844), 1 Coll. 323.

SUB-SECT. 4.—RECTIFICATION OF SETTLEMENT.

Rectification of settlements generally, *see* SETTLEMENTS.

2185. On ground of mistake by wife—Surprise.]—*LONG v. LONG*, No. 2164, *ante*.

2186. ———.]—A settlement of personal property belonging to a ward of ct. was made on her marriage & approved by the ct. It provided that, in case of failure of children, which event happened, after a life interest to the husband & wife, the property should go to the wife's next of kin. The wife survived her husband. On an affidavit by the wife that she had misunderstood the settlement, the ct. declared that, in the events which happened, she was entitled absolutely to the fund.—*SMITH v. ILIFFE* (1875), L. R. 20 Eq. 666; 44 L. J. Ch. 755; 33 L. T. 200; 23 W. R. 851.

Annotations:—Consd. Cogan v. Duffield (1876), 34 L. T. 593. *Expld. Hanley v. Pearson* (1879), 41 L. T. 673. *Dbtd. Tucker v. Bennett* (1887), 38 Ch. D. 1. *Mentd. Welman v. Welman* (1880), 15 Ch. D. 570.

2187. Settlement made immediately after majority—Power of court to rectify.]—Proposals of marriage with an infant ward of ct. were made six months before her marriage, not being such as the ct. would approve. The parties waited till her majority, & a few days after it a settlement was executed, pursuant to new proposals made a very short time before her majority. The terms of the settlement appeared to have been pursuant to the instructions, & in fact, the work of the

Sect. 8.—Settlements on marriage: Sub-sect. 4. Part XVI. Sects. 1, 2, 3, 4, 5 & 6. Part XVII. Sects. 1 & 2: Sub-sect. 1.]

ward's mother, & were such as the ct. would not have approved:—*Held*: the jurisdiction of the ct. over the ward had not ceased, & the settlement was rectified, so as to be what the ct., looking at

the position of the parties, would have made.—*MONEY v. MONEY* (1855), 3 Drew. 256; 3 Eq. Rep. 996; 24 L. J. Ch. 684; 25 L. T. O. S. 294; 3 W. R. 425; 61 E. R. 901.

2188. Post-nuptial settlement—Varied to comprise after-acquired property.] — *Re HOARE'S TRUSTS*, No. 2166, *ante*.

Part XVI.—Employment of Infants.

SECT. 1.—IN GENERAL.

See, now, Education Act, 1921 (c. 51), ss. 90–108.

2189. Street trading—Restricted by bye-law—Validity of bye-law.]—The N. corpn. made a bye-law that parents should be liable to a penalty if they suffered a child to be selling articles in the street after a certain hour:—*Held*: the bye-law was made in excess of the powers given by Municipal Corporations Act, 1882 (c. 50), s. 23, being too general & absolute, & justices rightly refused to convict thereunder.—*MACDONALD v. LOCHRANE* (1887), 51 J. P. 629; 3 T. L. R. 464, D. C.

See, further, PUBLIC HEALTH.

2190. — What amounts to—Boy calling at customers' houses—On behalf of employer.]—A person may be engaged in street trading within Employment of Children Act, 1903 (c. 45), s. 2, although he is not trading on his own account but is in the employment of another person.

A bye-law made under the sect. by resps., the Corpn. of East Ham, provided that no boy under sixteen should "be employed in or carry on street trading" unless he wore a badge. Appls., a co-operative & industrial society, carried on (*inter alia*) the business of bakers, & had a number of establishments where they sold goods. By their servants they called at certain periods on members of the society at their houses & supplied them with their goods from vans, each of which was in charge of a vanman & a boy. One of the boys was between fourteen & sixteen years of age & was in the employment of appls. at a weekly wage. He called at the house of a member of the society who was called upon daily. He had a basket of bread taken from the van. He knocked at the door, which was opened by the member, who asked for two loaves, for which she paid him 6d. He handed the money to the vanman. When he went to the house he did not know how many loaves the member would buy, or if she would buy any. The vanman & boy were also permitted to sell in a similar manner to persons who were not members of the society at their own houses any bread which was left over after all the requirements of members of the society had been met. The boy would have sold bread to persons other than members of the society had he been asked to do so by them, but, in fact, he had never done so. He did not wear a badge. Appls. having been convicted by a magistrate for unlawfully employing the boy in street trading without his wearing a badge contrary to the bye-law:—*Held*: the conviction was wrong, for Employment of Children Act, 1903 (c. 45), s. 2, read together with the definition of street trading contained in sect. 13, indicated that the statute prohibited trading & seeking customers in the street where the street was used as a market place, & did not prohibit legitimate business between a shop & customers in their houses.—*STRATFORD CO-OPERATIVE SOCIETY, LTD. v. EAST HAM CORPN.*, [1915] 2 K. B. 70; 84

L. J. K. B. 645; 112 L. T. 516; 79 J. P. 227; 31 T. L. R. 129; 13 L. G. R. 285; 24 Cox, C. C. 607, D. C.

2191. — Child employed as agent—News-vendor—Relationship of master & servant not essential.]—The offence of employing a child in street trading within Employment of Children Act, 1903 (c. 45), s. 3 (2), may be committed where the relation between deft. & the child is that of principal & agent; the enactment is not confined to the case of employment as a servant. A child received from resp., a wholesale & retail news-vendor, newspapers which he proceeded to sell in the streets, paying resp. for them at the rate of 9d. per dozen copies sold, the child making a profit of 3d. per dozen. He returned unsold copies to resp., who stated that if he saw the child destroying unsold copies he should prevent him if he could. The magistrate found that the relation of master & servant did not exist between them, & dismissed the information:—*Held*: on the facts the relation was that of principal & agent, & the resp. had employed the child within the Act, & must be convicted.—*MORGAN v. PARR*, [1921] 2 K. B. 379; 90 L. J. K. B. 1199; 125 L. T. 307; 85 J. P. 165; 37 T. L. R. 587; 19 L. G. R. 277; 26 Cox, C. C. 739, D. C.

Annotation:—*Folld. Sweet v. Williams* (1922), 128 L. T. 379.

2192. — — — — —.]—Applt., a newsagent, authorised two boys to obtain newspapers at his expense, his arrangement with the boys being that he should receive part of the money obtained by the boys by selling the papers in the streets, any unsold papers to be handed over to applt. Applt. also gave football programmes to two other boys on the terms that he was to receive from them a sum proportionate to the number sold, & that unsold programmes should be returned to him. Applt. exercised no control over the boys & they received no payment except their profits on the sales. On informations against applt. for "employing" the boys in street trading contrary to a bye-law made under Employment of Children Act, 1903 (c. 45), as amended by Education Act, 1918 (c. 39), s. 13, the justices found that each of the boys was an agent of applt., & was in that sense employed by him, & they convicted him:—*Held*: the boys, being occupied in street trading, were "employed" in street trading within the Act & the bye-law, & as there was evidence that each of them was employed by applt. as his agent, the convictions must be affirmed.—*SWEET v. WILLIAMS* (1922), 128 L. T. 379; 87 J. P. 51; 67 Sol. Jo. 183; 21 L. G. R. 23; 27 Cox, C. C. 373, D. C.

2193. Child employed by agent of employer—Liability of employer.]—By a bye-law made under Employment of Children Act, 1903 (c. 45), s. 3 (1), no child shall be employed between certain hours; & by sect. 6 (3) of the Act, "where an employer is charged" with an offence under the Act he shall be entitled upon information laid by

him to have the person whom he charges as the actual offender brought before the ct., & if "after the commission of the offence has been proved" the ct. is satisfied that the employer had used due diligence to comply with the provisions of the Act, & that the other person had committed the offence in question without the employer's knowledge, consent, or connivance, the other person shall be summarily convicted of the offence, & the employer shall be exempt from any fine. A vanman in the employment of the respondent, a baker, employed for his own convenience & benefit a child to deliver bread to resp.'s customers during hours forbidden by the bye-law. The child was actually engaged & his wages paid by the vanman, & his engagement was a voluntary & gratuitous act on the part of the vanman & formed no part of any arrangement between him & resp. Resp. had no knowledge that the child was so employed except during permitted hours. Resp. was charged with having unlawfully employed the child during prohibited hours contrary to the bye-law:—*Held*: (1) the mere fact that resp. was charged with the offence did not, in the absence of any evidence of a contract of employment of the child during prohibited hours by or on behalf of resp., make it incumbent upon him, under sect. 6 (3) of the Act, in order to claim exemption from a fine, to charge the vanman as the actual offender; (2) as there was no evidence of any unlawful employment of the child by resp., either directly or by an agent purporting to employ the child on his behalf, no offence by resp. had been proved.—*ROBINSON v. HILL*, [1910] 1 K. B. 94; 79 L. J. K. B. 189; 101 L. T. 573; 73 J. P. 514; 26 T. L. R. 17; 7 L. G. R. 1065, D. C.

2194. Contract with child under fourteen—Work carried on between prohibited hours—Contract void.]—The father of appct., who was a lad between thirteen & fourteen years of age, asked resp., a barge owner, to take on the lad as an odd boy & teach him the barge trade. Resp. agreed, & undertook to give the boy so much a week as his services were worth to him & his food when out with a barge. There was evidence that on more than one occasion the boy had to start with a barge before 6 a.m. On the day of the accident he had gone to work at 3 a.m. The county ct. judge found that there was a contract of service, but that it contravened Employment of Children Act, 1903 (c. 45), which makes it illegal to employ a child under the age of fourteen under any contract of service, between 9 p.m. & 6 a.m. The

learned judge held that the contract of service, being thus rendered an illegal contract, was void. No claim under Workmen's Comp. Act, 1906 (c. 58), could be founded upon it. Accordingly he gave his award for resp. On appeal:—*Held*: the award was right.—*POUNTENEY v. TURTON* (1917), 34 T. L. R. 103; 62 Sol. Jo. 159; 10 B. W. C. C. 601, C. A.

Annotation:—*Consd. M'Lelland v. Hutchison* (1918), 12 B. W. C. C. 428.

Interference with education.]—See EDUCATION, Vol. XIX., pp. 571, 572, Nos. 108–115.

SECT. 2.—CHIMNEY SWEEPING.

See Chimney Sweepers & Chimneys Regulation Act, 1840 (c. 85), ss. 2, 3; Chimney Sweepers Regulation Act, 1864 (c. 37), ss. 6–10.

SECT. 3.—IN FACTORIES, SHOPS AND WORKSHOPS.

See, generally, FACTORIES, Vol. XXIV., pp. 912, 926, 927, Nos. 83, 84, 181–190.

Education of infant employees.]—See EDUCATION, Vol. XIX., pp. 571, 572, Nos. 108–116.

Doctrine of common employment—Application to infants.]—See MASTER & SERVANT.

SECT. 4.—IN MINES.

See, generally, MINES.

Coal mines.]—See, now, Coal Mines Act, 1911 (c. 50).

Other mines.]—See Metalliferous Mines Regulations Act, 1872 (c. 77); Mines (Prohibition of Child Labour Underground) Act, 1900 (c. 21).

SECT. 5.—IN PUBLIC ENTERTAINMENTS.

See, now, Education Act, 1921 (c. 51), ss. 100–104; Children (Employment Abroad) Act, 1913 (c. 7), s. 2; generally, THEATRES.

SECT. 6.—EMPLOYERS' LIABILITY.

See MASTER & SERVANT.

Part XVII.—Protection of Infants.

SECT. 1.—PROTECTION OF INFANT LIFE.

See Children's Act, 1908 (c. 67), ss. 1–11, 127, 131.

SECT. 2.—OFFENCES AGAINST WHICH PROTECTION GIVEN.

SUB-SECT. 1.—CRUELTY AND EXPOSURE TO DANGER.

See Children's Act, 1908 (c. 67), ss. 12 (1)–(3), 13–18, 131; Children's Act (1908) Amendment Act, 1910 (c. 25); Infanticide Act, 1922 (c. 18).

Acts amounting to homicide—Correction of children.]—See CRIMINAL LAW, Vol. XV., pp. 791, 792, Nos. 8542–8558.

—*Neglect.*]—See CRIMINAL LAW, Vol. XV., pp. 792–795, Nos. 8559–8588, 8597.

2195. Cruelty to children—Failure to provide medical attention.]—*R. v. DE CRESPIGNY*, *Ex p. CARTER* (1912), *Times*, May 21.

2196. — Wilful assault.]—An assault within Children's Act, 1908 (c. 67), s. 12 (1), must be one which is likely to cause unnecessary suffering or injury to the health of the child.

Applt., who was the stepfather, & had the custody or care, of a girl of eleven years of age, was charged under the above sect. with wilfully assaulting the girl in a manner likely to cause her unnecessary suffering. The evidence of the girl was that applt. committed acts of indecency, not to her, but in her presence, & that when she screamed he put his hand over her mouth:—*Held*: this was not an assault within the sect.—*R. v. HATTON*, [1925] 2 K. B. 322; 94 L. J. K. B.

Sect. 2.—Offences against which protection given: Sub-sects. 1, 2 & 3. Sects. 3, 4 & 5: Sub-sects. 1 & 2. Parts XVIII.

863 ; 133 L. T. 735 ; 89 J. P. 164 ; 41 T. L. R. 637 ; 19 Cr. App. Rep. 29, C. C. A.

— **Neglect to make provision.**—*See CRIMINAL LAW, Vol. XV., pp. 854–856, Nos. 9372–9401.*

— **Abandonment & exposure.**—*See CRIMINAL LAW, Vol. XV., pp. 825, 856, Nos. 9016, 9017, 9402–9405.*

2197. Causing or procuring to beg—Evidence of age.—On a charge under Vagrancy Act, 1824 (c. 83), s. 3, for procuring a child to beg, the child appeared & gave evidence that his age was sixteen. There was no other direct evidence of the age:—*Held*: the magistrate, on seeing the child, & being satisfied the child's age was not so much as sixteen, might form his own conclusion on that point, & convict accordingly.—*R. v. VIASANI* (1866), 15 L. T. 240 ; 31 J. P. 260.

SUB-SECT. 2.—EXPOSURE TO PROSTITUTION AND SEDUCTION.

See Children's Act, 1908 (c. 67), ss. 16–18; Children's Act (1908) Amendment Act, 1910 (c. 25).

Procuration.—*See CRIMINAL LAW, Vol. XV., pp. 849, 850, Nos. 9327–9329, 9337.*

— **Conspiracy to procure.**—*See CRIMINAL LAW, Vol. XIV., p. 117, Nos. 867, 868.*

Defilement of girls.—*See CRIMINAL LAW, Vol. XV., pp. 846–848, Nos. 9308–9323.*

— **Owner or occupier of premises permitting defilement.**—*See CRIMINAL LAW, Vol. XV., p. 849, Nos. 9325, 9326.*

Seduction.—*See CRIMINAL LAW, Vol. XV., p. 851, Nos. 9344–9346.*

SUB-SECT. 3.—OTHER OFFENCES.

Incitement to betting & borrowing.—*See CRIMINAL LAW, Vol. XV., p. 760, Nos. 8179, 8180 ; GAMING & WAGERING, Vol. XXV., p. 449, No. 414 ; MONEY & MONEY-LENDING.*

Pawnbroker—Taking article in pawn from infant.—*See Children's Act, 1908 (c. 67), s. 117 ; PAWNS & PLEDGES.*

Sale of intoxicating liquors.—*See CRIMINAL LAW, Vol. XIV., p. 38, Nos. 81, 82 ; INTOXICATING LIQUORS.*

Purchase of old metal from infant.—*See Children's Act, 1908 (c. 67), s. 116.*

Education of children—Attendance at school.—*See Children's Act, 1908 (c. 67), s. 118 ; EDUCATION, Vol. XIX., pp. 564–569, Nos. 61–96.*

PART XVII. SECT. 5, SUB-SECT. 1.

1. Neglected child—Liability of parent.—Under Children's Protection Act of Ontario, s. 18 (d), which enacts that any person who is guilty of an act or omission which contributes to a child becoming a neglected child, shall incur a penalty & be liable to imprisonment, there is no right to punish unless it is shown that there was an actual injury to the child.—*R. v.*

DAVIS (1917), 40 O. L. R. 352.—*CAN.*

m. — — —.—An offence under Children Act, s. 12, may be tried either summarily or on indictment, but Irish Summary Jurisdiction Act gives no right to elect in which of the two ways the charge is to be tried.—*R. (CLARKE) v. COUNTY LOUTH JJ.* (1911), 46 I. L. T. 188.—*IR.*

n. — — —.—*B.* was convicted

— **Child in verminous condition.**—*See EDUCATION, Vol. XIX., p. 570, Nos. 103, 104.*

Juvenile smoking.—*See Children's Act, 1908 (c. 67), ss. 39–43.*

SECT. 3.—PROVISIONS FOR SAFETY.

See Children's Act, 1908, c. 67, ss. 20–25, 38, 75 (3), 125, 126, 131, sched. I. ; Mental Deficiency Act, 1913 (c. 28), s. 8 ; Children's (Employment Abroad) Act, 1913 (c. 7), s. 1 (2) ; Ministry of Health Act, 1919 (c. 21), s. 3 (1) (f).

SECT. 4.—PROVISIONS FOR EDUCATION.

See EDUCATION, Vol. XIX., pp. 576–578, Nos. 127–138.

SECT. 5.—PROSECUTION OF OFFENDERS.

SUB-SECT. 1.—IN GENERAL.

See Children's Act, 1908 (c. 67), ss. 12, 19, 24, 26 ; Infanticide Act, 1922 (c. 18) ; Licensing Act, 1902 (c. 28), s. 2.

SUB-SECT. 2.—PROCEDURE.

See Children's Act, 1908 (c. 67), ss. 27, 30–36, 114, Sched. I. ; Criminal Justice Administration Act, 1914 (c. 58), ss. 28, 44, Sched. IV. ; Children's (Employment Abroad) Act, 1913 (c. 7), s. 3.

Limitation of time for prosecution.—*See CRIMINAL LAW, Vol. XIV., p. 152, Nos. 1268, 1269.*

Evidence—Of children.—*See CRIMINAL LAW, Vol. XIV., pp. 258, 453–456, Nos. 2588–2593, 4800–4826 ; EVIDENCE, Vol. XXII., p. 388, Nos. 3974–3980.*

— **Evidence of complaint.**—*See CRIMINAL LAW, Vol. XIV., p. 399, Nos. 4195–4199.*

— **Dying declaration.**—*See CRIMINAL LAW, Vol. XV., p. 806, Nos. 8735, 8736.*

— **Acts of accused.**—*See CRIMINAL LAW, Vol. XIV., pp. 370, 380, 381, Nos. 3914, 4009, 4010, 4020.*

— **Defilement of girls.**—*See CRIMINAL LAW, Vol. XV., pp. 846–848.*

Trial of cruelty to children.—*See CRIMINAL LAW, Vol. XV., p. 857, Nos. 9406–9410.*

Offences triable summarily.—*See MAGISTRATES.*

of a charge that she did on Apr. 26, 1912, & on divers other dates within six months last past & on divers former dates, unlawfully & wilfully neglect her children in a manner likely to cause them unnecessary suffering:—*Held*: the offence charged was a continuous offence & the conviction, therefore, was not bad for uncertainty.—*R. (BROWN) v. COUNTY LONDONDERRY JJ.* (1912), 46 I. L. T. 170.—*IR.*

Part XVIII.—Offences by Infants.

See Children's Act, 1908 (c. 67), ss. 94-99, 101, 108-110, 111; Summary Jurisdiction Act, 1879 (c. 49), s. 29; Statutory Rules & Orders, 1909, No. 591; 1916, No. 297; 1919, No. 985; 1923, No. 769; Juvenile Courts (Metropolis) Act, 1920 (c. 68); MAGISTRATES; POLICE.

Criminal capacity.—*See* CRIMINAL LAW, Vol. XIV., pp. 53-55, Nos. 189-217, p. 93, Nos. 632-634.

Juvenile courts.—*See* MAGISTRATES.

Punishment.—*See* CRIMINAL LAW, Vol. XIV., p. 479, No. 5229; p. 491, Nos. 5406-5411.

Borstal institutions.—*See* CRIMINAL LAW, Vol. XIV., pp. 480, 481, Nos. 5238-5252.

Reformatory & industrial schools.—*See* EDUCATION, Vol. XIX., pp. 576-578, Nos. 127, 128.

Part XIX.—Illegitimate Children.

See, generally, BASTARDY, Vol. III., pp. 358 *et seq.*

Presumption of legitimacy.—*See* BASTARDY, Vol. III., pp. 358-368, Nos. 1-97.

Legitimacy declaration by infant.—*See* BASTARDY, Vol. III., p. 369, Nos. 106, 107.

Custody.—*See* BASTARDY, Vol. III., pp. 381, 383, Nos. 198-214.

— **Recovery by habeas corpus.**—*See* CROWN PRACTICE, Vol. XVI., pp. 270, 271, Nos. 793, 794, 802.

Guardianship.—*See* BASTARDY, Vol. III., p. 383, Nos. 215-224.

Education.—*See* BASTARDY, Vol. III., pp. 383, 384, Nos. 225-228.

Maintenance.—*See* BASTARDY, Vol. III., pp. 384-387, Nos. 229-252.

— **Bastard paupers.**—*See* POOR LAW.

Affiliation proceedings.—*See* BASTARDY, Vol. III., pp. 387-407, Nos. 253-407.

INFECTIOUS DISEASES.

See ANIMALS ; INNS AND INNKEEPERS ; PUBLIC HEALTH AND LOCAL ADMINISTRATION.

INFERIOR COURTS.

See COUNTY COURTS ; COURTS ; JUDGMENTS AND ORDERS.

INFORMATION.

See CRIMINAL LAW AND PROCEDURE ; CROWN PRACTICE ; MAGISTRATES.

INFORMATION AND BELIEF.

See EVIDENCE.

INFORMER.

See CRIMINAL LAW AND PROCEDURE ; MAGISTRATES.

INFRINGEMENT.

See COPYRIGHT AND LITERARY PROPERTY ; INJUNCTION ; PATENTS AND INVENTIONS.

INGRESS, EGRESS AND REGRESS.

See EASEMENTS AND PROFITS À PRENDRE ; TRESPASS.

INHABITED HOUSE DUTY.

The above duty was repealed by Finance Act, 1924 (c. 21), s. 20, & Sched. III., & therefore the title with the cases thereon do not now come within the scope of this work.

INHERITANCE.

See COPYHOLDS; DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS; REAL
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<i>Administrators</i>	<i>See</i> EXECUTORS.	<i>Nuisance</i>	<i>See</i> NUISANCE.
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<i>Boundaries</i>	„ BOUNDARIES.	<i>Party Walls</i>	„ BOUNDARIES.
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<i>Cremation</i>	„ BURIAL.	<i>Right of Way</i>	„ EASEMENTS.
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<i>Designs</i>	„ TRADE MARKS.	<i>Trade Marks</i>	„ TRADE MARKS.
<i>Engineers</i>	„ BUILDING CONTRACTS.	<i>Waste</i>	„ LANDLORD AND TENANT; REAL PROPERTY.
<i>Fences</i>	„ BOUNDARIES.		
<i>Inventions</i>	„ PATENTS.		
<i>Libellous Statements</i>	„ LIBEL AND SLANDER.		
<i>Mortgagors and Mortgagees</i>	„ MORTGAGE.		

Part I.—Nature of Injunction.

SECT. 1.—IN GENERAL.

1. Ancillary to claim for damages.]—An injunction is ancillary to the claim for damages & cannot be granted as a substantive form of relief by itself (LORD STERNDALÉ, M.R.).—*DAVEY v. ROBINSON*, [1923] as reported in 1 K. B. 563, C. A.

2. Court will not compel performance of illegal act.]—The ct. will not grant a writ of injunction under C. L. P. Act, 1854 (c. 125), when by so doing deft. would be called upon to do an illegal act.—*LONDON & SOUTH WESTERN RY. CO. v. WEBB* (1863), 15 C. B. N. S. 450; 12 W. R. 51; 143 E. R. 860; *sub nom.* *LONDON & NORTH WESTERN RY. CO. v. WEBB*, 9 L. T. 291.

Annotation:—*Reid. Mid. Ry. v. G. W. Ry.* (1873), 42 L. J. Ch. 438.

3. —.]—*CHAPMAN v. CRAYS GAS CO., LTD.* (1864), 28 J. P. Jo. 724.

4. Court will not order an impossibility.]—(1) Where pltf. has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the ct. to inquire in what way deft. can best remove it. In such a case a reference before the decree to an expert under Court of Chancery Act, 1852 (c. 80), s. 42, as to the existence of the injury, or as to the best mode of removing it is improper.

The C. lunatic asylum was built in 1851, under 8 & 9 Vict. c. 126, & was under the government of the committee of visitors of the county of M. appointed under Lunatic Asylums Act, 1853 (c. 97). In 1865 an information was filed at the relation of a local board of health to restrain the committee of visitors from permitting the sewage from the asylum to be a nuisance injurious to public health. The existence of the nuisance, which had been a continuing nuisance

from the time of the erection of the asylum, having been proved, one of the judges, at the hearing of the cause, referred it to an expert under Court of Chancery Act, 1852 (c. 80), s. 42, to inquire as to the existence of the nuisance & the best means of removing it:—*Held*: such reference was improper & an injunction ought to be granted.

(2) But when the difficulty of removing the injury is great, the ct. will suspend the operation of the injunction for a time, with liberty to deft. to apply for an extension of time.

(3) No doubt there are cases where the ct. will take care not to pronounce an idle & ineffectual order; for instance, the ct. will not issue a mandatory injunction where it is impossible that the mandatory injunction can by any means be complied with. The simplest illustration of this is the case of cutting down timber. It would be idle when the trees have been cut down to make an order not to allow the trees to remain prostrate, & all that can be done in such a case is to leave the parties to their remedy for damages. Take another illustration. There might be a bank to prevent the influx of the sea, & that bank might be most improperly destroyed; the ct. would restrain the performance of the act if it were in time to do so, but the act having been once done, & the sea admitted, the ct. could only then leave the parties to their remedy, for damages, considering it impossible to exclude the sea (LORD HATHERLEY, C.).

(4) *Semble*: the delay of fourteen years from the commencement of the nuisance to the filing of the information would be no bar to the relief, but at all events where the time had been occupied in negotiations & attempts to remove the nuisance the delay was immaterial.—*A.-G. v. COLNEY*

PART I. SECT. 1.

a. *General rule.*]—The ct. interferes by injunction only to prevent or restrain injuries to civil property & in defence of, or to enforce, rights which are capable of being enforced at law or in equity. The ct. has no jurisdiction to restrain persons from acting without authority.—*CALLOWAY v. PEARSON* (1890), 6 Man. L. R. 364.—CAN.

b. *Where legal remedy inadequate.*]—The ct. will only grant a writ of injunction in cases of extreme

necessity, where redress cannot be obtained in the usual legal mode.—*HALIFAX CITY v. NOVA SCOTIA ELECTRIC TELEGRAPH CO.* (1859), 4 N. S. R. (Coch.) 83.—CAN.

c. —.]—Granted where remedy at common law inadequate & impossible for jury to estimate damages.—*MASON v. SHEDD* (circa 1879), R. E. D. 478.—CAN.

d. —.]—The right of the ct. to grant an interdict is not restricted to cases of vindication of pecuniary interests only, but extends to cases

of the protection of other rights, the interference with which will work an injury to the party applying for which no other relief would constitute adequate reparation.—*BURGERS v. JOUBERT* (1866), 1 R. 351.—S. AF.

e. *Prevention of continuing injury.*]—The principle upon which the ct. grants an interdict is to prevent the infliction of a continuing injury.—*BOYES v. BRAND* (1864), 1 R. 178.—S. AF.

f. *Injunction operative till dissolved.*]—Resps. obtained against

Sect. 1.—In general. Sect. 2. Part II. Sect. 1.]

HATCH LUNATIC ASYLUM (1868), 4 Ch. App. 146; 38 L. J. Ch. 265; 19 L. T. 708; 33 J. P. 196; 17 W. R. 240, L. C. & L. J.

Annotations:—As to (2) Folld. A.-G. v. Birmingham B. C. (1871), 24 L. T. 224; *Hill v. Metropolitan Asylum District Managers* (1879), 4 Q. B. D. 433. *Refd. A.-G. v. Birmingham, Tame, & Rea Drainage Board*, [1912] A. C. 788. *As to (3) Consd. A.-G. v. Gee* (1870), L. R. 10 Eq. 131. *Refd. A.-G. v. Dorking Union Grdns.* (1882), 20 Ch. D. 595; *Islington Vestry v. Hornsey U. C.*, [1900] 1 Ch. 695.

5. —.]—Defts. were a local board constituted in Nov. 1875, under Public Health Act, 1875 (c. 55). Pltf. complained that for some time before & since defts. became the sanitary authority, sewage was allowed to fall into a stream passing near his residence so as to pollute it & cause a nuisance to him. He complained to defts. in May, 1876, & nothing having been done he brought an action against them in July, 1876, for damages & an injunction:—*Held*: assuming that an actionable nuisance existed, as defts. had themselves done no act to create or increase it, pltf. had no cause of action.

It would be contrary to the course of the ct. to make a decree of that nature against defts., unless the ct. is satisfied that there is some particular mode by which they can carry into effect this scheme of drainage (COTTON, L.J.).—*GLOSSOP v. HESTON & ISLEWORTH LOCAL BOARD* (1879), 12 Ch. D. 102; 49 L. J. Ch. 89; 40 L. T. 736; 44 J. P. 36; 28 W. R. 111, C. A.

Annotations:—Expld. & Folld. A.-G. v. Dorking Union Grdns. (1882), 20 Ch. D. 595. *Expld. Charles v. Finchley L. B.* (1883), 23 Ch. D. 767. *Consd. R. v. Staines L. B.* (1888), 60 L. T. 261; *Ainley v. Kirkheaton L. B.* (1891), 60 L. J. Ch. 734; *Ogilvie v. Blything Union R. S. A.* (1891), 65 L. T. 338; *Cowley v. Newmarket L. B.*, [1892] A. C. 345; *Yorkshire West Riding Council v. Holmfirth Urban S. A.*, [1894] 2 Q. B. 842. *Expld. Dent v. Bourne-mouth Corp.* (1897), 66 L. J. Q. B. 395. *Apld. Robinson v. Workington Corp.*, [1897] 1 Q. B. 619. *Consd. Foster v. Warblington U. D. C.*, [1906] 1 K. B. 648; *Dawson v. Bingley U. D. C.*, [1911] 2 K. B. 149. *Distd. Jones v. Llanrwst U. D. C.*, [1911] 1 Ch. 393. *Refd. Warwick & Birmingham Canal Navigation Co. v. Burman* (1890), 63 L. T. 670; *A.-G. v. Clerkenwell Vestry*, [1891] 3 Ch. 527; *Durrant v. Branksome U. D. C.* (1897), 76 L. T. 739; *Harrington v. Derby Corp.*, [1905] 1 Ch. 205; *McClelland v. Manchester Corp.*, [1912] 1 K. B. 118; *Hesketh v. Birmingham Corp.*, [1924] 1 K. B. 260. *Mentd. A.-G. v. Manchester (Dean & Canons)* (1881), 18 Ch. D. 596; *Holland v. Dickson* (1888), 37 Ch. D. 669; *R. v. Parby* (1889), 22 Q. B. D. 520; *R. v. St. George-the-Martyr, Southwark, Vestry* (1892), 61 L. J. Q. B. 398; *R. v. St. Giles, Camberwell, Vestry* (1897), 61 J. P. 217; *Smith v. Chorley District Council* (1897), 66 L. J. Q. B. 427; *Pasmore v. Oswaldtwistle U. D. C.*, [1898] A. C. 387; *Lee District Board v. L. C. C.* (1899), 82 L. T. 306; *Wincanton R. C. v. Parsons* (1905), 74 L. J. K. B. 533; *Davies v. Gas Light & Coke Co.*, [1909] 1 Ch. 248.

6. —.]—(1) The ct. will not make an order against a public body or against individuals to do an act unless it is satisfied that it is within their power to do it.

(2) In dealing with the question of restraining a public body from continuing a state of things which existed before the commencement of their powers, the ct. must take into consideration the balance of convenience.—*A.-G. v. DORKING UNION*

GUARDIANS (1882), 20 Ch. D. 595; 51 L. J. Ch. 585; 46 L. T. 573; 30 W. R. 579, C. A.

Annotations:—As to (1) Consd. Charles v. Finchley L. B. (1883), 23 Ch. D. 767; *Yorkshire, West Riding Council v. Holmfirth Urban S. A.*, [1894] 2 Q. B. 842; *Harrington v. Derby Corp.*, [1905] 1 Ch. 205. *Refd. Brown v. Dunstable Corp.*, [1899] 2 Ch. 378; *Baron v. Portalade-by-Sea U. C.* (1900), 69 L. J. Q. B. 899. *As to (2) Refd. R. v. Staines L. B.* (1888), 60 L. T. 261; *Brown v. Dunstable Corp.*, [1899] 2 Ch. 378; *Foster v. Warblington U. D. C.*, [1906] 1 K. B. 648; *West Riding Rivers Board v. Butterworth & Roberts* (1907), 98 L. T. 47. *Generally, Mentd. A.-G. v. Acton L. B.* (1882), 22 Ch. D. 221; *Hall v. Ewin* (1887), 37 Ch. D. 74; *Warwick & Birmingham Canal Navigation Co. v. Burman* (1890), 63 L. T. 670; *A.-G. v. Clerkenwell Vestry*, [1891] 3 Ch. 527; *Kirkheaton District L. B. v. Ainley*, [1892] 2 Q. B. 274; *Ogilvie v. Blything Union R. S. A.* (1892), 67 L. T. 18; *Bradford v. Eastbourne Corp.*, [1896] 2 Q. B. 205; *Peebles v. Oswaldtwistle U. D. C.*, [1897] 1 Q. B. 384; *Jones v. Llanrwst U. D. C.*, [1911] 1 Ch. 393; *Berton v. Alliance Economic Investment Co.* (1921), 38 T. L. R. 187.

7. —.]—*EVANS v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.*, No. 44, *post*.

See, further, Part X., Sect. 2, sub-sect. 3, C., post.

8. Court will not act oppressively.]—*BAXTER v. BOWER*, No. 306, *post*.

9. Where court cannot enforce performance.]

—A colliery co. having railways from their collieries, with junctions with the line of a railway co., claimed the right, under Railways Clauses Act, 1845 (c. 20), s. 92, to use the railway. After some correspondence as to the engines to be used for that purpose, the railway co. protested against the colliery co. using the railway with engines belonging to another railway co., & finally refused to allow them to use the railway. The colliery co. then attempted to run a train on to the line, but found the gates at the junction locked. They were likewise told that the signals & points would not be worked for them. They then filed their bill, alleging that the engines had been previously approved for another purpose, & praying for an injunction to restrain the railway co. from obstructing them in the use of the line. On motion the injunction was refused on the ground that defts. could not be compelled to work the signals. Pltfs. then amended their bill, alleging their right to have the signals worked for them by defts., & extending the injunction prayed for accordingly:—*Held*: although sect. 92 of the Act gave a right to use the line on certain terms, still the ct. would not grant an injunction, as it could not enforce the performance of an obligation to work the signals from time to time, that being a continuous act.—*POWELL DUFFRYN STEAM COAL CO. v. TAFF VALE RY. CO.* (1874), 9 Ch. App. 331; 43 L. J. Ch. 575; 30 L. T. 208, L. J.

Annotations:—Consd. Ryan v. Mutual Tontine Westminster Chambers Assoon., [1893] 1 Ch. 116; *L. & Y. Ry. v. Liverpool Corp.*, [1915] A. C. 152. *Refd. Woodruff v. Brecon & Merthyr Tydfil Junction Ry.* (1884), 28 Ch. D. 190; *Phipps v. Jackson* (1887), 56 L. J. Ch. 550; *Spillers & Bakers v. G. W. Ry.*, [1910] 1 K. B. 778; *G. C. Ry. v. Mid. Ry.*, [1912] 1 Ch. 206; *Kennard v. Cory* (1922), 91 L. J. Ch. 452. *Mentd. Danubian Sugar Factories v. I. R. Comrs.*, [1901] 1 K. B. 245.

10. —.]—Application for an interlocutory injunction to restrain deft. from asserting in this

appls. an interdict restraining the latter in the working of their mines. The interdict was recalled by the Inner House, & applts. brought their action for damages, & substantial damages were awarded:—*Held*: the interdict continued to be operative until its recall by the Inner House.—*CLIPPENS OIL CO., LTD. v. EDINBURGH DISTRICT*

g. Inconsistent claim for injunction.]—A pltf. whose claim is inconsistent with itself is not entitled to an

injunction.—*HOWELL v. UNION BANK OF AUSTRALIA* (1888), 6 N. Z. L. R. 567.—N.Z.

h. Where legal remedy adequate.]—Deft. could not be restrained, because there was an adequate remedy at law by setting the judgment aside.—*McKINNON v. McDUGALL* (1879), R. E. D. 342.—CAN.

k. Where act already completed.]—Injunctions are not granted with reference to accomplished injuries.—*BONSHAW FREEHOLD G. M. CO. v. PRINCE OF WALES CO.* (1868), 5 W. W.

& A'B. 140.—AUS.

l. —.]—The ct. ought never to interfere to restrain a co. by injunction from doing a thing which has been already done; if a co. enter upon lands without giving the requisite notice, when notice is required, the proper course is to proceed at law for the trespass, as this ct. cannot in such a case properly estimate the amount of damages.—*NEWCOMBE v. DUBLIN & WICKLOW RY. CO.* (1854), 7 Ir. Jur. 323.—IR.

m. Injunction in possessory cause

country that he had certain rights & powers in connection with some mines in Mexico. Refused, on the grounds that the injunction would be fruitless, & further that the ct. was not satisfied that deft.'s claim was put forward *malâ fide*, even if it were possible to frame any injunction which would be effective.—*M'ILWRAITH v. SMILEY* (1892), 8 T. L. R. 690, C. A.

See, further, Part X., Sect. 2, sub-sect. 3, B., C.

SECT. 2.—DOES NOT RUN WITH THE LAND.

11. *General rule.*]—In 1875 a perpetual injunction was obtained against a sanitary authority, restraining them from polluting a river with sewage. In 1877 a provisional order of the Local Government Board was made under Public Health

Act, 1875 (c. 55), constituting a new & larger district drainage board. In an action by the persons who had obtained the injunction in 1875 against the district drainage board, claiming a declaration that they were entitled as against the district drainage board to the same benefit of the injunction as if such board had been depts. to the former action:—*Held*: (1) the injunction did not run with the land; (2) the liability was not a liability constituted under the Act, & therefore pltf's. were not entitled to such a declaration.—*A.-G. v. BIRMINGHAM, TAME & REA DISTRICT DRAINAGE BOARD* (1881), 17 Ch. D. 685; 50 L. J. Ch. 786; 44 L. T. 906; 46 J. P. 36; 29 W. R. 793, C. A.

Annotations:—As to (1) *Reid. Hyde Corpn. v. Bank of England* (1882), 30 W. R. 790. As to (2) *Reid. A.-G. v. Dorking Grdns.* (1882), 30 W. R. 579. *Generally, Mend. Foster v. Warblington U. C.* (1906), 75 L. J. K. B. 514.

Part II.—Jurisdiction.

SECT. 1.—DISCRETION OF COURT.

12. *In common law courts.*]—*Semble*: under the power of granting injunctions conferred on them by C. L. P. Act, 1854 (c. 125), s. 82, the cts. of common law will not grant an injunction as matter of course where a legal right has been invaded, but will take the circumstances of the case into consideration.

In an action for obstructing ancient lights, with a count for an injunction under C. L. P. Act, 1854 (c. 125), s. 79, after a verdict had passed for pltf., the ct. granted an injunction, under sect. 82 of that statute, to restrain depts. from continuing the wrongful acts complained of in the action, & from committing any injury of the like kind relating to the property & rights of pltf. mentioned in the declaration, & from erecting, keeping erected, & continuing the erection of so much of the wall & buildings as was opposite a certain messuage & premises of pltf. mentioned & described in the declaration, & known, etc., so or in such manner as to darken or obstruct any of the ancient lights or windows of the messuage & premises, & from erecting any other building & doing any other act whereby the light & air coming to & entering his messuage & premises by means of the windows might be obstructed, or such messuage & premises might be in any way darkened, & from the repetition or continuance

of any act whereby an injury of a like kind might happen to pltf.; the writ of injunction to lie in the office till next term, depts. undertaking to pull down as much of the wall & building as should be sufficient to restore to pltf. the full enjoyment of the light & air he had previously, & to do same to the satisfaction of a surveyor to be agreed on or nominated by one of the judges of the ct., depts. to pay the costs of the rule & of the surveyor.—*JESSEL v. CHAPLIN* (1856), 27 L. T. O. S. 159; 2 Jur. N. S. 931; 4 W. R. 610.

Annotation:—*Reid. Smith v. Smith* (1875), L. R. 20 Eq. 500.

13. *In Court of Chancery.*]—In granting an injunction after a pltf. has established his right at law, the ct. is not guided by the amount of damages; the ct. will consider whether the injunction will afford pltf. the relief to which he is entitled, & will not grant it merely because the pltf. has a legal right to the thing sought to be protected.

Pltf. had occupied for many years a factory for worsted spinning on a stream, & claimed a right of having the water come to his works in a pure state. Deft. erected dye works on the same stream, by which the water was polluted. Pltf. brought an action against deft. & recovered a farthing damages, & now applied for an injunction to restrain deft. from a continuous infringement

—*Object of.*]—An injunction in a possessory cause is only to bring the deft. into court. He may disobey it, but then he must answer interrogatories as under an attachment, and then the court decide upon the right; if against the deft. he is in absolute contempt, & the court will not take off the attachment till he abate the nuisance.—*BODKIN v. KRALY* (1787), Vern. & Scr. 303.—IR.

PART I. SECT. 2.

11 i. *General rule.*]—An injunction does not run with the land.—*DAHYA-BHAI v. BAPALAL* (1901), I. L. R. 26 Bom. 140.—IND.

11 ii. —.]—A. obtained an injunction against B. restraining him from obstructing A. in the exercise of his right of way to his land over B.'s land. A. subsequently sold his land to C. B. similarly obstructed C. C. then brought a suit against B. for an injunction in terms similar to that formerly obtained by A. B. contended

that C.'s remedy, if any, was by way of execution of the decree obtained by A.:—*Held*: as the injunction did not run with the land there was in the circumstances of the case no bar to pltf.'s suit.—*JAMSETJI MANEKJI v. HARI DAYAL* (1907), I. L. R. 32 Bom. 181.—IND.

n. *Civil Procedure Code*, 1882, s. 234—*Effect of.*]—Pltf. obtained a decree against deft., restraining the latter from obstructing the access of light & air to her windows. Pltf. applied for execution. While this application was pending, deft. died, & his son & heir was brought on the record. It was contended that the injunction could not be enforced against the son as an injunction does not run with the land:—*Held*: having regard to Civil Procedure Code, 1882, s. 234, the injunction ordered against deceased deft. might be enforced against his son as his legal representative.—*SAKARLAL JASWANTRAI v. BAI PARVATIBAI* (1901), I. L. R. 26 Bom. 283.—IND.

PART II. SECT. 1.

o. *When exercised.*]—The rule of this ct. is never to interfere by injunction except where it can do so usefully & effectively.—*A.-G. v. INTERNATIONAL BRIDGE Co.* (1875), 22 Gr. 298.—CAN.

13 i. *In Court of Chancery.*]—Under Chancery Acts, 1858 (c. 27), & 1862 (c. 46), the ct. was bound to dispose finally of all questions arising out of the contract:—*Held*: therefore, though pltf. had not so prayed, the injunction should be made perpetual.—*BLAKENEY v. HARDIE* (1874), 8 I. R. Eq. 381.—IR.

13 ii. —.]—*GRAHAM v. EAKIN*, [1916] 1 I. R. 27.—IR.

p. *When property under receiver—Restraint of waste.*]—Where lands are under the receiver of the Ct. of Ch., this Ct. is unwilling to grant an injunction against waste, except the matter appears to call for an immediate remedy. When such is not the case, the appln. for an injunction should be

Sect. 1.—Discretion of court. Sect. 2: Sub-sects. 1 & 2.]

of his rights:—*Held*: a person may by long user acquire a right to the water of a stream free from pollution; he may have no proprietorship in the stream, & may acquire a right to pour polluted matter into a stream as against all new comers; a person having established his right at law is not, as a matter of course, entitled to an injunction, particularly where the injunction would not restore pltf. to the right he has established, & where the act complained of may be compensated by pecuniary damages; in this case the evidence proved that, owing to the increase of polluting matter poured into the stream from other sources than that of deft.'s works, pltf. could never be reinstated in his original rights; the damage might be compensated by money; & pltf. had been guilty of such an amount of acquiescence as would disentitle him to an injunction.

Pltfs. have not used due diligence in vindicating their rights. They stood by while defts. were constructing their works & they suffered defts. to use their works after they constructed for a period of nearly five years without giving them any hint that they were doing anything that they had not a lawful right to do. On this ground alone pltfs. are not entitled to an injunction (*KINDERSLEY, V.-C.*).—*WOOD v. SUTCLIFFE* (1851), 2 Sim. N. S. 163; 21 L. J. Ch. 253; 18 L. T. O. S. 194; 16 Jur. 75; 61 E. R. 303.

Annotations:—Reid. A.-G. v. Kingston-on-Thames Corp'n. (1865), 12 L. T. 665; *A.-G. v. Bradford Canal Proprietors* (1866), L. R. 2 Eq. 71. *Mentd. Crossley v. Lightowler* (1867), 16 L. T. 438.

].—(1) The grant of an injunction to restrain a person from doing a particular thing is an act dependent on the discretion of the ct., & in exercising that discretion a ct. of equity will consider, among other things, whether the doing of the thing sought to be restrained must produce an injury to the party seeking the injunction; whether that injury can be remedied or atoned for, & if capable of being atoned for by damages, whether those damages must be sought in successive suits or could be obtained once for all.

Two leases were granted of pieces of land with some buildings on them, one granted in 1798 for 999 years, the other granted in 1824 for 988 years. There was no reservation of a power of re-entry for breach of covenant, nor was there any negative covenant obliging the lessee not to change the use of the premises. There was a power of re-entry, for rent in arrear & no sufficient distress on the premises. In each lease there was a covenant by the lessee that he, his exors., etc., will "during the term hereby granted, preserve, uphold, support, maintain, & keep the same demised premises, & all improvements made & to be made thereon, in good & sufficient order, repair, & condition; & at the end or sooner determination of this demise shall & will so leave & deliver up same unto" the lessor, his heirs, etc. The premises had been used as corn stores for some years, & afterwards as artillery barracks & dwellings for married soldiers. They had fallen into disrepair; it became necessary to repair them; the lessee thought it would be beneficial to convert the store buildings into dwelling houses, which would much increase

their value, & was proceeding to convert them accordingly, when the lessor filed a bill to restrain him, alleging waste:—*Held*: this was not the case of enforcing a negative covenant where the words of contract were clear & indisputable; the waste alleged was meliorating waste, & in the circumstances, the ct. below had, in the due exercise of its discretion in such matters, properly refused to interfere by injunction.

(2) The ct. will not grant an injunction to prevent waste unless there is some real & substantial injury to the inheritance.

(3) If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a ct. of equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; & in such case the injunction does nothing more than give the sanction of the process of the ct. to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury; it is the specific performance by the ct. of that negative bargain which the parties have made, with their eyes open, between themselves (*LORD CAIRNS, C.*).—*DOHERTY v. ALLMAN* (1878), 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513, H. L.

Annotations:—As to (1) Consd. Meux v. Copley, [1892] 2 Ch. 253; *Bickmore v. Dimmer* (1902), 88 L. T. 78; *Osborne v. Bradley*, [1903] 2 Ch. 446. *Distd. Rose v. Spicer*, *Rose v. Hyman*, [1911] 2 K. B. 234. *Reid. Tucker v. Linger* (1882), 21 Ch. D. 18; *Dashwood v. Magniac*, [1891] 3 Ch. 306; *Re McIntosh & Pontypridd Improvements Co.* (1891), 61 L. J. Q. B. 164; *Metropolitan Electric Supply Co. v. Ginder* (1901), 70 L. J. Ch. 862; *McEacharn v. Colton*, [1902] A. C. 104; *Sunderland Orphan Asylum v. River Wear Comrs.* (1911), 106 L. T. 288; *Kelly v. Barrett*, [1924] 2 Ch. 379. *As to (2) Consd. Meux v. Copley*, [1892] 2 Ch. 253. *Reid. Tucker v. Linger* (1882), 21 Ch. D. 18; *Dashwood v. Magniac*, [1891] 3 Ch. 306; *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624; *Sunderland Orphan Asylum v. River Wear Comrs.* (1911), 106 L. T. 288. *As to (3) Consd. Sharp v. Harrison*, [1922] 1 Ch. 502. *Reid. Bickmore v. Dimmer* (1902), 88 L. T. 78; *McEacharn v. Colton*, [1902] A. C. 104; *Formby v. Barker*, [1903] 2 Ch. 539; *Osborne v. Bradley*, [1903] 2 Ch. 446; *Elliston v. Reacher*, [1908] 2 Ch. 374; *Leng v. Andrews* (1908), 78 L. J. Ch. 80.

Damages in lieu of injunction.—*See* Part VI., Sect. 2; Part VII., Sect. 1, *post*.

SECT. 2.—HIGH COURT.

SUB-SECT. 1.—ORIGINAL JURISDICTION OF COURT OF CHANCERY.

15. *Origin of jurisdiction.*—The origin of the jurisdiction of this ct. in regard to injunctions, & to what extent.

When this ct. first granted injunctions, it seems to have taken its jurisdiction from the writ of prohibition of waste; & to have extended it against a tenant for life, or a tenant for years from ploughing ancient meadows, from throwing down ancient inclosures, which, though not strictly, is of the nature of waste; from printing books, & from exercising new inventions; from the working of mines, possessing bills now out of use in this kingdom, but still in use in Ireland; & this ct. will grant an injunction whether covenant, or no covenant. The grantor of a

made to the Ct. of Ch.—*Re BRABAZON* (1851), 4 Ir. Jur. 100.—*IR.*

q. *What court will consider.*—It is a well-known principle, in matters of injunction, that the ct. will, in general, have regard not only to the

strict right of the parties, but also to the surrounding circumstances. No injunction will be granted to the petitioner, if it does not bring him any practical good. An injunction will not be granted when public

interest, based on international laws in time of war, is opposed to it.—*MARCONI WIRELESS TELEGRAPH CO. v. CANADIAN CAR & FOUNDRY CO., LTD., & SIMON* (1918), Q. R. 54 S. C. 535; 43 D. L. R. 382.—*CAN.*

common overstocks it; this ct. will grant an injunction (LORD BATHURST, C.).—*GOODESON v. GALLATIN* (1771), 2 Dick. 455; 21 E. R. 346, L. C.

16. Injury to property.]—*A.-G. v. SHEFFIELD GAS CONSUMERS Co.*, No. 811, *post*.

17. —.]—The foundation of the jurisdiction in equity to interfere by injunction is the existence of an injury to property of such a nature as to render the property in a material degree unsuitable for the purposes to which it is now applied or to lessen considerably the enjoyment of it. Such an injury is considered by the ct. to be incapable of compensation in damages.—*JACKSON v. NEWCASTLE (DUKE)* (1864), 3 De G. J. & Sm. 275; 4 New Rep. 448; 33 L. J. Ch. 698; 10 L. T. 635, 802; 28 J. P. 516; 10 Jur. N. S. 688, 810; 12 W. R. 1066; 40 E. R. 642, L. C.

Annotations:—*Dbtd. Calcraft v. Thompson* (1867), 31 J. P. 675; *Aynsley v. Glover* (1874), L. R. 18 Eq. 544. *Refd.* *Clarke v. Clark* (1865), 14 W. R. 115; *Stokes v. City Offices Co.* (1865), 13 L. T. 81; *Dent v. Auction Mart Co.*, *Pilgrim v. Auction Mart Co.*, *Mercers' Co. v. Auction Mart Co.* (1866), L. R. 2 Eq. 238; *Yates v. Jack* (1868), 30 J. P. 324; *Moore v. Hall* (1878), 47 L. J. Q. B. 334; *Wood v. Conway Corpn.*, [1914] 2 Ch. 47. *Mentd.* *Heath v. Brighton Corpn.* (1908), 98 L. T. 718.

18. —.]—*Re A. B. (AN INFANT)* (1885), 1 T. L. R. 657.

19. —.]—*POLLARD v. PHOTOGRAPHIC Co.*, No. 228, *post*.

20. Violation of right—Breach of contract or confidence.]—The ct. will interfere by injunction to prevent a party availing himself in any manner of a title arising out of a violation of right or breach of contract or confidence. The cases in which the ct. refuses to interfere by injunction until the legal right is established at law have no application to cases in which the ct. exercises an original & independent jurisdiction to prevent a wrong arising from a violation of right or breach of contract or confidence.—*ALBERT (PRINCE) v. STRANGE* (1849), 1 Mac. & G. 25; 1 H. & Tw. 1; 18 L. J. Ch. 120; 12 L. T. O. S. 441; 13 Jur. 109; 41 E. R. 1171, L. C.; *subsequent proceedings, sub nom. ALBERT (PRINCE) v. STRANGE, A.-G. v. STRANGE*, 2 De G. & Sm. 704.

Annotations:—*Apld.* *Morison v. Moat* (1851), 9 Hare, 241. *Consd.* *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345; *Merryweather v. Moore*, [1892] 2 Ch. 518; *Lamb v. Evans*, [1893] 1 Ch. 218. *Refd.* *Jefferys v. Boosey* (1854), 4 H. L. Cas. 815; *Palmer v. Dewitt* (1870), 23 L. T. 823; *Gilbert v. Star Newspaper Co.* (1894), 11 T. L. R. 4; *Robb v. Green*, [1895] 2 Q. B. 315; *Philip v. Pennell*, [1907] 2 Ch. 577. *Mentd.* *Reade v. Conquest* (1881), 9 C. B. N. S. 755; *Hole v. Bradbury* (1879), 12 Ch. D. 886; *Mansell v. Valley Printing Co.*, [1908] 2 Ch. 441; *Chappell v. Columbia Graphophone Co.*, [1914] 2 Ch. 745.

21. Separate property of married woman — Liable to payment of costs.]—An action by a married woman "suing in respect of her separate estate" was at the trial dismissed with costs, to be taxed & "payable out of her separate property, but not otherwise." The only separate property of the pltf. consisted of a share coming to her under a will. Before the taxation of debts, costs had been completed by certificate, the trustees of the will being about to distribute their estate & pay pltf. her share, debts applied for the appointment of a receiver to receive the share & hold it as security for the costs when taxed:—*Held*: independently of Jud. Act, 1873 (c. 66), s. 25, there was jurisdiction to protect by injunction or the appointment of a receiver the fund out of which the costs were payable, & a receiver ought to be appointed.—*CUMMINS v. PERKINS*, [1899] 1 Ch. 16; 68 L. J. Ch. 57; 79

L. T. 456; 47 W. R. 214; 15 T. L. R. 76; 43 Sol. Jo. 112, C. A.

SUB-SECT. 2.—EFFECT OF STATUTE—JUDICATURE ACTS.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 45.

22. Whether power to grant extended.]—I do not believe that sect. 25 (8) [of above Act] has added in the slightest degree to the power of this ct. to grant an injunction (*BACON, V.-C.*).—*DICKS v. BROOKS* (1879), 15 Ch. D. 22; *on appeal* (1880), 15 Ch. D. 31, C. A.

Annotations:—*Mentd.* *Halsey v. Brotherhood* (1881), 19 Ch. D. 386; *Burnett v. Tak* (1882), 45 L. T. 743; *Household & Rosher v. Fairburn & Hall* (1884), 51 L. T. 498; *Hanfstaengl v. Empire Palace*, [1894] 2 Ch. 1; *Hanfstaengl v. Empire Palace, Hanfstaengl v. Newnes*, [1894] 3 Ch. 109; *Boosey v. Whight*, [1899] 1 Ch. 836; *Hanfstaengl v. Smith*, [1905] 1 Ch. 519.

23. —.]—The power of the ct. to grant injunctions has been enlarged by sect. 25 of above Act.—*THOMAS v. WILLIAMS* (1880), 14 Ch. D. 864; 49 L. J. Ch. 605; 43 L. T. 91; 28 W. R. 983.

Annotations:—*Apprvd.* *Quartz Hill Consolidated Gold Mining Co. v. Beall* (1882), 20 Ch. D. 501. *Refd.* *Hermann Loog v. Bean* (1884), 26 Ch. D. 306; *Mogul S.S. Co. v. M'Gregor, Gow* (1885), 15 Q. B. D. 476; *Collard v. Marshall*, [1892] 1 Ch. 571; *White v. Mellin* (1895), 43 W. R. 353.

24. —.]—Sect. 25 (8) of above Act has given no power to the High Ct. to issue an injunction in a case in which no ct. before that Act had power to give any remedy whatever. Therefore the High Ct. has no jurisdiction to issue an injunction to restrain a party from proceeding with an arbitration in a matter beyond the agreement to refer, although such arbn. proceeding may be futile & vexatious. *Semble*: above Act has dealt only with procedure, & not with jurisdiction at all, & if no ct. had power to issue an injunction before that Act, the High Ct. has no such power now.—*NORTH LONDON RY. Co. v. GREAT NORTHERN RY. Co.* (1883), 11 Q. B. D. 30; 52 L. J. Q. B. 380; 48 L. T. 695; 31 W. R. 490, C. A.

Annotations:—*Folld.* *London & Blackwall Ry. v. Cross* (1886), 31 Ch. D. 354; *Wood v. Lillies* (1892), 61 L. J. Ch. 158. *Consd.* *Richardson v. Methley School Board*, [1893] 3 Ch. 510. *Expld. & Distd.* *Kitts v. Moore*, [1895] 1 Q. B. 253. *Folld.* *Den of Airlie S.S. Co. v. Mitsui & British Oil & Cake Mills* (1912), 106 L. T. 451. *Refd.* *Hayward v. East London Waterworks Co.* (1884), 28 Ch. D. 138; *Hanby & Fisher v. Mallet* (1886), 3 T. L. R. 71; *Farrar v. Cooper* (1890), 44 Ch. D. 323; *Companhia de Mocambique v. British South Africa Co.*, *De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358; *Devonport Corpn. v. Tozer*, [1902] 2 Ch. 182; *A.-G. v. Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101. *Mentd.* *Birmingham & District Land Co. v. L. & N. W. Ry.* (1887), 36 Ch. D. 650; *Young v. Thomas* (1892), 40 W. R. 468; *Holmes v. Millage*, [1893] 1 Q. B. 551; *Morgan v. Hart*, [1914] 2 K. B. 183.

25. —.]—(1) Notwithstanding the enlarged powers of granting injunctions conferred by the Jud. Act, 1873 (c. 66), s. 25 (8), the High Ct. has not since that Act any more than the Ct. of Ch. had before it jurisdiction to restrain by injunction a person from proceeding before an arbitrator on a claim for compensation under Land Clauses Consolidation Act, 1845 (c. 18), notwithstanding that his claim may be futile or vexatious.

(2) The very first principle of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy (*LINDLEY, L.J.*).—*LONDON & BLACKWALL RY. Co. v. CROSS* (1886), 31 Ch. D.

PART II. SECT. 2, SUB-SECT. 2.

22 i. Whether power to grant extended.]—The Jud. Act has not extended the powers of the ct. to grant injunctions.—*A.-G. v. HUNTLY (SHIRE)* (1887), 13 V. L. R. 66.—*AUS.*

Sect. 2.—High Court: Sub-sect. 2. Sects. 3 & 4: Sub-sect. 1.]

354; 55 L. J. Ch. 313; 54 L. T. 309; 34 W. R. 201; 2 T. L. R. 231, C. A.

Annotations:—*As to (1) Apld. Hanly & Fisher v. Mallet* (1886), 3 T. L. R. 71. *Consd. Birmingham & District Land Co. v. L. & N. W. Ry.* (1888), 40 Ch. D. 268. *Apld. Farrar v. Cooper* (1890), 44 Ch. D. 323. *Folld. Wood v. Lillies* (1892), 61 L. J. Ch. 158. *Expld. & Distd. Kitts v. Moore*, [1895] 1 Q. B. 253. *Refd. L. & N. W. Ry. v. Walker* (1900), 82 L. T. 93. *As to (2) Refd. Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372.

26. —.—The ct. has no jurisdiction to grant an injunction to restrain a person from proceeding with an arbn. in a matter beyond or outside an arbn. agreement, although such arbn. proceedings may be futile & vexatious; & the mere circumstance that the arbn. will be futile & vexatious affords no sufficient ground, under Jud. Act, 1873 (c. 66), s. 25 (8), for granting an injunction. Therefore, where W. & L. entered into a partnership for carrying on a theatre under an agreement containing a usual arbn. clause, & L. served W. with a notice referring to arbn. the question whether the theatre should be sold or not, the ct. declined to grant an injunction restraining L. from taking any further step in the arbn., although it was of opinion that the question was not one which fell within the arbn. clause.—*WOOD v. LILLIES* (1892), 61 L. J. Ch. 158; 8 T. L. R. 281.

Annotation:—*Refd. Kitts v. Moore*, [1895] 1 Q. B. 253.

27. —.—The ct. has jurisdiction to interfere by injunction on equitable grounds to restrain deft. from proceeding to arbn. when an action has been brought impeaching the instrument containing the agreement for reference.

Jud. Act, 1873 (c. 66), s. 25 (8), has not enlarged the jurisdiction of the ct. so as to enable it to grant an injunction when before the Act it could not have done so.—*KITTS v. MOORE*, [1895] 1 Q. B. 253; 64 L. J. Ch. 152; 71 L. T. 676; 43 W. R. 84; 39 Sol. Jo. 96; 12 R. 43, C. A.

Annotations:—*Distd. Den of Airle S.S. Co. v. Mitsui & British Oil & Cake Mills* (1912), 106 L. T. 451. *Consd. Smith, Coney & Barrett v. Becker, Gray*, [1916] 2 Ch. 86. *Refd. Devonport Corpn. v. Tozer*, [1902] 2 Ch. 182.

28. —.—Pltfs., who were the owners of the steamship *Den of Mains*, chartered her by charterparty dated Apr. 26, 1911, to defts. M. & co., to load a cargo of beans at Vladivostock, & to proceed to a port in the United Kingdom & there deliver the cargo "agreeably to bills of lading." On June 10 a cargo of about 6,000 tons was loaded, & bills of lading made out to the order of M. & co. or their assigns were signed by the master & handed to M. & co.'s representative. M. & co. had, by a contract dated Apr. 27, 1911, sold the cargo to defts. the B. co., on the terms of a "basis delivered" contract, by clause 10 of which the contract was to be void as regarded any portion shipped which might not arrive. On June 12 defts. M. & co., under the contract of Apr. 27, declared to the B. co. that the beans had been shipped by steamship *Den of Mains*. On arrival of the vessel at Liverpool, the port of discharge, M. & co. handed to the B. co. the bills of lading indorsed against a payment. When the discharge had been completed it was alleged that there was a shortage of 171 bags, & the B. co. having paid only in respect of the quantity actually delivered, M. & co. instructed them to make a

corresponding deduction from the freight, but pltfs. refused to acknowledge the claim for short delivery. A dispute having thus arisen, M. & co. gave notice that they demanded an arbn. under a clause in the charterparty which provided for arbn. "by arbitrators, one to be appointed by each of the parties to this agreement, if necessary the arbitrators to appoint a third," & formally required pltfs. within seven clear days to appoint their arbitrator. Pltfs. did not appoint an arbitrator, & defts. after the expiry of the seven days gave notice of the appointment of a gentleman to act as sole arbitrator. Pltfs. thereupon took out a summons for further directions, asking (*inter alia*) for an injunction to restrain first defts. from proceeding with the arbn., alternatively that leave be given to pltfs. to revoke the submission to arbn.:—**Held:** there was no jurisdiction in the ct. to grant the injunction asked for.—*DEN OF AIRLIE S.S. CO., LTD. v. MITSUI & CO., LTD., & BRITISH OIL & CAKE MILLS, LTD.* (1912), 106 L. T. 451; 12 Asp. M. L. C. 169; 17 Com. Cas. 116, C. A.

Annotation:—*Mentd. Hogarth Shipping Co. v. Blyth, Greene, Jourdain*, [1917] 2 K. B. 534.

29. Principles on which injunctions granted unchanged.]—*DAY v. BROWNRIGG*, No. 899, *post*.

30. —. But technical objections removed.]—Sect. 25 (8) of above Act does not alter the former practice as to injunctions, but is only intended to do away with certain technical objections.—*FLETCHER v. RODGERS* (1878), 27 W. R. 97, C. A.

31. —.]—(1) An estate was laid out for building & sold in lots, & the purchasers of the different lots executed a deed by which they covenanted with the vendor not to erect any buildings beyond a certain line, the covenant being subject to a proviso that it should not be personally binding on any one except in respect of breaches committed during his sole or joint seisin of the lot to which it related. In 1872 the purchaser of lot B. built upon it a bakehouse beyond the line. Pltf. about the same time bought the opposite lot A. No complaint appeared to have been made by any one of the erection of the bakehouse until this action was commenced. In 1876 deft. purchased the residue of a mtge. term in lot B., & in 1877 commenced building upon that plot a wooden stable beyond the line. Pltf., as soon as he heard of this, wrote to complain on Mar. 17, 1877, at which time the stable was built up to the eaves. Deft. proceeded to complete the stable, which was finished on the day on which pltf. commenced an action for an injunction to restrain deft. from allowing any buildings to continue on his land beyond the line:—**Held:** the injunction ought not to extend to the building which had been allowed to remain for five years without complaint, but must be confined to buildings erected since deft. acquired his title.

(2) Sect. 25 (8) has not altered the principles on which the ct. acts in granting injunctions.—*GASKIN v. BALLS* (1879), 13 Ch. D. 324; 28 W. R. 552, C. A.

Annotations:—*As to (1) Refd. Powell v. Hemsley*, [1909] 2 Ch. 252. *As to (2) Refd. North London Ry. v. G. N. Ry.* (1883), 11 Q. B. D. 30.

32. When court may grant—Where just & convenient.]—The jurisdiction to grant prohibition is now conferred by Jud. Acts upon every

30 i. Principles on which injunctions granted unchanged—But technical objections removed.]—Since the Jud. Act, the formal matters which used to be essential on application for injunction are no longer necessary, but the substantial matters necessary

to be proved continue as before. Thus the application may be made in a case sounding in damages or the like; but appot. must still, as heretofore, show some claim upon the subject matter of the suit, or some special relation with deft. against whom the

injunction is asked.—*HUDSON'S BAY CO. v. GREEN* (1881), 1 B. C. R. pt. 1, 247.—CAN.

32 i. When court may grant—Where just & convenient.]—The ct., having, under Jud. Act, s. 17, power to grant an injunction where it appears to be

judge of the High Ct.; but, inasmuch as one of the main objects of the Acts (Jud. Act, 1873 (c. 66), s. 24 (7)) is to enable the ct. to decide, if possible in one proceeding, all the questions in dispute in the same matter & between the same parties, & (Jud. Act, 1873 (c. 66), s. 25 (8)) to grant an injunction in all cases in which it shall appear to the ct. "just & convenient" so to do, the ct. may, in any case in which it has power to grant prohibition, grant an injunction to restrain the proceedings in the inferior ct. For instance, the ct. will grant an injunction to restrain a landowner from taking proceedings before justices of the peace on an irregular notice under Land Drainage Act, 1861 (c. 133).—*HEDLEY v. BATES* (1880), 13 Ch. D. 498; 49 L. J. Ch. 170; 42 L. T. 41; 28 W. R. 365.

Annotations:—*Consd.* Stannard v. St. Giles' Camberwell (1882), 20 Ch. D. 190; North London Ry. Co. v. G. N. Ry. (1883), 11 Q. B. D. 30. *Folld.* The Teresa (1894), 71 L. T. 342. *Consd.* St. James's Hall v. L. C. C. (1900), 83 L. T. 98. *Expld.* Re Connolly, Wood v. Connolly, [1911] 1 Ch. 731. *Refd.* Barlow v. St. Mary Abbott's Kensington (1883), 31 W. R. 514; Hayward v. East London Waterworks Co. (1884), 28 Ch. D. 138; The Receipts, [1893] P. 255; Grand Junction Waterworks Co. v. Hampton U. C., [1898] 2 Ch. 331. *Mentd.* New Romney Corpn. v. New Romney Comrs. of Sewers, [1892] 1 Q. B. 840.

33. ———.]—Pltf., alderman of a borough, made a composition with his creditors, but executed no composition deed; nor were any composition proceedings taken under Debtors Act, 1869 (c. 62). He had, however, executed a bill of sale, duly registered, to a person not a creditor, to secure a sum of money advanced by him to meet the amount of the composition. A meeting of the corpn. of the borough having been summoned by notice for the purpose of declaring the office held by pltf. void under Municipal Corporations Act, 1835 (c. 76), s. 52, & Debtors Act, 1869 (c. 62), s. 21, & electing a successor. An injunction was granted, at the instance of pltf., restraining the corpn. from proceeding under their notice on the ground, that, having regard to the express words of the sect., pltf. had not become disqualified from holding office; that under sect. 25 (8) of above Act the ct. had jurisdiction to grant the injunction; & that, having regard to sect. 34 of the same Act, the action which claimed the injunction only, had been properly brought in the Ch. Div.—*ASLATT v. SOUTHAMPTON CORPN.* (1880), 16 Ch. D.

just & convenient is not restricted to cases where there is no other remedy; nor must it wait until the other party has entered upon the doing of the injurious act. If there is reasonable ground to believe that a threat may be carried into operation, an injunction may be granted.—*CHEESWORTH v. CITY OF TORONTO* (1921), 49 O. L. R. 68; 58 D. L. R. 605; 19 O. W. N. 441.—*CAN.*

32 II. ———.]—The powers of the ct. in granting an injunction, either at the hearing or upon an interlocutory application, have been extended by Jud. Act, s. 28 (8); & the only limit to the jurisdiction is that the Ct. must be satisfied that it is just & convenient that the order should be made.—*CORK CORPN. v. ROONEY* (1881), 7 L. R. Ir. 191.—*IR.*

r. ——— *Where mandamus formerly required.*]—*CHAPLIN v. WOODSTOCK PUBLIC SCHOOL BOARD* (1889), 16 O. R. 728.—*CAN.*

t. *Power of Court of Appeal.*]—Pltf. made an application to the Ct. of Appeal for an injunction to restrain deft. from dealing with partnership moneys & for a receiver:—*Held*: the Ct. of Appeal, for the purposes of appeals, etc., may exercise the power, authority, & jurisdiction by the Jud.

Act vested in the High Ct.—*EMBRER v. McCURDY* (No. 2) (1907), 10 O. W. R. 131; 14 O. L. R. 325.—*CAN.*

a. ———.]—An Appellate Ct. will stay proceedings upon an order in which there is a right of appeal, & even where the appeal is from a judgment of dismissal in the first instance it will intervene by injunction, so that the appeal will not be nugatory if successful; provided always that the appeal is *bona fide* & there are proper safeguards to protect the opposing party.—*GIBSON v. McVEIGH* (No. 2), [1922] 1 W. W. R. 147.—*CAN.*

b. *Extent of jurisdiction.*]—A trader in England applied to the Ct. of Ch. for an injunction to prevent a trader domiciled & carrying on business in Scotland, circulating in England & Wales catalogues which he alleged to be printed from his. The writ was served in Scotland by leave of the Ct. of Ch. under rules made under Jud. Act, 1875, & no appearance having been entered a decree of injunction restraining the publication complained of within the territory of Ct. of Ch. was pronounced with costs. An action having been brought in the Ct. of Session to recover these costs. Defence pleaded that proceedings in Ct. of Ch. were of no effect since he was not

143; 50 L. J. Ch. 31; 43 L. T. 464; 45 J. P. 111; 29 W. R. 117.

Annotations:—*Distd.* Donahoe v. L. G. Board (1882), 46 L. T. 300. *Expld.* North London Ry. v. G. N. Ry. (1883), 11 Q. B. D. 30. *Consd.* Richardson v. Methley School Board, [1893] 3 Ch. 510. *Refd.* London & Blackwall Ry. v. Cross (1886), 31 Ch. D. 354; Holland v. Dickson (1888), 37 Ch. D. 669; Harris v. Beauchamp, [1894] 1 Q. B. 801.

34. ———.]—A judge of the Admlty. Div. has power to grant a prohibition with reference to a matter pending before an inferior ct. & has power to issue an injunction to a party proceeding in an inferior ct. to restrain him from going on with such proceedings.—*THE TERESA* (1894), 71 L. T. 342; 7 Asp. M. L. C. 505; *sub nom.* *THE THERESA*, 11 R. 681.

35. ——— *Where legal right existing at law or in equity.*]—Where, independently of sect. 25 (8) of above Act, there is a legal right which can be asserted either at law or in equity, a ct. of equity has jurisdiction under that sub-sect. to grant an injunction in protection of that right. For instance, where a member of a school board has been improperly declared disqualified for the office, he may apply for & obtain an injunction from a ct. of equity restraining the board from proceeding to elect a new member in his place, notwithstanding that he has a remedy at law by *quo warranto*.—*RICHARDSON v. METHLEY SCHOOL BOARD*, [1893] 3 Ch. 510; 62 L. J. Ch. 943; 69 L. T. 308; 42 W. R. 27; 9 T. L. R. 603; 37 Sol. Jo. 670; 3 R. 701.

Annotation:—*Refd.* Turnbull v. West Riding Athletic Club Leeds (1894), 70 L. T. 92.

SECT. 3.—COUNTY COURTS

See COUNTY COURTS, Vol. XIII., pp. 472, 480, 525, Nos. 208–213, 304, 305, 757.

SECT. 4.—OUSTER OF JURISDICTION.

SUB-SECT. 1.—PARTICULAR REMEDY PROVIDED BY STATUTE.

36. *Jurisdiction not ousted—General rule.*]—The statutory remedy must in general be followed, but there is at least one exception to the general rule. There may co-exist a remedy by injunction

subject to the jurisdiction thereof:—*Held*: Ct. of Ch. had jurisdiction to prevent a wrong being done within its own territory therefore this plea ought to be repelled.—*DAY v. BENNIE, WAY-GOOD & Co. v. BENNIE* (1885), 12 R. (Ct. of Sess.) 651.—*SCOT.*

c. *Power of local judge.*]—Where an injunction had already been obtained from one local judge the local jurisdiction was completely exhausted. It is not contemplated that a local judge whose power to restrain is limited to eight days, should be able to restrain indefinitely by granting a series of eight-day injunctions. It is even more vicious when pltf. applies to a second local judge for his second *ex p.* injunction.—*CAPITAL MANUFACTURING Co. v. BUFFALO SPECIALTY Co.* (1912), 20 O. W. R. 920; 3 O. W. N. 553; 1 D. L. R. 260.—*CAN.*

PART II. SECT. 4, SUB-SECT. 1.

36 I. *Jurisdiction not ousted—General rule.*]—The fact that a statute makes the conduct in question an offence, & imposes fines & imprisonment for its commission, does not derogate from the right of the ct., on the motion of the party injured, to restrain its commission by injunction. An injunction may be granted, although deft. makes

Sect. 4.—Ouster of jurisdiction: Sub-sect. 1.]

to protect a right. It cannot be disputed after *Cooper v. Whittingham*, No. 39, *post*, that if a pltf. is suing in respect of a right personal to himself he may be protected by injunction (BUCKLEY, J.).—*A.-G. v. ASHBORNE RECREATION GROUND Co.*, [1903] 1 Ch. 101; 72 L. J. Ch. 67; 87 L. T. 561; 67 J. P. 73; 51 W. R. 125; 19 T. L. R. 39; 47 Sol. Jo. 50; 1 L. G. R. 146.

Annotations:—*Apld.* *A.-G. v. Wimbledon House Estate Co.*, [1904] 2 Ch. 34; *Carlton Illustrators v. Coleman*, [1911] 1 K. B. 771. *Refd.* *Devonport Corpn. v. Tozer*, [1903] 1 Ch. 759; *Russell v. Midhurst R. D. C.* (1905), 98 L. T. 530.

37. — Municipal Corporations Act, 1835 (c. 1).—A.-G. v. ASPINALL, No. 766, *post*.

A borough which was governed by Municipal Corporations Act, 1882 (c. 50), & was also an urban authority under Public Health Act, 1875 (c. 55), had in Mar. 1903, exhausted all its borrowing powers & had in addition a large fluctuating overdraft at its bankers in respect of expenses previously incurred. The borough kept its banking account in the name of its treasurer, & during 1903 & 1904 the bank charged interest quarterly on the overdraft, & the treasurer in his accounts with the borough debited the borough & credited himself with the charges for interest, & his accounts were audited under Municipal Corporations Act, 1882 (c. 50), ss. 25-28, by the borough auditors, who passed the charges for interest, & the audited accounts were submitted to & approved by the borough council. In an action against the treasurer by the A.-G., suing on relation of a burgess, impeaching his accounts in respect of the charges for interest on the overdraft & claiming an injunction to restrain him from making any further payments for such interest out of the borough funds:—*Held*: the fact that deft.'s accounts had been audited under the Act was no bar to the action, there being nothing in the Act which made such audit finally binding & conclusive on the borough & the burgesses.—*A.-G. v. DE WINTON*, [1906] 2 Ch. 106; 75 L. J. Ch. 612; 70 J. P. 368; 54 W. R. 499; 22 T. L. R. 446; 50 Sol. Jo. 405; 4 L. G. R. 549.

Annotations:—*Mentd.* *R. v. Roberts*, [1908] 1 K. B. 407; *R. v. Locke*, [1910] 2 K. B. 201.

39. — Copyright.]—(1) A pltf. need not, for the purposes of proceeding under the Act [Copyright Act, 1842 (c. 45)] in respect of the offence of importing for sale, give such a person notice at all, but can bring an action forthwith & obtain an *ex p.* injunction without notice (*JESSEL, M.R.*).

(2) Where a statute creates a new offence & imposes a penalty, the ancillary remedy by injunction may be claimed.

(3) Whenever an act is illegal, & is threatened, the ct. will interfere & prevent the act being done (*JESSEL, M.R.*).

(4) Where an action is brought to enforce a legal right & there is no misconduct on the part of pltf., the ct. has no discretion to refuse him costs.—*COOPER v. WHITTINGHAM* (1880), 15 Ch. D. 501; 49 L. J. Ch. 752; 43 L. T. 16; 28 W. R. 720; 24 Sol. Jo. 611.

Annotations:—*As to* (2) *Consd.* *Hayward v. East London*

affidavits that he has taken precautions against the recurrence of the injury complained of.—*A.-G. FOR THE DOMINION OF CANADA v. EWEN* (1895), 3 B. C. R. 468—CAN.

36 II. ——Notwithstanding the existence of a remedy at law for breach of the statutory condition, a ct. of equity could interfere by injunc-

tion.—*STEELE v. TIERNAN & CRONLY* (1889), 23 L. R. Ir. 583.—IR.

d. — Common Schools Act.]—There might be cases where the remedy given by sect. 92 would be inadequate, as where a secretary of a district had a considerable sum of school money in his possession which he refused to account for or give up;

Waterworks Co. (1884), 28 Ch. D. 138. *Folld.* *Stevens v. Chown, Stevens v. Clark*, [1901] 1 Ch. 894; *A.-G. v. Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101; *Carlton Illustrators v. Coleman*, [1911] 1 K. B. 771. *Refd.* *Devonport Corpn. v. Tozer*, [1902] 2 Ch. 182. *As to* (3) *Consd.* *A.-G. v. Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101. *Refd.* *Proctor v. Bailey* (1889), 42 Ch. D. 393, n.; *Devonport Corpn. v. Tozer*, [1902] 2 Ch. 182; *Russell v. Midhurst R. D. C.* (1908), 98 L. T. 530. *As to* (4) *Folld.* *Upmann v. Forester* (1883), 24 Ch. D. 231. *Consd.* *Jones v. Curling* (1884), 13 Q. B. D. 262. *Folld.* *Ruskin v. Robinson* (1885), 2 T. L. R. 18. *Consd.* *Huxley v. West London Extension Ry., Hughes v. Merrett, Wood v. Madge* (1886), 17 Q. B. D. 373. *Distd.* *Sonnenschein v. Barnard* (1887), 57 L. T. 712; *Florence v. Mallinson* (1891), 65 L. T. 354. *N.F.* *Walter v. Steinkopff*, [1892] 3 Ch. 489. *Consd.* *Forster v. Farquhar*, [1893] 1 Q. B. 564; *O'Connor v. Star Newspaper Co.* (1893), 68 L. T. 146; *Gray v. Ashburton*, [1917] A. C. 26. *Refd.* *Felix v. Gordon* (1884), 1 T. L. R. 96; *Wood v. Cox* (1889), 5 T. L. R. 272; *Roberts v. Jones, Willey v. G. N. Ry.*, [1891] 2 Q. B. 194; *Lomer v. Waters*, [1898] 2 Q. B. 326; *Haynes v. Aldridge Colliery Co.* (1923), 130 L. T. 282. *Generally, Mentd.* *Hollnake v. Truswell* (1894), 7 R. 568.

40. ——Where there has been a breach of a statutory enactment as to which the sole remedy provided is a penalty an injunction may be granted to prevent future breaches & I think the authorities show that if there is a probability of the breach being repeated the injunction should be granted (*CHANNELL, J.*).—*CARLTON ILLUSTRATORS v. COLEMAN & CO., LTD.*, [1911] 1 K. B. 771; 80 L. J. K. B. 510; 104 L. T. 413; 27 T. L. R. 65.

41. — Waterworks Clauses Act, 1847 (c. 17), s. 68.]—Although the statutory remedy provided by Waterworks Clauses Act, 1847 (c. 17), s. 68, for the settlement by two justices of disputes as to the annual value of a tenement supplied with water, & the special remedy by penalties given by sect. 43 against a co. for withholding water, have not ousted the general jurisdiction to restrain the co. by injunction from cutting off the supply of water pending proceedings for settling a dispute as to value, such injunction will not be granted on the application of an owner or occupier who will not undertake to commence proceedings with due speed before the justices under sect. 68.—*HAYWARD v. EAST LONDON WATERWORKS Co.* (1884), 28 Ch. D. 138; 54 L. J. Ch. 523; 52 L. T. 175; 49 J. P. 452; 1 T. L. R. 56.

Annotations:—*Expld. & Distd.* *Stevens v. Chown, Stevens v. Clark*, [1901] 1 Ch. 894. *Refd.* *Young v. Thomas* (1892), 40 W. R. 468; *Panagotis v. S.S. Pontiac*, [1912] 1 K. B. 74.

42. — Public Health (Building in Streets) Act, 1888, (c. 52).]—The first point taken by defts. is that there is one remedy only, namely, the remedy given by the statute [above Act]. In my opinion that point is concluded by the decision in *A.-G. v. Ashborne Recreation Ground Co.*, No. 36, *ante*, approved in *Devonport Corpn. v. Tozer*, No. 47, *post*. I am clear that there is not one remedy only, namely, the statutory remedy. There is first of all the statutory obligation not to build without the written consent, & if that is disobeyed apart from any question of penalty there is a remedy by injunction because it is a public general Act prohibiting certain matters in the interests of public health & in order to preserve uniformity in the width of the public streets, & that is a matter for which the A.-G. can sue (*FARWELL, J.*).—*A.-G. v. WIMBLEDON HOUSE ESTATE Co., LTD.*, [1904] 2 Ch. 34; 73 L. J. Ch.

but as it was by the bill & not by arguments or objections on the motion for the injunction that the right of pltf. to institute the suit must depend, & as there was no allegation in the bill that the books & papers which deft. refused to deliver up were of such a character & value as to require the interposition of a ct. of equity, or that

593; 91 L. T. 163; 68 J. P. 341; 20 T. L. R. 489; 2 L. G. R. 826.

Annotations:—*Consd. A.-G. v. Birmingham, Tame & Rea Drainage Board*, [1910] 1 Ch. 48. *Refd. A.-G. v. Denby*, [1925] Ch. 596.

43. — Public Health Act, 1875 (c. 55).]—Crude sewage was discharged by a local authority into the bed of a natural stream which flowed intermittently. The stream passed through pl'tfs.' land & discharged into a tidal river. Part of the stream was culverted over. The culvert, which had been constructed under private agreements with an owner of the pl'tfs.' land prior to the passing of above Act was in bad repair. The culvert permitted sewage to escape on to pl'tfs.' land, which was periodically overflowed & sewage deposited thereon:—*Held*: the bed of the stream was a public nuisance & the culvert had become a sewer & was vested under sect. 13 of above Act, in the local authority, who were liable in damages & must be restrained by injunction.

Semble: although sect. 299 of above Act provides a statutory remedy by complaint to the Local Government Board in the case of a local authority making default "in the maintenance of existing sewers," it does not preclude a private individual from obtaining damages & an injunction against the local authority in respect of a common law nuisance arising from that default.—*A.-G. v. LEWES CORPN.*, [1911] 2 Ch. 495; 81 L. J. Ch. 40; 105 L. T. 697; 76 J. P. 1; 27 T. L. R. 581; 55 Sol. Jo. 703; 10 L. G. R. 26.

Annotation:—*Refd. R. v. Marshland Smeeth & Fen District Comrs.*, [1920] 1 K. B. 155.

44. — Unless expressly provided — Private Act.]—On the bank of a canal constructed under an old Act of Parliament a mill had been built. In consequence of the working of a coal mine the canal & mill had subsided, & water leaked from the canal into the mill. The mill owner brought an action against the canal co. for an injunction & for damages:—*Held*: (1) though a co. authorised by Act of Parliament were not under the same liabilities as a private person, they were liable for damages if they were guilty of negligence, & the canal co. had been guilty of negligence, inasmuch as they might have prevented the damage; & they were bound to compensate the mill owner. But, under the special provisions of their Act, compensation must be recovered as directed by the Act & not by action; (2) such being the case, an injunction would not be granted, & apart from this, inasmuch as the time & extent of any further subsidence could not be foreseen, there ought not to be an injunction.

(3) It would be wrong to enjoin a co. or an individual from permitting that to be done which is really beyond his control. Not beyond his control in this sense, that there is a *vis major* or an act of God paramount; but beyond his control in the sense that he cannot by any precaution or by any works with reasonable certainty prevent that happening which all contemplate as likely (*KEKEWICH, J.*).—*EVANS v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1887), 36 Ch. D. 626; 57 L. J. Ch. 153; 57 L. T. 194; 36 W. R. 328; 3 T. L. R. 691.

45. — — — — —.]—Where a statute [a private Act] provides a particular remedy for the infringement of a right of property thereby created or re-enacted, the jurisdiction of the High

Ct. to protect that right by injunction is not excluded, unless the statute expressly so provides.

—*STEVENS v. CHOWN, STEVENS v. CLARK*, [1901] 1 Ch. 894; 70 L. J. Ch. 571; 84 L. T. 796; 65 J. P. 470; 49 W. R. 460; 17 T. L. R. 313.

Annotations:—*Consd. A.-G. v. De Winton*, [1906] 2 Ch. 106. *Apprvd. Fraser v. Fear*, No. 2 (1912), 57 Sol. Jo. 29. *Refd. Yorkshire Miners' Assocn. v. Howden*, [1905] A. C. 256; *Panagotis v. S.S. Pontiac*, [1912] 1 K. B. 74.

46. — — — — — Public Health Act, 1875 (c. 55).]—A local authority when draining their district under the powers of above Act & Private Street Works Act, 1892 (c. 57), have under sects. 15, 16 & 17 of above Act, a right to discharge surface water into a natural stream or watercourse or canal on land belonging to another person within their district, so long as such surface water is, as required by sect. 17, free from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity & quality of the water in such stream or watercourse.

Any damage caused by the proper exercise by the local authority of the right in question is a matter for compensation under sect. 308 of above Act, & forms no ground for an injunction against the local authority or for an action for damages by the owner of the land on which is the bed of the stream.—*DURRANT v. BRANKSOME URBAN DISTRICT COUNCIL*, [1897] 2 Ch. 291; 66 L. J. Ch. 653; 76 L. T. 739; 46 W. R. 134; 13 T. L. R. 482; 41 Sol. Jo. 621, C. A.

Annotations:—*Mentd. Croysdale v. Sunbury-on-Thames U. C.*, [1898] 2 Ch. 515; *Sykes v. Sowerby District Council* (1899), 80 L. T. 392; *A.-G. v. Birmingham, Tame & Rea District Drainage Board*, [1908] 2 Ch. 551; *Dell v. Chesham U. D. C.*, [1921] 3 K. B. 427; *Hesketh v. Birmingham Corpn.*, [1924] 1 K. B. 260.

47. — — — — — Bye-law.]—Defts. were the owners of a triangular piece of land within pl'tfs.' borough. Two sides of the triangle abutted upon public highways within the borough. Defts. in pursuance of a building scheme, erected houses on their land fronting the highways. Pl'tfs. alleged that defts. were laying out the highways as "new streets" which did not comply with the requirements of the borough bye-laws as to width, & they claimed, first, an injunction, & secondly, a declaration that pl'tfs. were entitled to remove or pull down any work begun or done by defts. in contravention of the bye-laws. The bye-laws which were framed under Public Health Act, 1875 (c. 55), prescribed a penalty for infringement, to be recovered by summary proceedings, & provided that pl'tfs. might, subject to any statutory provision in that behalf, remove, alter or pull down any work begun or done in contravention of the bye-laws:—*Held*: bye-laws could not be enforced by action for injunction, but only by special remedies thereby provided, or by way of information by the A.-G.—*DEVONPORT CORPN. v. TOZER*, [1902] 2 Ch. 182; 71 L. J. Ch. 754; 86 L. T. 612; 18 T. L. R. 489; *affd.*, [1903] 1 Ch. 759, C. A.

Annotations:—*Folld. A.-G. v. Pontypridd Waterworks Co.*, [1908] 1 Ch. 388. *Refd. A.-G. v. Wimbledon House Estate Co.*, [1904] 2 Ch. 34; *Watson v. Hythe B. C.* (1906), 4 L. G. R. 340; *Russell v. Midhurst R. D. C.* (1908), 98 L. T. 530. *Mentd. Fellowes v. Sedgley U. D. C.* (1906), 70 J. P. 412; *A.-G. v. Gibb*, [1909] 2 Ch. 265; *A.-G. v. Dorin*, [1912] 1 Ch. 369.

48. — — — — — Public Health (Building in Streets) Act, 1888 (c. 52).]—Deft. had erected a building after submitting plans of it to the urban

there were special circumstances in the case requiring the interference of the Ct., he thought pl'tfs. should have resorted to the remedy provided by sect. 92, & the injunction ought not to have been granted.—*WEST v.*

JOHNSTON SCHOOL DISTRICT TRUSTEES (1882), 22 N. B. R. 56.—*CAN.*

44 i. — — — — — Unless expressly provided—Private Act.]—Incompetent to interdict proceedings under a statute

for a public work within the powers of the Act, which only provided the remedy of indemnification for loss sustained.—*DOUGLAS (LORD) v. DUNDEE & NEWTYLE RY. CO.* (1827), 6 Sh. (Ct. of Sess.) 329.—*SCOT.*

Sect. 4.—Ouster of jurisdiction: Sub-sects. 1 & 2.
Part III. Sect. 1: Sub-sect. 1.]

authority. The plans were certified by the borough surveyor as being in order, & were afterwards approved, subject to a slight amendment, by a resolution passed by a committee of the corpn. of L., the urban authority for the district. Subsequently various proceedings of the committee, including the resolution as to the plans, were approved & adopted at a general meeting of the corpn. A minute to this effect was entered in the minute book of the corpn., approved at the next general meeting, & thereupon signed by the chairman of the corpn. The new erections projected beyond the building line, & pltf., the owner of an adjoining house, brought this action, alleging that no "written consent" of the urban authority within sect. 3 of above Act had been obtained; & that, in consequence, the erection constituted a breach of such sect. He maintained that he had suffered special damage thereby, & had therefore a private right of action; he claimed damages & a mandatory injunction against deft. :—*Held*: upon the true construction of sect. 3 of above Act only one statutory offence was thereby created for which a fine, to be exacted by the urban authority, was constituted the appropriate penalty. The exaction of this fine was therefore the sole remedy, & pltf. had no cause of action.—*MULLIS v. HUBBARD*, [1903] 2 Ch. 431; 72 L. J. Ch. 593; 88 L. T. 661; 67 J. P. 281; 51 W. R. 571; 1 L. G. R. 769.

Annotation:—*Refd.* *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539.

49. ——— Salmon Fisheries Acts, 1861 (c. 109), 1873 (c. 71).]—The lessee of a dwelling-house & premises & of certain rights of fishing attached to the demised premises sued the occupiers of a mill on the stream in which the fishing rights were enjoyed in respect of certain acts which pltf. alleged obstructed the free passage of salmon to & from the sea & destroyed large numbers of young fish. An objection was taken that an action for damages for the injury to the fishery & for an injunction restraining the continuance or repetition of the acts complained of would not lie in view of the penalties imposed by above Acts:—*Held*: the legislature had provided means for enforcing the prohibitions in above Acts, & that was the proper mode to deal with such a case as the present; &, although an illegal act causing special & peculiar damage to the property of another person might justify an action to abate the mischief, it could not be said that any & every person having fishery rights in the river in question could maintain an action against the mill owners, but some special & definite damage clearly attributable to the illegal act must be established.—*FRASER v. FEAR* (1912), 107 L. T. 423; 57 Sol. Jo. 29, C. A.

Compulsory purchase of land.

See COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 136, 137, Nos. 232–243, 245.

SUB-SECT. 2.—PARTICULAR TRIBUNAL PROVIDED BY STATUTE.

50. Whether jurisdiction ousted—Proceedings before magistrates.]—Under an Act of Parliament,

PART II. SECT. 4, SUB-SECT. 2.

a. Whether jurisdiction ousted.]—Action by an improvement co. & an individual against the board of education, H., J., & S., for an injunction

restraining defts. from proceeding with an arbitration to fix the value of lands of pltf. which defts. desired to expropriate for a school site, & from taking possession of the lands, & for a declaration that defts. had no warrant

any owner of mines, etc., lying within a certain distance of a canal, was authorised to apply to the comrs. of the navigation, to have a railway made over the lands of other proprietors, intervening between them & the canal, for the purpose of communicating with it; & if it should appear to the major part of the comrs., that such road was fitting or necessary, it was to be lawful for the proprietor of the mine, etc., to make it, subject to certain restrictions expressed in the Act; & it was provided, that if any person should think himself aggrieved by anything done in pursuance of the Act, he might within six calendar months appeal to the quarter sessions. Under this Act, the comrs., by their award, authorised deft. to make a railway over the lands of pltf. Pltf. having filed his bill to restrain the execution of the work, on the ground that the railway was not fitting & necessary, an injunction was granted.—*DUDLEY v. HORTON* (1826), 4 L. J. O. S. Ch. 104.

51. ———.]—*ARMITSTEAD v. DURHAM*, No. 154, *post*.

52. ———.]—Where the legislature has pointed out a special tribunal for determining a question, as a general rule no other ct. ought to restrain the proceedings before it; but where the question has come before another ct. in independent proceedings in which it is necessary to decide the whole matter between the parties, the ct. may in such case restrain the proceedings elsewhere by injunction in order to save expense.

A dispute having arisen between defts., who were a local authority, & pltf. about a drain which pltf. had interfered with, defts. gave notice to pltf. that they would enter on his land & reinstate the drain; but they afterwards abandoned their intention, & instead took proceedings against him before the magistrate. Pltf. then brought an action against defts., claiming an injunction to restrain them from trespassing on his land, & from proceeding against him before the magistrate. In the statement of claim pltf. did not in terms allege that defts. threatened & intended to trespass on the land:—*Held*: as no intention to commit a trespass was proved or alleged, pltf. had not made out his case for an injunction against the trespass; & that being so, the ct. had no jurisdiction to restrain the proceedings before the magistrate.—*STANNARD v. ST. GILES, CAMBERWELL VESTRY* (1882), 20 Ch. D. 190; 51 L. J. Ch. 629; 46 L. T. 243; 30 W. R. 693, C. A.

Annotations:—*Consd.* *North London Ry. v. G. N. Ry.* (1883), 11 Q. B. D. 30. *Appl.* *Grand Junction Waterworks Co. v. Hampton U. C.*, [1898] 2 Ch. 331. *Consd.* *Re Connolly, Wood v. Connolly*, [1911] 1 Ch. 731. *Refd.* *Barlow v. St. Mary Abbott's, Kensington, Vestry* (1883), 31 W. R. 514; *Barrett v. Day, Day v. Foster* (1890), 43 Ch. D. 435; *Merrick v. Liverpool Corpn.*, [1910] 2 Ch. 449.

53. ———.]—*HAYWARD v. EAST LONDON WATERWORKS CO.*, No. 41, *ante*.

54. ———.]—The ct. will not interfere by way of injunction or declaration of right where the legislature has pointed out a mode of procedure before a magistrate; unless, it seems, in very special circumstances.—*GRAND JUNCTION WATERWORKS CO. v. HAMPTON URBAN COUNCIL*, [1898] 2 Ch. 331; 67 L. J. Ch. 603; 78 L. T. 673; 62 J. P. 566; 46 W. R. 644; 14 T. L. R. 467; 42 Sol. Jo. 571.

Annotations:—*Consd.* *St. James's Hall v. L. C. C.* (1900), 83 L. T. 98. *Appl.* *Devonport Corpn. v. Tozer*, [1902]

nor right to arbitrate & that the arbitration proceedings & award were irregular & void, & to set aside the award & avocate the registration thereof:—*Held*: the relief sought was included in School Sites Act, 1909

2 Ch. 182. *Folld. Merrick v. Liverpool Corp.*, [1910] 2 Ch. 449. *Reid. A.-G. v. Merthyr Tydfil Grdns.*, [1900] 1 Ch. 516; *Russell v. Midhurst R. D. Co.* (1908), 98 L. T. 530; *Burghes v. A.-G.*, [1911] 2 Ch. 139. *Mentd. A.-G. & Stourbridge District Council v. Rufford* (1899), 63 J. P. 232; *L. O. C. v. Wandsworth & Putney Gas Co.* (1900), 82 L. T. 562; *Elsdon v. Hampstead Corp.*, [1905] 2 Ch. 633; *R. v. Philbrick, County Court Judge, Ex p. Edwards* (1905), 53 W. R. 527; *Williams v. Weston-super-Mare U. D. C.* (1909), 74 J. P. 52; *Slimmonds v. Newport Abercarn Black Vein Steam Coal Co.*, [1920] 3 K. B. 131; *Russian Commercial & Industrial Bank v. British Bank for*

Foreign Trade, [1921] 2 A. C. 438; *Everett v. Griffiths*, [1924] 1 K. B. 941.

55. ———.]—The ct. will not interfere by way of injunction or declaration of right where the legislature has pointed out a mode of procedure before the magistrate, unless in very special circumstances.—*MERRICK v. LIVERPOOL CORPN.*, [1910] 2 Ch. 449; 79 L. J. Ch. 751; 103 L. T. 399; 74 J. P. 445; 8 L. G. R. 966.

Part III.—Interlocutory Injunctions.

SECT. 1.—DISCRETION OF COURT.

SUB-SECT. 1.—IN GENERAL.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 45.

56. *Circumstances of case.*—In no case does the ct. grant injunction, of course, till hearing.—*POTTER v. CHAPMAN* (1750), Amb. 98; 27 E. R. 61, L. C.; *previous proceedings*, 1 Dick. 146.

Annotations:—*Mentd. Mirehouse v. Rennell* (1833), 7 Bll. N. S. 241; *Walsh v. Lincoln (Bp.)* (1875), L. R. 10 C. P. 518.

57. ———.]—The ct., in dealing with interlocutory applications, will confine itself strictly to the immediate object sought, &, as far as possible, abstain from prejudging the question in the cause. Where property has been administered & applied without complaint according to a uniform course of management for a long series of years, the ct. will not, by an interlocutory order, disturb the possession upon the ground that such application is a breach of trust, unless it is perfectly clear that the party in whom the property is vested is a mere naked trustee, & has not, even to a limited extent, any of the rights or interests of an owner.

A motion for the appointment of a receiver of the estates vested in the Irish Society [& an injunction], at the instance of one of the London cos., claiming a beneficial interest in the income of the estates, was therefore refused.—*SKINNERS' CO. v. IRISH SOCIETY* (1835), 1 My. & Cr. 162; 40 E. R. 338, L. C.

58. ———.]—(1) A party is entitled to move to dissolve an injunction, if, from ambiguity in its

terms, he may under any construction of the order be prejudicially affected.

(2) It is the duty of a party asking for an injunction to bring under the notice of the ct. all facts material to the determination of his right to that injunction; & it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward.

Thus, where pltf. obtained an *ex p.* injunction on the facts stated in the bill, but other facts came out in deft.'s answer raising a question of law on which the right of pltf. to the injunction depended:—*Held*: the omission of pltf. to bring these facts under the notice of the ct. was of itself a sufficient ground for dissolving the injunction.

(3) Principles on which the Court acts on an application for an injunction to restrain a party from prosecuting a legal right.

Where justice cannot be done without it between the parties, the ct., notwithstanding the inconvenience, will grant the injunction in the first instance, & will not leave the party to any other course of proceeding to ascertain the legal right (*LORD LANGDALE*).—*DALGLISH v. JARVIE* (1850), 2 Mac. & G. 231; 2 H. & Tw. 437; 20 L. J. Ch. 475; 15 L. T. O. S. 341; 14 Jur. 945; 42 E. R. 89.

Annotations:—*Apld. R. v. Kensington Income Tax Comrs., Ex p. de Polignac*, [1917] 1 K. B. 486. *Generally, Mentd. London Assoc. v. Mansel* (1879), 11 Ch. D. 363; *Seaton v. Heath, Seaton v. Burnand*, [1899] 1 Q. B. 782; *Joel v. Law Union & Crown Insee.*, [1908] 2 K. B. 431.

59. ———.]—*Interference on appeal.*—The Ct. of Appeal will not interfere with the exercise of the discretion of the judge who has granted an injunction until the trial of the action.—*BAKER v. WHITE* (1884), 1 T. L. R. 64, C. A.

(c. 93), s. 20 (1), & therefore the action was not maintainable.—*SANDWICH LAND IMPROVEMENT CO. v. WINDSOR BOARD OF EDUCATION* (1912), 23 O. W. R. 142; 3 O. W. N. 1150; 4 O. W. N. 112; 6 D. L. R. 854.—CAN.

f. ———.]—The Canada Temperance Act, R. S. C., 1906 (c. 152), provides its own code of procedure, & the provision which it makes affords the only way in which by a judicial proceeding the result of the voting can be inquired into.—*MURDOCK v. KILGOUR* (1914), 19 D. L. R. 878; 7 O. W. N. 165; 8 O. W. N. 144; 33 O. L. R. 412.—CAN.

PART III. SECT. 1, SUB-SECT. 1.

56 i. *Circumstances of case.*—If a person whose rights were injuriously affected were refused compensation, he might be compelled to bring an action for injunction. But even in that case the ct. would probably not interfere with the construction of the works by an interlocutory injunction if the railway co. acted reasonably, & were willing to put the matter in train for the assessment of compensation. As a general rule, it would only be right to grant an injunction where the

company was acting in a high-handed and oppressive manner, or guilty of some other misconduct.—*PARKDALE CORPN. v. WEST* (1887), 3 T. L. R. 802.—CAN.

56 ii. ———.]—Affidavits were conflicting at the time the application for an interlocutory injunction was made & allowed:—*Held*: the granting of the injunction was in the discretion of the judge, & that his discretion was rightly exercised.—*PARTRIDGE v. NORTH SYDNEY TOWN* (1893), 25 N. S. R. 557.—CAN.

56 iii. ———.]—On a motion for an interlocutory injunction, the ct. should be satisfied that there is a serious question to be determined, & that under the facts there is a probability that pltf. will be held entitled to relief.—*BURDEN v. HOWARD* (1903), 2 N. B. Eq. Rep. 461.—CAN.

56 iv. ———.]—The granting of such an injunction, under Code of Civil Procedure, s. 493, is a matter of judicial discretion.—*SUBBA NAIDU v. HAJI BADSHA SAHIB* (1902), 1 L. R. 26 Mad. 168.—IND.

59 i. ———.]—*Interference on appeal.*—The granting of an interlocutory injunction is largely in the discretion

of the judge, which ought not to be interfered with by the Ct. of Appeal, except for some very grave & powerful reason which did not exist in this case.—*BANK OF MONTREAL v. ROBERTSON, THORPE v. ROBERTSON* (1892), 31 N. B. R. 653.—CAN.

g. *Necessity for application.*—An injunction cannot be granted where none is prayed for.—*REID v. GIBSON*, 17 C. L. T. Occ. N. 226.—CAN.

h. *Where damages appropriate remedy.*—*Interim* injunction was refused; pltf. co. having a remedy in damages, if its business should be injured by the operations of deft. co.—*BRITISH COLUMBIA EXPRESS CO. v. GRAND TRUNK PACIFIC RY. CO.* (1914), 28 W. L. R. 460.—CAN.

k. *Where other adequate remedy provided.*—A party who brings an action against a municipality for a declaration that he is not liable for a tax imposed upon him, & for an injunction to restrain the attempted levy of such tax, is not entitled to an interim injunction to restrain such levy, as he has another adequate remedy, namely, to pay the tax under protest & sue to recover it back.—*DOMINION EXPRESS CO. v. CITY OF*

Sect. 1.—Discretion of court: Sub-sects. 1 & 2, A. & B.]

60. Court will not decide question of title.]—*CROSSE v. DUCKERS*, No. 328, *post*.

SUB-SECT. 2.—PRINCIPLES GOVERNING EXERCISE OF DISCRETION.

A. Equitable Right Free from Doubt.

61. General rule.]—It was the general rule of the ct., that where a plain equity set forth by the bill is set forth by the answer, but endeavoured to be avoided by another fact, the injunction shall always be continued till the hearing.—*ALLEN v. CROBCROFT* (1740), Barn. Ch. 373; 27 E. R. 684, L. C.

62. —.]—(1) Mode in which the ct. exercises its jurisdiction, where one work of compilation, such as an encyclopædia, copies matter from a preceding work of the same description.

(2) The ct. will interfere to protect copyright from piracy, at the suit of pltf.s. who appear to have a good equitable title, even though it should not be quite clear that their legal title is complete.—*MAWMAN v. TEGG* (1826), 2 Russ. 385; 38 E. R. 380, L. C.

Annotations:—As to (1) Consd. *Lewis v. Fullarton* (1839), 2 Beav. 6; *Bohn v. Bogue* (1846), 7 L. T. O. S. 277; *Jarrold v. Houlston* (1857), 3 K. & J. 708. *Refd.* *Sweet v. Maugham* (1840), 4 Jur. 479; *Spiers v. Brown* (1858), 6 W. R. 352; *Tinsley v. Lacy* (1863), 32 L. J. Ch. 535. *As to (2) Distd.* *Performing Right Society v. London Theatre of Varieties*, [1924] A. C. 1.

63. —.]—The right at law should not be moved without sufficient reason being shown to believe that this right is one which equity will finally vary, control or displace.—*CLAYTON v. A.-G.* (1834), 1 Coop. temp. Cott. 97; 47 E. R. 766, L. C.

Annotation:—Mentd. *Kirk v. R., A.-G. v. Kirk* (1872), L. R. 14 Eq. 558.

64. —.]—A Railway Act empowered the co. to make calls upon the shares, &, in case of non-payment, to sue the proprietor, or to declare the shares to be forfeited, prescribing certain

formalities to be observed in the declaration of such forfeiture. The Act also allowed an owner of shares, not in arrear for calls, to sell & transfer his shares with certain formalities; & it authorised the co. to buy up shares offered for sale. Pltf., a registered proprietor of one hundred shares, & a director of the co. offered to the other directors to forfeit & relinquish his shares; the directors accepted the offer, & a deed was prepared for the purpose by the solrs. of the co., & was executed by pltf. None of the formalities required by the Act for the forfeiture or sale & transfer of shares, were complied with. In Aug. 1837, pltf. ceased to be a director of the co. In the same month, a call was made on the shareholders of the co.; & in May, 1838, a subsequent call was made. In Aug. 1838, the co. required pltf. to pay the whole of the calls on his shares; &, on his default to do so, they, in Dec. 1838, commenced an action at law against him for the amount of such calls. Pltf. filed his bill, & obtained the common injunction, which was extended to stay trial of the action. The co. obtained the order *nisi* to dissolve, on putting in their answer. Upon cause being shown, the judge continued the injunction:—*Held*: (1) the ct. cannot, upon an alleged equity, interfere with an admitted legal right, unless there be a manifest certainty that, at the hearing of the cause, pltf. will be entitled to relief; (2) the title to relief was not so clear as to justify the ct. in continuing the injunction, except upon the terms of pltf. giving judgment in the action, & paying the amount sued for into ct.—*PLAYFAIR v. BIRMINGHAM, BRISTOL & THAMES JUNCTION RY. CO.* (1840), 1 Ry. & Can. Cas. 640; 9 L. J. Ch. 253, L. C.

B. Exercise of Legal Right.

65. *Primâ facie* case sufficient.]—Probability of right is sufficient to sustain an interlocutory injunction.—*TONSON v. WALKER* (1752), 3 Swan. 672; 36 E. R. 1017, L. C.

Annotations:—Refd. *Dodsley v. Kinnersley* (1761), Amb. 403; *Tonson v. Collins* (1761), 1 Wm. Bl. 321; *Osborne v. Donaldson* (1765), 2 Edon. 327; *Millar v. Taylor* (1769), 4 Burr. 2303; *Albert v. Strange, A.-G. v. Strange* (1849), 2 De. G. & Sm. 652.

BRANDON (1909), 19 Man. L. R. 257.—CAN.

l. *Where title sub judice.*]—Interim injunction refused where title of party claiming was *sub judice*.]—*PALGRAVE MINING CO. v. McMILLAN* (1892), 25 N. S. R. 56.—CAN.

m. *Similar proceedings pending elsewhere.*]—Where the exchequer ct. was asked to grant an interim injunction to restrain an infringement of a patent of invention, & it appeared that similar proceedings had been previously taken in a provincial ct. of concurrent jurisdiction, which had not been discontinued at the time of such application being made, ct. refused the application.—*AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHER* (1897), 5 Exch. C. R. 384.—CAN.

n. *Period over which granted.*]—An interlocutory injunction order will only be granted over an interim; & an order final in form & effect, though reserving liberty to the deft. to move to vacate it, will be set aside or varied.—*CLINTON v. SELLARS* (1908), 6 W. L. R. 788; 1 Alta. L. R. 129.—CAN.

o. *Solicitors of parties in same district—Jurisdiction of local judge.*]—Where the solrs. for both parties reside in the same city the local judge has jurisdiction to grant an injunction until the trial.—*DOUGALL v. HUTTON*, 19 C. L. T. Occ. N. 190.—CAN.

p. *Where result of an appeal l.*]—The equity ct. has no

jurisdiction to restrain proceedings at law pending an appeal to the Privy Council on the mere grounds that they are, in the opinion of the primary judge, reasons for thinking it doubtful whether the decision at law will be sustained on the appeal, & that, unless the proceedings be restrained, applt., though successful, may, through the interim acts of resp., lose the fruits of victory. To justify an injunction in such circumstances, there must be shown some ground of equity outside of, or contrary to, the legal rights of the parties.—*BROWN v. PATTERSON* (1883), 4 N. S. W. L. R. 1.—AUS.

q. *Injunction granted by subordinate judge—Whether binding on district judge.*]—*AMIR DULHIN (alias MAHOMDIJAN) v. ADMINISTRATOR GENERAL OF BENGAL* (1895), 1 L. R. 23 Calc. 351.—IND.

r. *Pending decision on facts by jury.*]—As by the practice in this colony issues of fact in actions for specific relief are determined by a jury, & not by the judge:—*Semble*: in such actions, wherever the declaration contains allegations essential to pltf.'s right to relief, which involve an issue of fact, an *interim* injunction ought to issue until that fact be decided by a jury, provided always that there be, in the opinion of the ct., sufficient ground apparent on the face of the declaration for sustaining the injunc-

tion until the hearing or trial of the disputed issues.—*MASONIC HALL CO., LTD. v. HARDWICK, FENN & HUDSON* (1893), 1 J. R. 93.—N.Z.

t. *Pending amendment of pleadings.*]—Although the facts appeared to establish a *primâ facie* case of illegality which would be a ground for refusing relief, the proper course, in view of the fact that the illegality had not been pleaded as a defence was to grant an injunction until further order of the ct., reserving to defts. power to move to vary or discharge the order, & thus bring up the question of illegality for further consideration.—*WILSON MALT EXTRACT CO., LTD. v. WILSON*, [1919] N. Z. L. R. 659.—N.Z.

PART III. SECT. 1, SUB-SECT. 2.—A.

61 l. *General rule.*]—*MINNESOTA & ONTARIO POWER CO. v. RAT PORTAGE LUMBER CO.* (1912), 20 O. W. R. 876; 3 O. W. N. 502; 1 D. L. R. 95.—CAN.

PART III. SECT. 1, SUB-SECT. 2.—B.

a. *Primâ facie* right sufficient.]—Where an *interim* injunction had been granted restraining applt. from trespassing or mining upon land covered by the private gold lease application of resp., who under New South Wales Mining on Private Lands Act, 1894, had obtained a miner's right & authority, & had made application not yet granted at date of suit for a twenty years' lease:—*Held*: resp., having a

66. —.]—It is not necessary for a party who seeks to continue an injunction to the hearing, to show an indefeasible right to the decree prayed by the bill.

Where, therefore, assignees of bkpt. sought a specific performance of an agreement for a lease, against a party who was herself a lessee, & restrained from assigning without the consent of the lessor in writing thereto obtained; the ct. continued the injunction to restrain proceedings at law; there being a probability of obtaining the consent of the lessor to the assignment.—*POWELL v. LLOYD* (1827), 1 Y. & J. 427.

Annotation:—*Refd.* *Crosbie v. Tooke* (1833), 1 My. & K. 431.

67. —.]—(1) The ct. possesses, & will exercise, jurisdiction over a bottomry bond in a case of fraud; & will, for that purpose, restrain proceedings upon the bond in the Admlty. Ct., by injunction.

(2) It is not necessary for the purpose of supporting an interlocutory injunction of that kind, that the ct. should find a case which would entitle pltf. to relief at all events; it is sufficient if the ct. finds, upon the evidence then before it, a case which makes the transaction a proper subject of investigation in a ct. of equity.—*GLASCOTT v. LANG* (1838), 3 My. & Cr. 451; 2 Jur. 909; 40 E. R. 1000; *sub nom.* *THE MARGARET OGILVIE*, *GLASCOTT v. LANG*, 3 L. T. 824, L. C.

68. —.]—*HILTON v. GRANVILLE* (LORD), No. 1418, *post*.

69. —.]—*SHREWSBURY & CHESTER RY. CO. v. SHREWSBURY & BIRMINGHAM RY. CO.*, No. 127, *post*.

70. —.]—(1) On a motion for an injunction as to a matter merely pecuniary, pltf. cannot succeed without satisfying the ct., not merely that there is a case to be tried, but that there is some probability of the bill not being dismissed at the hearing.

(2) An information to restrain a municipal corpn. from applying the borough fund or raising a rate for the purpose of opposing a bill in Parliament, the object of which was to interfere with the sewage & drainage of the town:—*Held*: not a suit in which success was sufficiently probable to entitle the relator to an interlocutory injunction. *Semble*: if a corpn. is about to apply the borough

definite statutory right to apply for a lease, had a *locus standi* to apply for an injunction which should be maintained till discharged by the ct.—*CROUDACE v. ZOBEL*, [1899] A. C. 258.—AUS.

b. —.]—Where pltf. is in possession of land, & shows a *prima facie* right to it, & it is not clear that there is any *bond fide* dispute about the boundaries, he has sufficient title to sustain an injunction to prevent the overflowing of the land.—*WEEKS v. DODDS* (1869), N. B. Dig. 647.—CAN.

c. —.]—Pltf., in consideration of \$25 paid by deft., executed in his favour a lease of a small plot of land, at a yearly rent of one cent if demanded, with the right on the part of deft. to remove all buildings at any time during the lease. The lease contained no covenants on the part of the lessee other than those to pay rent & to pay taxes, & it was silent as to any right on the part of the lessee to bore for oil:—*Held*: *prima facie*, the lessee had not the right to bore for oil, & having done so & commenced operations in pumping crude oil, an injunction was granted to restrain the further removal of oil from the premises until the hearing of the cause.—*LANCEY v. JOHNSTON* (1881), 29 Gr. 67.—CAN.

d. —.]—As pltf. had established a *prima facie* case in regard to the rights they claimed, there was jurisdiction to interfere by way of injunction pending the determination of the question at the trial, & an injunction was granted, upon a consideration of the balance of convenience, in favour of pltf.—*HAMILTON & MILTON ROAD CO. v. RASPBERRY* (1887), 13 O. R. 466.—CAN.

e. —.]—The court generally requires three things to be shown before granting an interlocutory injunction. There must be a strong *prima facie* case that pltf. will succeed at the hearing. There must be some wrong suffered or threatened not sufficiently or appropriately to be covered by a money payment. The preponderance of convenience must be in favour of the injunction.—*JONES v. VICTORIA CITY CORPN.* (1890), 2 B. C. R. 8.—CAN.

f. —.]—It is not necessary to support an interlocutory injunction, that the ct. should find a case which would entitle the pltf. to relief at all events.—*BANK OF MONTREAL v. ROBERTSON, THORPE v. ROBERTSON* (1892), 31 N. B. R. 653.—CAN.

g. —.]—*WRIGHT v. WRIGHT* (1892), 31 N. B. R. 476.—CAN.

fund or to raise an illegal rate, an application ought to be made to the Ct. of Q. B.—*A.-G. v. WIGAN CORPN.* (1854), 5 De G. M. & G. 52; 23 L. J. Ch. 429; 23 L. T. O. S. 43; 18 J. P. 245; 18 Jur. 299; 2 W. R. 308; 43 E. R. 789, L. JJ.

Annotations:—*Generally, Refd.* *Ollerenshaw v. Harrop* (1874), 9 Ch. App. 480. *Mentd.* *Bateman v. Ashton-under-Lyne Corpn.* (1858), 3 H. & N. 323; *R. v. Sheffield Corpn.* (1871), L. R. 6 Q. B. 652; *A.-G. v. Brecon Corpn.* (1878), 10 Ch. D. 204; *Cleverton v. St. Germain's Union R. S. A.* (1886), 56 L. J. Q. B. 83; *R. v. Brighton Corpn., Ex p. Shoesmith* (1906), 4 L. G. R. 1104.

71. —.]—It is clear that the ct. ought not to grant an injunction unless pltf. makes out a *prima facie* case (*BRUCE, J.*).—*BROWN v. STOCK EXCHANGE COMMITTEE* (1892), 30 Sol. Jo. 752.

72. —.]—Pltf. demised to deft. certain quarries of hard & soft limestone, with full power & authority to work the quarries; & deft. covenanted not to assign, demise, or part with the mines, powers, authorities, & premises, or any part thereof, for the whole or any part of the term. There was a right of re-entry for breach of covenant. Deft. sold to certain purchasers marl to be gotten by them from the lands included in the demise, & the purchasers in pursuance thereof worked the marl & took it away:—*Held*: pltf. had made out a *prima facie* case of breach of covenant, & he was *prima facie* entitled to an interim injunction until the trial of the action to restrain the further working of the quarries.—*MOSTYN (LORD) v. MANGER* (1901), 17 T. L. R. 281, C. A.

73. Where legal right doubtful — Jurisdiction exercised with caution.]—The principles upon which the ct. acts in granting or refusing an injunction, where the legal right of pltf. as against the deft. is open to doubt.

When this ct. is applied to, if there be doubt, it becomes the ct. to be very cautious in the exercise of its equitable jurisdiction; & this for two reasons, first, because, if the legal title fails, the ct. has interfered without cause; & secondly, & this is the principal reason, because there is no comparison between the error in refusing & that in granting an injunction, for, if granted, it does more injury to deft. than not granting it can possibly cause to pltf. (*LORD COTTENHAM, C.*).—*ELECTRIC TELEGRAPH CO. v. NOTT* (1847), 2 Coop. temp. Cott. 41; 8 L. T. O. S. 529; 11 Jur. 157; 47 E. R. 1040, L. C.

h. —.]—Upon motion to dissolve an injunction retaining property in dispute *in statu quo, pendente lite*, it is not necessary in order to maintain the injunction for the ct. to inquire further into the rights of the parties, if it appears upon the affidavits that pltf. has made, upon his own showing, a good case for the interference of the ct., & that there is upon all the facts before the ct., a reasonable prospect of his succeeding at the trial.—*WARD & CO. v. CLARK & HENNIGER* (1895), 3 B. C. R. 356.—CAN.

k. —.]—If a right at law is clearly or fairly made out, it is the duty of the ct. to interfere by interlocutory injunction.—*ELLIOT v. HATZIO PRAIRIE, LTD.* (1912), 21 W. L. R. 897; 6 D. L. R. 9.

73 i. Where legal right doubtful — Jurisdiction exercised with caution.]—As appct.'s legal right was not clear, & as serious loss & public inconvenience would necessarily result from granting the order, while no irreparable loss would result from refusing it, the interlocutory injunction should not have been granted.—*DWYRE v. OTTAWA CORPN.* (1898), 25 A. R. 121.—CAN.

l. —.]—A judgment creditor has a right to sell under execution an alleged right that his debtor has in

Sect. 1.—Discretion of court: Sub-sect. 2, B. & C.]

74. ———.]—A foreign author, while resident in this country published a work in the first instance here. An edition of the work being afterwards published at Frankfort on the Maine, copies of it were introduced into this country & sold by a London bookseller. The ct., at the instance of the author & his publishers, granted an injunction to restrain the sale of these copies, pltf. undertaking to bring an action if deft. desired it.

The question of the legal right being in doubt, is a matter for the serious attention of the ct., & one to which it is right that weight should be given; but it is not a matter which renders it incumbent on the ct. to refuse the injunction. It must be guided by a discretion exercised according to the exigencies & the nature of each particular case (BRUCE, V.-C.).—OLLENDORFF v. BLACK (1850), 4 De G. & Sm. 209; 20 L. J. Ch. 165; 16 L. T. O. S. 257; 14 Jur. 1080; 64 E. R. 801.

Annotation:—Mentd. Jefferys v. Roosey (1854), 4 H. L. Cas. 819.

75. ———.]—A railway co. contracted with another for the use of the line of the latter for a term, at graduated tolls, according to the tonnage carried, which were to be a charge on the tolls & dues of the former co. The former co. had no express parliamentary power thus to charge their tolls:—Held: the charge was of too doubtful legality to be enforced by an injunction to restrain the former co. from paying a dividend to its share-

holders until the sums due upon the agreement were provided for, no case being made out showing a probability of there being no fund forthcoming to answer the demand at the hearing.—SOUTH YORKSHIRE RY. & RIVER DUN CO. v. GREAT NORTHERN RY. CO. (1853), 3 De G. M. & G. 576; 22 L. J. Ch. 761; 1 W. R. 203; 43 E. R. 226, L. JJ.

76. Legal right sought to be restrained—Duty of plaintiff to show substantial grounds against its existence.]—On a bill to restrain the exercise of a legal right, it is the duty of pltf. to satisfy the ct. that there are substantial grounds for doubting the existence of the legal right.—SPARROW v. OXFORD, WORCESTER & WOLVERHAMPTON RY. CO. (1851), 9 Hare, 436; 18 L. T. O. S. 116; 68 E. R. 580; on appeal (1852), 2 De G. M. & G. 94, L. JJ.

Annotations:—Mentd. Salisbury v. G. N. Ry. (1852), 17 Q. B. 840; Pinchin v. London & Blackwall Ry. (1854), 1 K. & J. 34; Spackman v. G. W. Ry. (1855), 1 Jur. N. S. 790; Hedges v. Met. Ry. (1860), 28 Beav. 109; Haynes v. Haynes (1861), 1 Drew. & Sm. 426; St. Thomas' Hospital v. Charing Cross Ry. (1861), 1 John. & H. 400; Reddin v. Metropolitan Board of Works (1862), 4 De G. M. & J. 532; Furniss v. Mid. Ry. (1868), L. R. 6 Eq. 473.

77. Preservation of property—Till rights determined.]—Fraud by making a lease after a feoffment, & before livery & seisin. The bill set forth, that G., one of defts., in consideration of £286, did bargain & sell unto pltf. certain lands in the bill mentioned; & made unto

certain land; & a party in possession, & claiming the land, cannot restrain the creditor from selling, & thereby acquiring a *locus standi* to contest the title.—CASE v. PALMER (1870), 2 Han. 183.—CAN.

m. ——— Patent.]—In an action for an infringement of a patent, an application under the C. L. P. Act for an injunction to restrain deft. was refused, the patent being very recent, & there being conflicting affidavits as to the rights of pltf. to it. Pltf. must establish his title at law before he would be entitled to an injunction.—BONATHAN v. BOWMANVILLE FURNITURE MANUFACTURING CO. (1870), 5 P. R. 195.—CAN.

n. ——— Trade mark.]—In an action of damages for infringement of trade marks in which pursuer concluded also for interdict, a motion was made for *interim* interdict under the conclusion for interdict. Motion referred on the ground that the summons was framed on the footing that pursuer should establish his right before obtaining interdict.—GREEN v. SHEPHERD (1866), 4 Macph. (Ct. of Sess.) 1028; 38 Sc. Jur. 523.—SCOT.

o. ———.]—Upon a conviction for a forcible entry an order for restitution is usually awarded in favour of the party dispossessed, irrespective of the question of title, but where redress is sought by a civil action the title of pltf. must be considered, & the ct. will not generally investigate it upon an interlocutory proceeding, such as an application for an interlocutory injunction.—TORONTO BREWING & MALTING CO. v. BLAKE (1883), 2 O. R. 175.—CAN.

p. ———.]—The distinction between a case in which a temporary injunction may be granted & a case in which a receiver may be appointed is that, while in either case it must be shown that the property should be preserved from waste or alienation in the former case it would be sufficient if it be shown that pltf. in the suit has a fair question to raise as to the existence of the right alleged; while

in the latter case a good *prima facie* title has to be made out.—CHANDIDAT JHA v. PADMANAND SINGH (1895), 1 L. R. 22 Cal. 459.—IND.

q. Legal right sought to be restrained.]—Interdict, till a title was made up, granted against a party claiming a right by conveyance to an heritable bond, with a power of sale, & who had intimated his intention to sell.—M'DOWALL v. MILLIGAN (1825), 4 Sh. (Ct. of Sess.) 182.—SCOT.

r. Where no legal right.]—SALTER v. EVERSON (1913), 24 O. W. R. 757; 4 O. W. N. 1457; 11 D. L. R. 832.—CAN.

t. Where garnishee & attachment proper remedies.]—Pltf. may not have, before judgment, an *interim* injunction to restrain a deft. from dealing with property; his proper remedy is by way of garnishee & attachment.—PACIFIC INVESTMENT CO. v. SWAN (1898), 3 Terr. L. R. 125; 20 C. L. T. 152.—CAN.

PART III. SECT. 1, SUB-SECT. 2.—C.

77 i. Preservation of property—Till rights determined.]—Where there is in dispute a difficult question of title to auriferous land, the ct. should, on an interlocutory application, endeavour to preserve the gold for the party ultimately succeeding.—BAND OF HOPE & ALBION CONSOLS v. YOUNG BAND EXTENDED Q. M. CO. (1882), 8 V. L. R. 120.—AUS.

77 ii. ———.]—Where pltf. has exercised a definite statutory right to apply for a lease, he is entitled to an injunction to restrain operations which may have the effect of injuring, or destroying the subject-matter of his application while it is still pending.—CROUDACE v. ZOBEL (1898), 68 L. J. P. C. 47.—AUS.

77 iii. ———.]—WOLFE v. JONES, WOLFE v. HART, unreported. Filed Supreme Ct., at Halifax, in cause 13373a.—CAN.

77 iv. ———.]—There are many cases in which the ct. will interfere by injunction to maintain things in

statu quo pendente lite, not only where pltf.'s title to relief is unquestioned, but even where it is doubtful; provided there is a substantial question to be settled.—A.-G. v. MCLAUGHLIN (1849), 1 Gr. 34.—CAN.

77 v. ———.]—Where a strip of land was vested in pltf. (according to the report of commissioners appointed to run the line between two townships), but deft. claimed it, & had applied to the ct. of Q. B. to quash the report, pending the application deft. commenced to fell the timber, alleged to be valuable, growing on the strip. The ct. restrained such felling until a decision of the motion pending before the Q. B.—CHRISTIE v. LONG (1852), 3 Gr. 630.—CAN.

77 vi. ———.]—WEEKS v. DODDS (1869), N. B. Dig. 647.—CAN.

77 vii. ———.]—CARLETON BRANCH RY. CO. v. GRAND SOUTHERN RY. CO. (1882), 21 N. B. R. 339.—CAN.

77 viii. ———.]—Deft. N. being indebted to defts. C. & S., they commenced an action against him to recover the amount due. An acceptance of service was given, appearance entered, declaration & pleas filed, an order to strike out the pleas obtained, judgment signed and execution issued all on the same day. Pltf. had also obtained judgment & execution against N., & now filed their bill to set aside the judgment & execution obtained by defts. C. & S. On an application to continue an *interim* injunction to restrain proceedings upon the judgment of defts. C. & S.:—Held: the injunction should be continued till the hearing.—WHITHAM v. COOPER (1884), 2 Man. L. R. 11.—CAN.

77 ix. ———.]—An *ex p.* order for an injunction to last for a few days, & until a motion to continue it had been disposed of, was obtained upon a misstatement of a fact material to one of the grounds upon which, in the bill, pltf.'s right was founded. Upon an appln. to continue the injunction:—Held: having in view the great importance to pltf. of maintaining the

him a deed of feoffment, & a letter of attorney, to make livery & seisin; & before livery, made a lease to C., who knew of the bargain, & he leased to B., who knew also of the bargain, & this appearing to this ct. to be true, an injunction was granted to pltf., until the cause should be heard & determined.—**IREBY v. GIBONE, CATLINE & BROWN** (1579), Cary, 82; 21 E. R. 44.

78. ———.]—A bill may be brought to be quieted & established in the enjoyment of a mine or colliery, before the right is established at law, for fear the mine should be ruined in the mean time, & a proper remedy can be had in no other ct.—**FALMOUTH (LORD) v. INNYS** (1729), Mos. 87; 25 E. R. 287, L. C.

79. ———.]—On an interlocutory application for an injunction, the ct. will only act prospectively, & with a view to keep matters *in statu quo*, & will not, unless in a very special case, grant the order in such a form as indirectly to compel some positive act to be done by the party enjoined.—**BLAKEMORE v. GLAMORGAN-**

status quo & the absence of damage to deft., the injunction might be continued, notwithstanding the misstatement in respect of a portion of the property in question upon an equitable ground not affected by the fact misstated; but pltf. was ordered to pay the costs of the motion.—**WINNIPEG & HUDSON'S BAY CO. v. MANN** (1890), 6 Man. L. R. 409.—**CAN.**

77 x. ———.]—In a case of very special & exceptional circumstances, & to preserve the property in dispute, a party in an adverse action, who had obtained judgment at the trial, may, after appeal has been brought, be enjoined from persisting in his application for, or from obtaining a certificate of improvements pending such appeal. An undertaking not to proceed further until the trial of the action is observed, of improvements pending such appeal, although proceedings are taken before the formal order or decree is drawn up, but after judgment delivered.—**DUNLOP v. HANEY** (1899), 1 M. M. Cas. 344; 7 B. C. R. 300.—**CAN.**

77 xi. ———.]—On the application of pltf., who alleged that defts.' railway was not commenced within two years, that no map or plan & profile of the whole line of railway had been prepared & deposited in the department of the Minister of Railways, & that the work being done by defts. was not authorised & was not being prosecuted in good faith under their charter, but was really for the benefit of G. Co., so that it might extend its railway system, which lies south of the international boundary, into British Columbia, injunctions were granted restraining until the trial of the action defts. from continuing in possession & proceeding with the expropriation of the land of pltf. hotel co., & also from taking any proceedings toward effecting the proposed crossing of the right of way of pltf. ry. co. on the ground that there were several points of importance which should be decided at the trial.—**YALE HOTEL CO. v. VANCOUVER, VICTORIA & EASTERN RY. & NAVIGATION CO., GRAND FORKS & KETTLE RIVER RY. CO. v. VANCOUVER, VICTORIA & EASTERN RY. & NAVIGATION CO.** (1902), 9 B. C. R. 66.—**CAN.**

77 xii. ———.]—Pltf. had shown a sufficient *prima facie* case to entitle them to a preservation of their rights until the trial.—**PRICE v. RUGGLES**, [1917] 2 W. W. R. 1035.—**CAN.**

—.]—The object of an interlocutory or *interim* injunction is to preserve matters *in statu quo* until the case can be tried & to protect the party applying from irreparable injury.—**COHEN v. HAZEN AVENUE SYNA-**

GOGUE CONGREGATION (1919), 46 N. B. R. 152.—**CAN.**

77 xiv. ———.]—**BRAUMONT v. HARRIS** (1920), 28 B. C. R. 70.—**CAN.**

77 xv. ———.]—The ct., in granting an *ad interim* injunction, will first see that there is a *bona fide* contention between the parties, & then on which side, in the event of obtaining a successful result to the suit, will be the balance of inconvenience if the injunction do not issue, bearing in mind the principle of retaining immovable property *in statu quo*.—**GOMES v. CARTER** (1866), 1 Ind. Jur. N. S. 411.—**IND.**

77 xvi. ———.]—Pltf., who were in possession of certain premises, brought a suit to restrain deft. from selling a share in them which he had attached in execution of a decree upon a mtge. to him of that share, & to set aside the deed of mtge. According to pltf.' case, they were in possession under a decree of ct. obtained upon a mtge. executed to them by the exor. of the will of the last proprietor under a power contained in the will, & the mtgors. to deft., who were the brother & the son of the testator, had no interest in the property at the time of their mtge. to deft. Pltf. applied for an *ad interim* injunction, & ct. granted the application.—**RUPIAL KHETTRY v. MAHIMA CHANDRA ROY** (1870), 5 B. L. R. 254.—**IND.**

77 xvii. ———.]—Pltf., who were in possession of certain premises brought a suit to restrain defts. from selling a share in them which he had attached in execution of a decree upon a mtge. to him of that share, & to set aside the deed of mtge. According to pltf.' case, they were in possession under a decree of ct. obtained upon a mtge. executed to them by the exor. of the will of the last proprietor under a power contained in the will, & the mtgors. to deft., who were the brother & the son of the testator, had no interest in the property at the time of their mtge. to the deft. Pltf. applied for an *ad interim* injunction, & the ct. granted the application.—**SREENARAIN CHUCKERBUTTY v. MILLER** (1810), 5 B. L. R. 254, n.—**IND.**

77 xviii. ———.]—A. obtained a decree against B. & others (Hindus), on a title of purchase from them, for possession of an undivided moiety of a dwelling-house, to the remaining moiety of which C. (a Hindu) alleged he was jointly entitled, & that he & his family were in possession. On A.'s proceeding to obtain execution of his decree, C. brought a suit, alleging that A. had obtained no title under his purchase, & praying for partition of

CANAL NAVIGATION (1882), 1 My. & K. 154; 2 L. J. Ch. 95; 39 E. R. 639, L. C.

Annotations:—**Distd. Taylor v. Davis** (1834), 4 L. J. Ch. 18. **Apld. Dawson v. Paver** (1847), 5 Hare, 415. **Fold. East Lancashire Ry. v. Hatterley** (1849), 8 Hare, 72. **Consd. Lumley v. Wagner** (1852), 1 De G. M. & G. 604. **Refd. Milligan v. Mitchell** (1833), 1 My. & K. 446; **Spencer v. London & Birmingham Ry.** (1838), 1 Ry. & Can. Cas. 159; **Cohen v. Wilkinson** (1849), 12 Beav. 138; **Ware v. Regent's Canal Co.** (1858), 3 De G. & J. 212; **Cardiff Corp'n. v. Cardiff Waterworks Co.** (1859), 33 L. T. O. S. 104; **Devonport Corp'n. v. Plymouth, Devonport & District Tram. Co.** (1884), 52 L. T. 161. **Mentd. R. v. Edge Lane** (1836), 4 Ad. & El. 723; **Lee v. Milner** (1837), 2 M. & W. 824; **Duncan v. Findlater** (1839), Macl. & Rob. 911; **R. v. Eastern Counties Ry.** (1839), 10 Ad. & El. 531; **Duncombe v. Levy** (1846), 11 Jur. 262; **Graham v. Birkenhead Lancashire & Cheshire Junction Ry.** (1850), 2 Mac. & G. 146; **R. v. L. & Y. Ry.** (1852), 22 L. J. Q. B. 57; **York & North Midland Ry. v. R.** (1853), 1 E. & B. 858; **Bostock v. North Staffordshire Ry.** (1856), 3 Sm. & G. 283; **Roberts v. Roberts** (1862), 3 B. & S. 183; **Baxendale v. G. W. Ry.** (1863), 14 C. B. N. S. 1; **Cubitt v. Maxse** (1873), L. R. 8 C. P. 704; **Taylor v. St. Helens Corp'n.** (1877), 6 Ch. D. 264; **Norton v. L. & N. W. Ry.** (1878), 9 Ch. D. 623; **R. v. French** (1878), 3 Q. B. D. 187; **A.-G. v. G. E. Ry.** (1879), 11 Ch. D. 449; **R. v. G. W. Ry., Ex p. Ruabon Brick & Terra Cotta Co.** (1893), 69 L. T. 443.

the property. On application for an *interim* injunction to restrain A. from executing his decree pending the partition suit, the ct. granted the application.—**ANANTNATH DEY v. MACKINTOSH** (1871), 6 B. L. R. 571.—**IND.**

77 xix. ———.]—Certain immovable property was attached in execution of a decree obtained by L. against N. A claim was thereupon put in by S. but his claim was refused, & he brought a suit as provided by Act VIII., 1859, s. 246, against L. to establish his right, & applied for & obtained an injunction under sect. 92 restraining L. from proceeding to execute his decree against the property in dispute. N. was subsequently made a party to the suit under sect. 73. From the order granting the injunction L. appealed to the High Ct.:—*Held*: this was not a proper case for the issue of an injunction under sect. 92. There was nothing to show that the property in dispute was in danger of being wasted, damaged, or alienated by L. nor was the property in his possession.—**JUTCHMEPUT SINGH v. SECRETARY OF STATE** (1873), 11 B. L. R. App. 27; 20 W. R. 11.—**IND.**

77 xx. ———.]—**MORAN v. RIVERS STEAM NAVIGATION CO.** (1875), 14 B. L. R. 352.—**IND.**

77 xxi. ———.]—**KIRPA DAYAL v. RANI KISHORI** (1887), 1 L. L. R. 10 All. 80.—**IND.**

77 xxii. ———.]—It is only in cases where property which it is essential should be kept in its existing condition during the pendency of the suit, is in danger of being wasted that the ct. ought to interfere.—**BEGG, DUNLOP & CO. v. SATISH CHANDRA CHATTERJEE** (1919), 1 L. L. R. 46; Calc. 1001.—**IND.**

77 xxiii. ———.]—**CLAVERING v. AGUIRE** (1880), 5 L. R. Ir. 97.—**IR.**

a. ———.]—*Issues already decided in other cases.*—An *interim* injunction will not be granted in aid of a pltf., to preserve the subject-matter of his action *in statu quo* long enough to enable him to obtain the decision of an appellate ct. on points already decided in other cases, against his contention, in cts. of first instance.—**WYLD v. MCMASTER** (1884), 4 O. R. 717.—**CAN.**

b. *Where no active interference.*—The office of an interlocutory injunction is simply to retain matters *in statu quo*. Where, therefore, the railway track of the Niagara Falls Suspension Bridge had been declared to be a public highway, & that an agreement that the same should be used by one railway exclusively was *ultra vires* the charter of the bridge co., the E. & N. R. W. co. moved to restrain the

Sect. 1.—Discretion of court: Sub-sect. 2, C. & D.]

80. ———.] — SAUNDERS v. SMITH, No. 106, *post*.

81. ———.] — The words of the Act are, that the co. of proprietors shall & may have power to purchase lands to them & their successors & assigns. If I were to dissolve the injunction the co. would be at the mercy of the lord. I should decide that the co. have no right, & can have no right against the lord. It is merely the common order on an injunction, to preserve the property until the right is determined, & I certainly shall not adjudicate on the right (LORD COTTENHAM, C.).—GRAND JUNCTION CANAL CO. v. DIMES (1838), 2 Jur. 1077, L. C.

Annotation:—Mentd. Dimes v. Grand Junction Canal Co. (1846), 9 Q. B. 469.

82. ———.] — Pltf. was a lessee for a term of twenty-one years of prebendal lands, there being reserved to the lessors the woods, underwoods, mines, quarries, seams of clay, with full & free authority & power to enter & cut down, & to dig, win, work, get & carry away same, with free ingress, egress, wayleave, & passage to & from same, or to or from any other mines, quarries, & seams of clay, on foot & on horseback, & with carts & all manner of carriages; & also all necessary & convenient ways, passages, conveniences, privileges, & powers whatsoever, for the purposes aforesaid, & particularly of laying, making, & granting waggon-ways in & over the demised premises, paying reasonable damages. The judge inclining to the opinion that the reservation did not enable the lessors to grant to a public co. a licence to make a railway for the purpose of conveying passengers & general merchandise, but was only intended to enable the lessors or their grantees to convey mineral produce & wood from the demised lands to or from adjacent lands, granted an injunction, restraining the lessors & their licencees from proceeding to make a railway for the former purpose, previous to the precise extent of the reservation being ascertained by the decision of a ct. of law. Upon affidavits filed by the licencees, stating, that the proposed railway was intended to be used for purposes & objects which should be held to be within the terms of the reservation; that the primary purpose of the railway was to convey mineral produce, & the scheme of general traffic a secondary object; & showing, that there was a considerable quantity of coal in the neighbourhood of the demised land, the injunction was dissolved:—*Held*: discharging the latter order & restoring the injunction, this being a question for a ct. of law, upon the construction of the reservation, the property ought to be protected, pending the necessary trial at law; & it was made a condition of granting the injunction, that pltf. should proceed to a trial of the question at the earliest possible opportunity.—FARROW v. VANSITTART (1839), 1 Ry. & Can. Cas. 602, L. C.

Annotation:—Reid. Bowser v. Maclean (1860), 2 De G. F. & J. 415.

83. ———.] — The object of the interference of a ct. of equity, by interlocutory injunction, between two parties who are at issue upon a legal right, is solely the protection of the property in dispute until the legal right shall have been ascertained.—HARMAN v. JONES (1841), Cr. & Ph. 299; 41 E. R. 505, L. C.

G. W. R. W. co., with whom such illegal agreement had been made from preventing the E. & N. R. W. co. from crossing the lands of the G. W. R. W. co., in order to obtain access to the

bridge: & it was shown that the latter co. were not actively interfering to prevent the approach being obtained, but were simply passive, the ct., on interlocutory motion, refused the

84. ———.] — The ct. will in many cases interfere to preserve property *in statu quo* during the pendency of a suit in which the rights to it are to be decided; & that without expressing, & often without having the means of forming, any opinion as to such rights. In order to support an injunction for such purpose, it is not necessary for the ct. to decide upon the merits in favour of pltf. If, therefore, the bill states a substantial question between the parties, the title to the injunction may be good, & yet the title to the relief prayed may ultimately fail.—GREAT WESTERN RY. CO. v. BIRMINGHAM & OXFORD JUNCTION RY. CO. (1848), 2 Ph. 597; 5 Ry. & Can. Cas. 241; 17 L. J. Ch. 243; 10 L. T. O. S. 497; 12 Jur. 106; 41 E. R. 1074, L. C.

Annotations:—Consd. Shrewsbury & Chester Ry. v. Shrewsbury & Birmingham Ry. (1851), 1 Sim. N. S. 410. *Mentd.* West Cornwall Ry. v. Mowatt (1848), 12 Jur. 407; Eastern Counties Ry. v. Hawkes (1855), 5 H. L. Cas. 331; Bourgoin v. Compagnie du Chemin de fer de Montréal, Ottawa et Occidental (1880), 5 App. Cas. 381.

85. ———.] — Pltfs. having purchased goods abroad by the order of B. & Co. of Liverpool, shipped the goods on board a ship belonging to B. & Co. & by insertions in the bill of lading, retained or intended to retain a lien upon the goods until bills, which pltfs. had drawn on B. & Co. for the price of the goods, had been paid. Before the arrival of the ship in Liverpool, B. & Co. had become bkpt., & their assignees claimed the goods as being in the legal ownership of bkpcy.:—*Held*: equity would interfere by injunction to preserve the property until the question of right had been tried at law.—MANLOVE v. CARTER (1848), 12 L. T. O. S. 169, L. C.

86. ———.] — (1) Consideration of the principle on which the ct. may, in certain cases, interpose to prevent a contract from being performed *in specie*, protecting the legal or supposed legal right of the party seeking such assistance, & preserving to the other party the substantial benefit of the specific performance.

Disputes having arisen between a railway co. & a contractor employed in making the railway, the co. insisting upon a right under the contract, owing to the alleged default of the contractor, to discharge him, took possession of the line & materials, & completed the works themselves, & the contractor resisting such claim, imputing the backward state of the works to the acts of the co., & holding forcible possession; collisions occurring between the workmen of the two parties, each being charged with impeding the operations of the other; & the completion & opening of the railway for traffic being in the meantime delayed, the ct., on the application of the co., restrained the contractor from continuing on the line or interfering with the operations of the co., directed an account of what was due to the contractor for works & materials done & provided, without regard to the formal certificates of the co.'s engineer, & an issue to try whether the co., at the time they proceeded to enter upon the works & remove the contractor, were lawfully justified in so doing; reserving as well the question of the right of the contractor to compensation for loss of profit on unexecuted works, as all other directions, until after the trial & the report.

(2) Irreparable mischief will be done to the co., irreparable in the sense that the ct. uses the term, that it is quite impossible that the ct. or a

injunction, although of opinion that, at the hearing, the relief should be granted.—ERIE & NIAGARA RY. CO. v. GREAT WESTERN RY. CO. (1874), 21 Gr. 171.—CAN.

jury could ever measure the damages to the co. from the railroad being shut up for a time owing to its not being in a proper state for working (WIGRAM, V.-C.).

(3) It is only in very special cases, & not at the option of the parties, that affidavits are admitted on a motion, after it has been opened to the ct.—EAST LANCASHIRE RY. CO. v. HATTERSLEY (1849), 8 Hare, 72; 68 E. R. 278.

Annotation:—As to (1) *Consd. Kirk v. R., A.-G. v. Kirk* (1872), L. R. 14 Eq. 558.

87. ———.]—The railway co. had become owners of a canal by purchase, & they were bound, by several statutes, to keep it open & navigable. Pltf. was the owner of a mill abutting upon a sort of bay in the canal, which he alleged formed part of the canal itself; this fact was denied by defts., who built a wall across the bay, so as to make the canal of the same width there as in other parts. Pltf. filed his bill for an injunction to make defts. undo what had been done, & to prevent them from doing more:—*Held*: the ct. could not make defts. undo anything done, but pltf. was entitled to an injunction to restrain them from proceeding to do more, on pltf. undertaking to bring an action at law to try the disputed right.—BRADBURY v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO., & BOWLER (1851), 15 Jur. 1167; *subsequent proceedings* (1852), 5 De G. & Sm. 624.

88. ———.]—Although an injunction *ex p.* will not be granted to stay waste, yet an *interim* order will be given with leave to discharge it, where the object of the application is to preserve property during litigation.—ANWYL v. OWENS (1853), 22 L. J. Ch. 995; 1 W. R. 205, L. JJ.

89. ———.]—On the principle of protecting property pending litigation, the ct. will, in a suit to impeach a conveyance of an advowson, restrain the institution of a clerk, even as against a deft. claiming to be a purchaser for valuable consideration without notice under it.—GREENSLADE v. DARE (1853), 17 Beav. 502; 51 E. R. 1129.

90. ———.]—Between the date of a bill of sale of shares of a ship & the entry of the transfer on the register, the purchaser had notice that the vendor, though the shares were registered in his name, was a trustee. The case presenting a *prima facie* appearance of fraud, the ct. granted an *interim* injunction to restrain the purchaser from dealing with the shares or indorsing the transfer on the certificate of registry, so as to insure the effective determination of the questions at the hearing.—ARMSTRONG v. ARMSTRONG (1854), 21 Beav. 71; 2 W. R. 678; 52 E. R. 785.

Annotation:—*Refd. Coombes v. Mansfield* (1855), 3 Drew. 193.

91. ———.]—An agreement between a railway co. & a contractor provided that in case the contractor should be guilty of any delay or default in the fulfilment of the contract, the co. might take the execution of the works out of his hand, & might use all or any of his plant, materials, or implements; & that in addition to all other rights & remedies which the co. might have against the contractor, the co. might apply any moneys to which the contractor would otherwise be entitled under his contract towards satisfaction of all losses or expenses occasioned to the co. by the delay; & that all the materials, plant, & imple-

ments, which at the time of such delay or default should be in or about the site of the works, should thereupon become the absolute property of the co., & be valued or sold, to the amount of such valuation or sale credited to the contractor in reduction of the moneys, if any, recoverable from him by the co. The co. took the execution out of the contractor's hand under this clause. The contractor brought an action for breach of contract, which with all matters in difference between the parties was referred to arbn.:—*Held*: the plant & materials did not become the absolute property of the co. unless loss or expense had been occasioned to them; & an interlocutory injunction was awarded to restrain them from removing & selling the plant & materials pending the arbn.—GARRETT v. SALISBURY & DORSET JUNCTION RY. CO. (1866), L. R. 2 Eq. 358; 14 L. T. 693; 12 Jur. N. S. 495; 14 W. R. 816.

92. ———.]—*Destructive operations.*—In matters of great importance, which can only be properly determined at the hearing, the ct. is in favour of restraining destructive operations until the hearing.—A.-G. v. GREAT EASTERN RY. CO. (1872), 41 L. J. Ch. 202; 25 L. T. 867; *on appeal*, 7 Ch. App. 475, L. JJ.; (1873), L. R. 6 H. L. 367, H. L.

Annotations:—*Mentd. Edinburgh Street Tram. Co. v. Black* (1873), L. R. 2 Sc. & Div. 336; *Mackett v. Herne Bay Comrs.* (1876), 35 L. T. 202; *Yarmouth Corpn. v. Simmons* (1878), 10 Ch. D. 518; *Rhondda U. D. C. v. Taff Vale Ry.* (1907), 24 T. L. R. 165; *Taff Vale Ry. v. Cardiff Ry.*, [1917] 1 Ch. 299.

93. ———.]—*Intention of defendant to part with property.*—In an action by an equitable mtgee. for sale or foreclosure the ct. granted an *interim* injunction to restrain dealing with the legal estate till the next motion day on an *ex p.* application by pltf., there being ground for believing that defts. intended to part with the estate *pendente lite*.—LONDON & COUNTY BANKING CO. v. LEWIS (1882), 21 Ch. D. 490; 47 L. T. 501; 31 W. R. 233, C. A.

Annotation:—*Refd. Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37.

94. ———.]—PRESTON v. LUCK, No. 737, *post*.

95. ———.]—A co. assigned to H. various items of property, comprising together its whole undertaking & assets, reserving to itself a right of re-emption, & the property was leased back by H. to the co. The assignment was for the purpose of raising money, & was not in the ordinary course of business. H. afterwards determined the tenancy & entered into possession:—*Held*: that transaction was subject to the rights of the debenture-holders; by parting in that way with the whole of its assets the co. ceased to be a going concern; & the debenture-holders became thereupon entitled to realise their security; & an injunction was granted to keep matters *in statu quo* until the trial.—HUBBUCK v. HELMS (1887), 56 L. J. Ch. 536; 56 L. T. 232; 35 W. R. 574; 3 T. L. R. 381.

Annotations:—*Refd. Re Borax Co., Foster v. Borax Co.* (1900), 83 L. T. 638. *Mentd. Robson v. Smith*, [1895] 2 Ch. 118; *Re Crighton & Law Car & General Insee. Corpn.*, [1910] 2 K. B. 738.

D. Prevention of Irreparable Injury.

96. What is irreparable injury—Injury not adequately compensated by damages.]—I take the meaning of irreparable injury to be that which if

PART III. SECT. 1, SUB-SECT. 2.—D.

a. *General rule.*]—The fact of the title being in dispute, or of the opposite party acting under a claim of right, will

not prevent the granting of an injunction where the value of the inheritance is in jeopardy or irreparable mischief is threatened.—HAMILTON v. BROWN

(1866), 2 Old. 260.—CAN.

96 i. What is irreparable injury—Injury not adequately compensated by damages.]—It is not necessary that

Sect. 1.—Discretion of court: Sub-sect. 2, D.]

not prevented by injunction cannot be afterwards compensated for by any decree which the ct. can pronounce in the result of the cause (ALDERSON, B.).—A.-G. v. HALLETT (1847), 16 M. & W. 569; 16 L. J. Ex. 131; 8 L. T. O. S. 450; 11 J. P. 744; 153 E. R. 1316.

97. ———.]—EAST LANCASHIRE RY. CO. v. HATTERSLEY, No. 86, *ante*.

Thus, . it would be a case of "irreparable" injury (using "irreparable" in the sense in which the ct. uses it, that is, not that there would be no physical possibility of repairing it, but that it would be a very grievous injury indeed) to allow defts. to proceed (LORD CRANWORTH, C.).—PINCHIN v. LONDON & BLACKWALL RY. CO. (1854), 5 De G. M. & G. 851; 3 Eq. Rep. 433; 24 L. J. Ch. 417; 24 L. T. O. S. 196; 18 J. P. 822; 1 Jur. N. S. 241; 3 W. R. 125; 43 E. R. 1101, L. C. & L. JJ.

*Annotations:—*Refd. London Asscn. of Shipowners & Brokers v. London & India Docks Joint Committee, [1892] 3 Ch. 242. *Mentd.* Schwinge v. London & Blackwall Ry. (1855), 3 Sm. & G. 30; Ingram v. Mid. Ry. (1860), 3 L. T. 533; Haynes v. Haynes (1861), 1 Drew. & Sm. 426; Re Met. Dist. Ry. & Cosh (1880), 13 Ch. D. 607; G. W. Ry. v. Swindon & Cheltenham Extension Ry. (1884), 9 App. Cas. 787.

99. ———.]—Damage which it is impossible to measure will be deemed irreparable.—LONDON & NORTH WESTERN RY. CO. v. LANCASHIRE & YORKSHIRE RY. CO. (1867), L. R. 4 Eq. 174; 36 L. J. Ch. 479; 17 L. T. 42; 15 W. R. 810.

100. ———.]—But it must be remembered that if I allow the dividend to be received & the ct. should at the hearing determine that it was improperly declared, it will never be recovered, even if recoverable, from those to whom it will be paid, & in this sense the injury to the E. shareholders may be not incorrectly described as irreparable (LORD CHELMSFORD, C.).—BLOXAM v. METROPOLITAN RY. CO. (1868), 3 Ch. App. 337; 18 L. T. 41; 16 W. R. 490, L. C.

*Annotations:—*Refd. Salisbury v. Met. Ry. (1869), 38 L. J. Ch. 249. *Mentd.* Robson v. Dodds (1869), L. R. 8 Eq. 301; Yool v. G. W. Ry. (1870), 39 L. J. Ch. 562; Bardwell v. Sheffield Waterworks Co. (1872), L. R. 14 Eq. 517; Mutter v. Eastern & Midlands Ry. (1888), 38 Ch. D. 92; Re National Bank of Wales, [1899] 2 Ch. 629; Hinds v. Buenos Ayres Grand National Tram. Co., [1906] 2 Ch. 654.

101. ———.]—MOGUL S.S. CO. v. M'GREGOR, Gow & Co., No. 114, *post*.

102. ———.]—I always understood the true principle as to injunctions to be not to grant an *interim* injunction before the determination of the case, unless it is one in which irreparable injury is being done, & which cannot be compensated for by damages given by a jury (LORD COLERIDGE, C.J.).—ARMSTRONG v. ARMIT (1886), 2 T. L. R. 887, D. C.

103. Court will interfere to prevent—Ploughing up meadow land.]—This is not a case of

irremediable injury, which is the only ground of this summary interposition of cts. of equity; the ploughing up ancient meadow is, upon the face of it, irreparable waste (*per* CUR.).—JOHNSON v. GOLD-SWAIN (1796), 3 Anst. 749; 145 E. R. 1027.

104. ———.]—Injunction before answer to prevent irreparable mischief, deft. having previously established his right at law.—CHALK v. WYATT (1810), 3 Mer. 688; 36 E. R. 264, L. C.

*Annotation:—*Refd. Ripon v. Hobart (1834), Coop. temp. Brough. 333.

105. ———.]—Injunction refused where no irreparable injury was shown.—SOUTHAMPTON (EARL) v. LONDON & BIRMINGHAM RY. CO. (1838), 2 J. P. 757; 2 Jur. 1012.

106. ———. Copyright.]—(1) Where the proprietor of copyright has for some time suffered several to extract from his work, the ct. will not grant an injunction to protect his copyright, without at all events a trial at law in the first instance.

(2) The principles by which cts. of equity are governed do not require them to exercise their jurisdiction in determining what may be the legal rights of parties, but merely to protect those rights when ascertained by legal tribunals, or at most to clear the way of impediments while litigation with that object is proceeding; & which, unless removed, would cause irreparable mischief & injury (LORD COTTENHAM, C.).

(3) The course which I adopt now . . . upon the . . . principle, namely, that the injunction would be an extreme hardship upon deft., as compared with the hardship pltf. would sustain, by being put, in the first instance, at all events, to establish his title at law (LORD COTTENHAM, C.).—SAUNDERS v. SMITH (1838), 3 My. & Cr. 711; 7 L. J. Ch. 227; 2 Jur. 536; 40 E. R. 1100, L. C.

*Annotations:—*As to (1) *Consd.* Sweet v. Shaw (1839), 8 L. J. Ch. 216. *Refd.* Jarrold v. Houlston (1857), 3 Jur. N. S. 1051.

107. ———. Damage from mining.]—HILTON v. (LORD), No. 1418, *post*.

108. ———. Agreement between railway companies.]—Where a railway co. sought specifically to enforce an agreement against another co., performance of which was resisted on the grounds that the terms of the agreement were uncertain, & that the agreement was contrary to law, an opportunity was given to pltf. to try those questions at law, but the ct. refused to restrain defts. in the meantime from violating the agreement, no case of irreparable injury having been made out.—SHREWSBURY & BIRMINGHAM RY. CO. v. LONDON & NORTH WESTERN RY. CO. (1850), 3 Mac. & G. 70; 20 L. J. Ch. 90; 18 L. T. O. S. 321; 14 Jur. 1125; 42 E. R. 187, L. C.

*Annotations:—*Distd. Beman v. Rufford (1851), 1 Sim. N. S. 550. *Mentd.* Shrewsbury & Birmingham Ry. v. L. & N. W. Ry., Shropshire Union Ry. & Canal Co., & Glyn & Cowan (1857), 26 L. J. Ch. 482.

the injury should be actually irreparable to entitle a party to this remedy but it must be of a serious character, & if it be so, though he may have a remedy at law, he may, notwithstanding, obtain an injunction if he can show that the remedy is not full & complete.—TROOP v. BONNETT (*circa* 1875), R. E. D. 186.—CAN.

96 ii. ———.]—The ct. generally requires three things to be shown before granting an interlocutory injunction. There must be a strong *prima facie* case that pltf. will succeed at the hearing. There must be some wrong suffered or threatened not sufficiently or appropriately to be covered by a money payment. The preponderance of convenience must be in favour of the

injunction.—JONES v. VICTORIA CITY CORPN. (1890), 2 B. C. R. 8.—CAN.

96 iii. ———.]—Pltf. had not shown that the injunction until the trial was necessary to protect him against irreparable injury, i.e. injury which could never be adequately remedied or atoned for by damages, & the interlocutory injunction was refused.—CANADIAN PACIFIC RY. CO. v. CANADIAN NORTHERN RY. CO. (1912), 22 W. L. R. 289; 7 D. L. R. 120; 5 Alta. L. R. 407.—CAN.

d. ———.]—By "irreparable injury" is not meant that there must be no physical possibility of repairing the injury, only that the injury is a material one.—BEGG, DUNLOP & Co.

v. SATISH CHANDRA CHATTERJEE (1919), 1 L. R. 46 Cal. 1001.—IND.

103 i. Court will interfere to prevent—Erection of building beyond authorised height.]—The ct. will not grant an *interim* interdict without evidence of irreparable injury. Where appt.'s affidavit showed that foundations were being laid for a building which when erected would obstruct his view, interfere with the free access of air, & be otherwise detrimental to the value of his property:—*Held*: these allegations did not make out a case of such irreparable injury as to justify the granting of an *interim* interdict.—HOTCHIN v. FRANCIS (1919), 40 N. L. R. 52.—S. AF.

109. Erection of building beyond authorised height.]—Although the ct. has power to restrain parties from using a building which has been erected in a form that is in violation of the terms of a contract, or of an Act of Parliament, yet a small excess in the height of a building beyond that to which it might lawfully have been raised, where no irreparable injury arises from such excess in height, would not be a case in which the ct. would interfere by interlocutory injunction to restrain the use of the building after it had been erected.—*DOVER HARBOUR (WARDEN, ETC.) v. SOUTH EASTERN RY. CO.* (1852), 9 Hare, 489; 21 L. J. Ch. 886; 68 E. R. 603.

110. — Breach of covenant.]—A lease of a farm contained a covenant on the part of the lessee against alienation or parting with possession without the lessor's assent, & a condition for re-entry in that event, whether occurring by act of the lessee, or by operation of law. The lessee became bkpt. On a bill filed by the lessor, alleging that the assignees had elected to take the lease, & were about to assign it & to part with the possession without the lessor's assent, that the farm was within a short distance of the lessor's residence, & that it would cause personal annoyance to the lessor if the farm were assigned to a person not approved by him:—*Held*: a sufficient case of mischief was not made out to support an interlocutory injunction.—*DYKE v. TAYLOR* (1861), 3 De G. F. & J. 467; 30 L. J. Ch. 281; 3 L. T. 717; 25 J. P. 515; 7 Jur. N. S. 83; 9 W. R. 403; 45 E. R. 959, L. J.

111. — —.]—*WILKINSON v. ROGERS*, No. 132, *post*.

112. — — —.]—Pltf., a surgeon, engaged deft., who was not qualified to practice, but was studying with a view to pass the necessary examination, to assist him in his practice, the engagement being terminable at the will of either party. Subsequently deft., previously to going up to pass his examination, executed, at the request of pltf., a bond which was conditioned to be void if deft. should not practice within certain limits, but which contained no express agreement on the part of pltf. to continue deft.'s employment. Deft. remained in pltf.'s employment for about three months afterwards, & was then dismissed. He subsequently commenced practising within the prescribed limits, & a suit was instituted to restrain him from so doing:—*Held*: (1) an agreement by pltf. to continue deft.'s employment on the old terms could be inferred; there was consideration to support the bond, & pltf. was entitled to an injunction; (2) the point was one that ought to be decided on motion without waiting for the hearing.

I also think that this is one of the cases in which I am bound to decide the question of law on the motion, & not to leave it to the hearing; to do otherwise might be to ruin one of the parties (*JESSEL, M.R.*).—*GRAVELY v. BARNARD* (1874), L. R. 18 Eq. 518; 43 L. J. Ch. 659; 30 L. T. 863; 39 J. P. 20; 22 W. R. 891.

Annotations:—As to (1) *Reid. Davies v. Davies* (1887), 36

Ch. D. 359; *London & Yorkshire Bank v. Pritt* (1887), 56 L. J. Ch. 987; *Hood & Moore's Stores v. Jones* (1899), 81 L. T. 189. *Generally, Mentd. Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164.

113. — Damages adequate compensation.]—*GARRETT v. BANSTEAD & EPSOM DOWNS RY. CO.*, No. 647, *post*.

114. — Combination in restraint of trade.]—A confederation or conspiracy by an associated body of shipowners which is calculated to have & has the effect of driving the ships of other merchants or owners, & those of pltf's. in particular, out of a certain line of trade, even though the immediate & avowed object be not to injure pltf's., but to secure to the conspirators themselves a monopoly of the carrying trade between certain foreign ports & this country, is, or may be, an indictable offence, & therefore actionable if private & particular damage can be shown. To warrant the ct., however, in granting an *interim* or interlocutory injunction to restrain the parties from continuing to pursue the objectionable course, those who complain must at least show that they have sustained or will sustain "irreparable damage," that is, damage for which they cannot obtain adequate compensation without the special interference of the ct.—*MOGUL S.S. CO. v. M'GREGOR, GOW, & CO.* (1885), 15 Q. B. D. 476; 54 L. J. Q. B. 540; 53 L. T. 268; 49 J. P. 646; 1 T. L. R. 664; 5 Asp. M. L. C. 467; 15 Cox, C. C. 740, D. C.

115. — Passing off.]—*CLARK v. PETROCOKINO* (No. 2) (1896), 41 Sol. Jo. 142, C. A.

116. — Infringement of patent.]—Letters patent were granted in 1913 for "improvements in incandescent electric lamps." In an action for infringement of the patent, it had been held invalid at the trial & in the Ct. of Appeal, but on appeal to the House of Lords the patent was held to be valid & a certificate of validity was subsequently granted. After the grant of the certificate the patentees commenced an action for infringement of the patent against different defts., & moved for an *interim* injunction to restrain defts. from infringing the patent. Defts. filed evidence setting out new grounds of invalidity of the patent, & it was stated on their behalf that they intended to contest the action & do all they could to impeach the validity of the patent. Defts. on these grounds resisted the motion for an *interim* injunction:—*Held*: there was no evidence before the ct. showing that defts. were doing such a business as that the granting of an injunction would inflict irreparable damage on them; & having regard to the fact that the only evidence furnished by defts.' expert was to the effect that, if the information furnished to him by defts. could be proved to be accurate, then the prospects of success were good, & in view of the fact that a certificate of validity had been granted, an injunction, to which pltf's. were *prima facie* entitled, ought to be granted.

If a *prima facie* case were made on such a motion that defts. intended to pursue a *bona fide* objection to pltf's. patent, & if it were a case in which the granting of an injunction would inflict irreparable damage on defts. in their business & pltf's. might to some extent be protected if some lesser relief

110 i. — Breach of covenant.]—*BRITISH COLUMBIA POULTRY ASSOCN. v. ALLANSON*, [1922] 2 W. W. R. 831.—CAN.

113 i. — Damages adequate compensation.]—*BREED v. ROGERS* (1913), 24 O. W. R. 864; 4 O. W. N. 1576; 12 D. L. R. 620.—CAN.

e. — Fraudulent transfer of land.]—The manager of a mining co. procured the sale of its property under a fraudulent judgment, & became the

purchaser. Part of the property consisted of a lease under the Transfer of Land Act, which was transferred to him, & by him to a purchaser, both transfers being registered on the same day. On bill to set aside the sale & restrain dealings with the lease by the second purchaser, injunction granted, the second purchaser having certain of the fraud of the first. The immense power which the Transfer of Land Statute gives to a proprietor of completely barring clear equities presents

a reason for cts. of Equity readily interfering by injunction.—*DAVIS v. WEKEY* (1872), 3 V. R. (Eq.) 1.—AUS.

f. — Damages from blasting.]—*BELL TELEPHONE CO. v. AVERY* (1912), 22 O. W. R. 963; 3 O. W. N. 1664; 6 D. L. R. 852.—CAN.

g. Threat of force by applicant.]—The fact that pltf. will by force oppose a threatened trespass, & so possibly cause bloodshed, is no reason why the

Sect. 1.—Discretion of court: Sub-sect. 2, D. & E.]

than that by way of injunction were granted, the ct. would incline to give the lesser relief.—**BRITISH THOMSON-HOUSTON Co., LTD. v. B. T. T. ELECTRIC LAMP & ACCESSORIES Co.** (1922), 39 R. P. C. 167.

E. Balance of Convenience.

117. Consideration of comparative injury.]—GREENHALGH v. MANCHESTER & BIRMINGHAM RY. Co., No. 524, post.

118. —.]—SAUNDERS v. SMITH, No. 106, ante.

119. —.]—NEILSON v. FORMAN, No. 182, post.

120. —.]—Defts., not being possessed of compulsory powers for taking land for the purposes of a railway, & it being necessary for them, in order to complete their line, to cross pltfs.' railway, gave notice of their intention of crossing the same, but were restrained by injunction from so doing until the question of right could be decided at law. They had entered into a contract with an owner of land on one side of pltfs.' railway, by which a way-leave was to be granted if the line were completed within a certain time: but this injunction

ct. should grant an interlocutory application, if he is not otherwise entitled to it.—**CANADIAN PACIFIC RY. Co. v. NORTHERN PACIFIC & MANITOBA RY. Co.** (1888), 5 Man. L. R. 301.—**CAN.**

PART III. SECT. 1, SUB-SECT. 2.—E.

117 i. Consideration of comparative injury.]—WATERHOUSE v. KNOX (1909), 10 S. R. N. S. W. 155.—AUS.

117 ii. —.]—Pltf., who claimed the exclusive user of certain streams flowing through his lands, which right defts. denied, obtained an interlocutory injunction restraining defts. from using the improvements thereon for floating down their logs, upon the usual undertaking to pay any damages sustained thereby:—Held: pltf. was not entitled to an interlocutory injunction, as it was not shown that irreparable damage would result from refusing it, or that the balance of inconvenience was in his favour.—MOLAREN v. CALDWELL (1880), 5 A. R. 363.—CAN.****

117 iii. —.]—Upon motion for an interlocutory injunction where the right is doubtful, the ct. will consider on what side is the balance of convenience; to which party is injury more likely to be done by its interference or refusal to interfere; in what way the parties can best, after the final determination of their rights, be kept, in, or restored to, their position at the time of the motion.—A.-G. v. RYAN (1888), 5 Man. L. R. 81.—CAN.****

117 iv. —.]—The preponderance of convenience must be in favour of the injunction.—JONES v. VICTORIA CITY CORPN. (1890), 2 B. C. R. 8.—CAN.****

117 v. —.]—A bye-law of a municipal corpn., passed under Consolidated Municipal Act, s. 283, for the purpose of regulating procedure, requiring work exceeding \$200 in value to be done by contract after tenders had been called for, was on the acceptance of duly advertised for tenders for the construction of a pavement on a particular street, disregarded by the council stipulating in accepting the tenders that the contract should be held to cover & include the construction during the year of any similar pavement on other streets at the same prices & terms. In pursuance of the stipulation the contractors entered into other contracts with the corpn., & proceeded with the work by opening up other streets & otherwise, when they were enjoined from proceeding by an interlocutory order in an action by a ratepayer:—

would render it impossible for them to complete their contract:—**Held: the injunction should be dissolved so far as to enable defts. to complete their contract.**

Semble: where the construction of an Act of Parliament is doubtful, the ct. will send the question to a ct. of law; in the meantime, granting, continuing, or dissolving the injunction, as the case may be, in favour of the party who will sustain the greater injury; & the ct. will not consider mere inconvenience in the light of injury.—CLARENCE RY. Co. v. GREAT NORTH OF ENGLAND, CLARENCE & HARTLEPOOL JUNCTION RY. Co. (1842), 2 Ry. & Can. Cas. 763; 6 Jur. 269, L. C.****

121. —.]—An information was filed at the relation of the trustees of a turnpike road against a railway co., in order to compel them to remove a temporary bridge, which had been erected for the purpose of conveying spoil earth over the road, or to compel them to set out a new road. On motion to dissolve an injunction granted *ex p.*:—Held: the operation of the injunction should, on certain terms, be suspended for seven weeks, or until further order, no case of practical inconvenience having been made out, although there had been a clear infraction of the law.****

Held: as applt.'s legal right was not clear, & as serious loss & public inconvenience would necessarily result from granting the order, while no irreparable loss would result from refusing it, the interlocutory injunction should not have been granted.—DWYRE v. OTTAWA CORPN. (1898), 25 A. R. 121.—CAN.****

117 vi. —.]—REYNOLDS v. URQUHART (1902), 5 Terr. L. R. 413.—CAN.

117 vii. —.]—SUTHERLAND v. GRAND COUNCIL, PROVINCIAL WORKMEN'S ASSOCN. (1908), 6 E. L. R. 45.—CAN.

117 viii. —.]—Inconvenience to the public cannot be set up as against private rights, & where it is shown that the removal of sand from the bed of a river opposite pltf.'s property has caused a subsidence of the bank, & if continued, is likely to cause irreparable damage, an injunction should be granted to stop the dredging, notwithstanding affidavits showing that contractors & the public would suffer loss & inconvenience if the sand could no longer be procured from that source for building purposes.—PATTON v. PIONEER NAVIGATION & SAND Co. (1906), 5 W. L. R. 40; 16 Man. L. R. 435.—CAN.****

117 ix. —.]—YORK PUBLISHING Co. v. COULTER & WAYSIDE PUBLISHERS, LTD. (1913), 24 O. W. R. 384; 4 O. W. N. 1091; 10 D. L. R. 824.—CAN.

117 x. —.]—Pltf. sought to restrain deft. from erecting a building in violation of restrictions contained in the conveyances to him of two lots according to a plan. The restrictive covenant on the sale of each lot was that only one dwelling house should be erected upon it. Deft. was not the original purchaser, but had acquired by divers *mesne* conveyances, title to the two adjoining lots originally sold to separate purchasers, & was erecting three houses upon the two lots:—Held: upon a motion for an interlocutory injunction, there being difficult questions to be decided at the trial which ought to be determined in advance, & the material before the ct., on the motion not being sufficient to enable the ct. to form a satisfactory opinion of pltf.'s rights, the disposition of the motion must turn upon the relative convenience or inconvenience which might result to the parties from granting or withholding the injunction: & in this case the balance of convenience was in defts.' favour, & the injunction should be withheld,****

on the clear understanding, that deft. was proceeding at his own risk.—**PLAYTER v. LUCAS (1921), 51 O. L. R. 492; 69 D. L. R. 514.—CAN.**

117 xi. —.]—The Ct., in granting an *ad interim* injunction, will first see that there is a *bona fide* contention between the parties, & then on which side, in the event of obtaining a successful result to the suit, will be the balance of inconvenience if the injunction do not issue, bearing in mind the principle of retaining immoveable property *in statu quo*.—GOMES v. CARTER (1866), 1 Ind. Jur. N. S. 411.—IND.****

117 xii. —.]—In granting or withholding an injunction, a ct. should exercise a judicial discretion, & should weigh the amount of substantial mischief done or threatened to pltf. & compare it with that which the injunction, if granted, would inflict upon deft.—SHAMNUGGER JUTE FACTORY Co. v. RAMNARAIN CHATTERJEE (1886), 1 L. R. 14 Calc. 189.—IND.****

117 xiii. —.]—ISRAEL v. SHAMSHIR RAHMAN (1913), 1 L. R. 41 Calc. 436.—IND.

117 xiv. —.]—Where a railway co., instead of observing the mode prescribed by the Lands Clauses Consolidation Act, to obtain possession of land, the amount of compensation for which is disputed, enter into possession, & say they had the consent of the owner's solr., on bill filed for an injunction, to restrain the progress of the works:—Held: although in strictness the injunction should go, yet as great public injury would result from stopping the works, without corresponding benefit to pltfs., the better course was, to say—no rule, the co. at once to obtain the finding of a jury, & to pay all the costs fairly incurred.—**HARE v. CORK & BANDON RY. Co. (1850), 17 L. T. O. S. 21.—IR.******

117 xv. —.]—If it appears that greater damage would result to appct. by refusing an interdict in the event of the legal right subsequently proving to be in his favour, than to resp. by granting the interdict in the event of it proving afterwards to have been wrongly granted, the interdict will issue.—BURKS v. SPRINGS MUNICIPALITY & DICKENS (1917), W. L. D. 143.—S. AF.****

h. Inconvenience to third parties.]—Where the injunction sought will injuriously affect the rights of a person or body not before the ct. it will not

The ct. will exercise its discretion according to circumstances, &, although there may have been an infraction of the law, it will endeavour to do substantial justice to one party without imposing unnecessary hardship on the other, especially in a case where the legal tribunals are open (KNIGHT BRUCE, V.-C.).—A.-G. v. EASTERN COUNTIES RY. CO. (1843), 3 Ry. & Can. Cas. 337; 1 L. T. O. S. 432; 7 Jur. 806.

122. —.]—Where the opinion of the ct. was not clearly for or against pltf., it would be governed by the balance of inconvenience on either side in granting or refusing the injunction; &, where the damage to pltf. was shown to be small in amount, the ct. would not prejudice the legal question by granting the injunction, but would require an account to be kept pending the trial at law.—CORY v. YARMOUTH & NORWICH RY. CO. (1844), 3 Hare, 593; 3 Ry. & Can. Cas. 524; 67 E. R. 516.

Annotations:—Mentd. Perkins v. L. & N. W. Ry. (1874), 1 Ry. & Can. Tr. Cas. 327; Hammerton v. Dysart, [1916] 1 A. C. 57.

123. —.]—SPOTTISWOODE v. CLARK, No. 204, *post*.

124. —.]—ELECTRIC TELEGRAPH CO. v. NOTT, No. 73, *ante*.

125. —.]—In case of contested copyright, the ct. is disposed rather to restrict than increase the number of cases in which it interferes by injunction before the establishment of the legal title, & it will give great weight to the consideration of the questions, which side is more likely to suffer by an erroneous or hasty judgment, & the prejudicial effect the injunction may have on the trial of the action.—M'NEILL v. WILLIAMS (1847), 8 L. T. O. S. 493; 11 Jur. 344.

Annotations:—Consd. Jarrold v. Houlston (1857), 3 K. & J. 708. Fold. Bradbury v. Beeton (1869), 39 L. J. Ch. 57. Refd. Moffatt & Paigo v. Gill (1901), 84 L. T. 452.

126. —.]—At a meeting of a railway co. on May 31, 1848, it was resolved that £1,055,000 should be raised by 105,500 preference shares of £10 each, on which a fixed dividend of £8 per cent. should be paid. On July 7, 1848, one of the dissentients filed a bill, praying a declaration that this resolution was unauthorised by the co.'s Acts, & praying for an injunction against the issue of such shares, & no other specific relief. Upon a motion made on Aug. 7, 1848, for an injunction accordingly, it appeared by the affidavit of the secretary that the preference shares had been offered to all the shareholders ratably, & had been taken to the amount of £777,770, on which the first instalment had been paid, & that other shareholders had expressed their desire to accept other shares, & that there were only five dissentients:—*Held*: the motion involved substantially the whole matter in dispute in the cause; &, having regard to the balance of the possible mischief arising from interfering or not interfering on an interlocutory application, must be refused.—FIELDEN v. LANCASHIRE & YORKSHIRE RY. CO. (1848), 2 De G. & Sm. 531; 64 E. R. 237.

127. —.]—(1) In what cases the ct. will interfere to preserve property in litigation *in statu quo*.

Injunction to restrain defts. from entering into an agreement with another railway co. which would be a violation of or inconsistent with a subsisting agreement between pltf. & defts., refused; the inconvenience to arise from granting the injunction

being greater than the inconvenience to arise from refusing it.

(2) When the ct. is called on to interfere to preserve the property *pendente lite* . . . the ct. must satisfy itself . . . not that pltf. has a right, but that he has a fair question to raise as to the existence of such a right (LORD CRANWORTH, V.-C.).—SHREWSBURY & CHESTER RY. CO. v. SHREWSBURY & BIRMINGHAM RY. CO. (1851), 1 Sim. N. S. 410; 20 L. J. Ch. 574; 17 L. T. O. S. 275; 15 Jur. 548; 61 E. R. 159.

128. —.]—On an application for an injunction to restrain an alleged irreparable injury, by taking away stones from the sea shore, the ct. considering that pltf. was most likely to suffer by its non-interference, granted the injunction; & although pltf.'s title was purely legal, & was not clearly made out, it refused to put him on the terms of bringing an action to try it, but merely gave him liberty so to do.—CLOWES v. BECK (1851), 13 Beav. 347; 20 L. J. Ch. 505; 17 L. T. O. S. 300; 51 E. R. 134; *on appeal* (1852), 2 De G. M. & G. 731, L. JJ.

Annotation:—Mentd. Constable v. Nicholson (1863), 14 C. B. N. S. 230.

129. —.]—By three Acts of Parliament of the same session, a railway co. was empowered to make three distinct lines, forming a cluster, & not a continuous line. In the next session an Act was passed, declaring the co. to have been & to be only one co., & authorising & requiring them to grant a lease of the lines to another co. They completed only one of the lines, which was worked by the other co. under the provisions of the last Act. Some months after it was obvious that the other two lines could not be completed within the time prescribed by the Acts, a shareholder in the first co. filed a bill, seeking to restrain it from applying its funds otherwise than for the purpose of constructing all three of the lines; but he did not make the co., who were lessces, parties to the suit:—*Held*: more inconvenience would arise from the ct. interfering than from its abstaining to do so; &, on this account, as well as on the grounds of acquiescence & want of parties, an injunction granted by the ct. below was dissolved.

Qu.: whether railways forming a cluster, differ from a continuous line with respect to the propriety of granting an injunction against the construction of part only of an undertaking authorised by the legislature.

From the facts before the ct., for more than twelve months before the bill was filed, pltf. must have known that the abandoned lines would be abandoned & that there was no substantial chance for making either of them within the time fixed by Parliament, & yet there was no bill filed (KNIGHT BRUCE, L.J.).—HODGSON v. POWIS (EARL) (1851), 1 De G. M. & G. 6; 21 L. J. Ch. 17; 18 L. T. O. S. 103; 15 Jur. 1022; 42 E. R. 453, L. JJ.; *reversd*. (1850), 12 Beav. 529.

Annotation:—Refd. Graham v. Birkenhead, Lancashire & Cheshire Junction Ry. (1850), 12 Beav. 460.

130. —.]—Considering the degree of inconvenience likely to result from a decision upon this occasion too much in accordance with the wishes of pltf., as compared with the degree of inconvenience likely to result from a decision too much otherwise. . . . I think we should grant an injunction (KNIGHT BRUCE, L.J.).—NORMAN v. MITCHELL (1854), 5 De G. M. & G. 648; 24 L. T. O. S. 53; 2 W. R. 685; 43 E. R. 1022, L.

ordinarily & without special circumstances be granted.—GUARDIAN ASSURANCE CO., LTD. v. MATTHEW, [1919] 1 W. W. R. 67.—CAN.

k. —.]—The balance of though the act improper, refuse

ct. will consider inconvenience, &, complained of be the motion, if the

granting it would be attended with inconvenience to third parties.—A.-G. v. DUBLIN CORPN. (1849), 1 Ir. Jur. 177.—IR.

Sect. 1.—Discretion of court: Sub-sect. 2, E.; sect. 3, A. (a).]

131. —.]—Deft. against whom an injunction is prayed to be restrained from diverting a water-course, has a right to have the alleged right of pltf. established by means of an action at law. The ct. will not grant such an injunction, in the meantime, where the balance of convenience or inconvenience in the attendant circumstances would be against deft.'s right to do the thing sought to be restrained.—*WILLIAM v. HEATH* (1859), 1 L. T. 267.

132. —.]—Where the covenant & its breach are clear & distinct, & irreparable injury is likely to occur from it, the ct. will interfere by injunction before the hearing; but if otherwise, the question becomes one of comparative injury, & the ct. will consider whether greater injury will be done by granting or withholding the injunction.—*WILKINSON v. ROGERS* (1864), 2 De G. J. & Sm. 62; 3 New Rep. 347; 9 L. T. 696; 10 Jur. N. S. 162; 12 W. R. 284; 46 E. R. 298, L. JJ.

Annotation:—Mentd. Reeves v. Cattell (1876), 24 W. R. 485.

133. —.]—*GARRETT v. BANSTEAD & EPSOM DOWNS RY. CO.*, No. 647, *post*.

134. —.]—(1) The ct. will not, by an interlocutory injunction, restrain an act, the validity of which, as between the parties to the suit, is matter of doubt & for which, if wrongful, pltf. can obtain adequate compensation in damages at the hearing of the cause; while the injunction, if granted, would inflict serious injury on the party sought to be restrained.

(2) The ct., on motion for an injunction, will act as well according to the comparative injury which may arise from granting or withholding the injunction, as according to the justice of the case as appearing on the evidence.

(3) The ct. will not interfere by injunction between the parties to a contract, specific performance of which cannot be decreed.

(4) This being an interlocutory application, the injunction cannot exceed the prayer of the bill (*Knight Bruce*, L.J.).

(5) On motion for an injunction it is open to counsel to use any affidavit filed before he addresses the ct.—*MUNRO v. WIVENHOE & BRIGHTLINGSEA RY. CO.* (1865), 3 De G. J. & Sm. 723; 12 L. T. 655; 11 Jur. N. S. 612; 13 W. R. 880; 46 E. R. 1100, L. JJ.

Annotations:—As to (1) *Reid. Garrett v. Salisbury & Dorset Junction Ry.* (1866), L. R. 2 Eq. 358; *Foster & Dicksee v. Hastings Corp.* (1903), 87 L. T. 736.

135. —.]—*WELLS v. ATTENBOROUGH*, No. 617, *post*.

136. —.]—Where an interlocutory injunction will not inconvenience deft. & the refusal to grant one would determine the whole suit, the ct. will grant such injunction, although it may be doubtful whether pltf. is entitled to relief.—*ANDREW v. RAEBURN* (1874), 9 Ch. App. 524, n.; 31 L. T. 73; 22 W. R. 564, L. C. & L. JJ.

Annotations:—Mentd. Nagle-Gillman v. Christopher (1876), 4 Ch. D. 173; *Malan v. Young* (1889), 6 T. L. R. 38; *Re Martindale*, [1894] 3 Ch. 193; *Scott v. Scott*, [1913] A. C. 417.

137. —.]—Pltfs. were owners of the tolls of an ancient cattle market held weekly on Thursday. Defts., who were auctioneers, fitted up with stalls & pens a neighbouring piece of ground, & issued circulars stating that weekly sales of cattle by auction would be held there on Mondays. Pltfs. brought their action to restrain defts. from holding their proposed sales, as being an interference with pltfs.' market:—*Held*: defts. undertaking to keep an account, an interlocutory injunction ought not to be granted, for that, if an injunction was granted & it turned out

that defts. were in the right, there would be great difficulty in ascertaining the compensation to which they would be entitled, whereas, if an injunction was refused, & pltfs. succeeded at the trial, there would be no difficulty in giving them compensation, & their market would suffer no permanent injury from the sales by defts. in the meantime.—*ELWES v. PAYNE* (1879), 12 Ch. D. 468; 48 L. J. Ch. 831; 41 L. T. 118; 28 W. R. 234, C. A.

Annotations:—Mentd. Manchester Corp. & Citizens v. Lyons (1882), 47 L. T. 677; *Abergavenny Improvement Comrs. v. Straker* (1889), 42 Ch. D. 83; *Hallsham Cattle Market Co. v. Tolman*, [1915] 1 Ch. 360; *Morpeth Corp. v. Northumberland Farmers' Auction Mart Co.*, [1921] 2 Ch. 154.

138. —.]—*SPICER v. MARGATE CORPN.* (1880), 24 Sol. Jo. 821.

139. —.]—Pltfs. being the owners of an ancient building which had numerous windows pulled it down & rebuilt it. A few of the windows in the new house included the space occupied by ancient windows, but were of larger dimensions; several others included some portion of the space occupied by ancient windows; & in some cases the spaces occupied by ancient windows were entirely built up in the new house. Defts. commenced to build a house on the opposite side of the street, which if completed according to the plans would materially interfere with the light coming to pltfs.' windows. On a motion for a *interim* injunction the ct., holding that pltfs. had shown an intention to preserve, & not to abandon, their ancient lights, & that there was a fair question of right to be tried at the hearing & considering that the balance of convenience was in favour of granting an injunction rather than of allowing defts. to complete their building with an undertaking to pull it down if required to do so, granted an injunction till the hearing.—*NEWSON v. PENDER* (1884), 27 Ch. D. 43; 52 L. T. 9; 33 W. R. 243, C. A.

Annotations:—Reid. Scott v. Pape (1886), 31 Ch. D. 554. *Mentd. Wigram v. Fryer* (1887), 56 L. J. Ch. 1098; *Smith v. Baxter*, [1900] 2 Ch. 138.

140. —.]—(1) Both pltfs. & defts. were calico printers. Pltfs. had registered four designs, & some months after registration discovered that goods bearing designs similar in effect to theirs were being sold by defts. Defts.' designs did not actually produce the *minutiae* of pltfs.' designs, but they were a combination of similar drawings so arranged & coloured as to produce a similar effect. Defts. admitted that they had submitted pltfs.' designs to their artist in Paris so that he might, whilst producing the same effect, which was the fashion in vogue, avoid imitating the *minutiae* of pltfs.' designs. The question arose whether a registered design, consisting of a dominant & of subordinate parts so arranged as to produce a certain general effect, could be infringed by a design producing a similar effect, although such design imitated neither the dominant nor the subordinate parts of the original & registered designs. It was contended that general effect could not be registered:—*Held*: pltfs. having established a *prima facie* case, on the balance of convenience & inconvenience, an interlocutory injunction must be granted until the hearing of the action.

(2) In the case of an interlocutory injunction the ct. refused to make an order, that the costs should be allowed on the higher scale, though an important question was raised.

You must show special reason for having costs on the higher scale (*LINDLEY*, L.J.).—*GRAFTON v. WATSON* (1884), 51 L. T. 141, C. A.

Annotations:—Generally, Mentd. Sherwood v. Decorative

Art Tile Co. (1887), 4 R. P. C. 207; *Nevill v. Bennet* (1898), 15 R. P. C. 412; *Pilkington v. Abrahams* (1914), 32 R. P. C. 61; *Rose v. Pickavant* (1923), 40 R. P. C. 320; *Wallpaper Manufacturers v. Derby Paper Staining Co.* (1925), 42 R. P. C. 443.

141. — Necessity for *prima facie* case.]—In order to obtain an interlocutory injunction *pltf.* must make out a *prima facie* case, *i.e.* a case such that if the evidence remains the same at the hearing it is probable that he will obtain a decree & unless he makes out such a case an injunction will not be granted on the mere consideration of the balance of convenience & inconvenience.—*CHALLENGER v. ROYLE* (1887), 36 Ch. D. 425; 56 L. J. Ch. 995; 57 L. T. 734; 36 W. R. 357; 3 T. L. R. 790; 4 R. P. C. 363, C. A.

Annotations:—Reid. Dowson Taylor v. Drosophore Co. (1894), 11 R. P. C. 653. *Mentd. Kurtz v. Spence* (1887), 36 Ch. D. 770; *Combined Weighing & Advertising Co. v. Automatic Weighing Machine Co.* (1889), 42 Ch. D. 665; *Barrett v. Day, Day v. Foster* (1890), 43 Ch. D. 435; *Colley v. Hart* (1890), 44 Ch. D. 179; *Johnson v. Edge*, [1892] 2 Ch. 1; *Willoughby v. Taylor* (1893), 11 R. P. C. 45; *Haskell Golf Ball Co. v. Hutchison & Main* (1904), 21 R. P. C. 497; “Z” Electric Lamp Manufacturing Co. v. Osram Lamp Works, Ltd. (1911), 28 R. P. C. 472.

142. —.]—In a motion by a *pltf.* under Patent Act, 1883 (c. 57), s. 32, for an *interim* injunction to restrain *deft.* from issuing threats of legal proceedings for an alleged infringement of *deft.*'s patent, it is not necessary for *pltf.* to prove that he has not infringed *deft.*'s patent, but the question is one of the balance of convenience & inconvenience, & the *ct.* will decide according to its opinion whether more harm will be done by granting or refusing an injunction.—*WALKER v. CLARKE* (1887), 56 L. J. Ch. 239; 56 L. T. 111; 35 W. R. 245; 3 T. L. R. 297.

Annotation:—Consd. Challenger v. Royle (1887), 36 Ch. D. 428, n.

143. —.]—*Defts.*, who were French subjects, contracted with the Peruvian Govt. for the purchase of guano, & agreed to be bound by the tribunals of Peru. Disputes arose on matters of account, & the matter was compromised between *defts.*, who assented to this course, & the *de facto* Govt. of Peru of the Dictator, P., which had been recognised by the French Govt. After many years' litigation against other parties in other English *cts.*, *defts.* recovered a large sum to which they were entitled under the compromise, & this sum was still in *ct.* *Pltfs.*, who were the *de jure* Govt. of Peru, reconstituted in 1886, did not interfere in those proceedings, but they now moved to restrain *defts.* from taking the money out of *ct.*, on the ground that the compromise was void unless ratified by the *de jure* Govt. when restored:—*Held*: *pltf.*s. had not shown a probable case for relief at the hearing, therefore on the balance of convenience the motion must be dismissed, with costs.—*PERU REPUBLIC v. DREYFUS BROTHERS & Co.* (1888), 38 Ch. D. 348; 57 L. J. Ch. 536; 58 L. T. 433; 36 W. R. 492; 4 T. L. R. 333.

Annotations:—Mentd. West Rand Central Gold Mining Co. v. R., [1905] 2 K. B. 391; *Aksionainoye Obschestvo A. M. Luther v. Sagor*, [1921] 1 K. B. 456.

144. —.]—*THOMSON v. HUGHES*, No. 190, *post*.

145. —.]—*COLLIE v. BLOXHAM* (1893), 37 Sol. Jo. 757.

146. —RIESS v. THE OXFORD, LTD. (1898), 37 Sol. Jo. 842.

147. —*Resps.* having completed their line to London, certain fish traffic was handed to them at Grimsby for conveyance to London “via G. N. railway.” This had hitherto been so forwarded, but *resps.* now conveyed it by their own route to London & delivered it themselves. On an application for an *interim* injunction enjoining the G. O. Co. to desist from diverting

from the G. N. Co. the fish traffic from Grimsby to London which is consigned by the G. N. railway:—*Held*: the route being *prima facie* a reasonable one, the G. N. Ry Co. would have *prima facie* the right of requiring traffic to be carried by it on reasonable terms; there being also *prima facie* a contract to that effect, & as an *interim* injunction would not harm *resps.*, provided accounts were kept, & the absence of it might seriously damage *appcts.*, an *interim* injunction should be granted.—*GREAT NORTHERN RY. CO. v. GREAT CENTRAL RY. CO.* (1899), 10 Ry. & Can. Tr. Cas. 266.

.]—*Pltfs.* who were the owners of two patents, one for “improvements relating to the manufacture of incandescent electric lamps” & the other for an “improved method of producing metallic incandescence bodies for electric glow lamps,” brought an action against *defts.* for infringement of their patents, each of which consisted in a chemical process for removing carbon from the filaments of lamps. They moved for an interlocutory injunction. *Defts.* contended that there were other methods of removing the carbon, & that *pltf.*s. in order to succeed must show that in *defts.*' filaments it had not been removed physically:—*Held*: on the evidence it was doubtful whether in case of *defts.*' filaments the carbon had been removed physically; & on the balance of convenience, an interlocutory injunction should be granted.—*OSRAM LAMP WORKS, LTD. v. DAVID SMITH & Co.* (1912), 30 R. P. C. 114.

149. Onus of proof on plaintiff—To show balance in his favour.]—(1) Acquiescence [for six years] in the violation of a covenant to a certain extent held a sufficient objection to an interlocutory application for an injunction against a greater violation of it.

(2) Where on a motion for an injunction to restrain an alleged breach of covenant the question in dispute appeared doubtful:—*Held*: the burden of proof was on *pltf.* to show that the balance of convenience was in favour of granting the injunction.—*CHILD v. DOUGLAS* (1854), 5 De G. M. & G. 739; 23 L. T. O. S. 283; 2 W. R. 701; 43 E. R. 1057, L. J.J.

Annotations:—Generally, Mentd. Keates v. Lyon (1869), 4 Ch. App. 218; *Bowes v. Law* (1870), L. R. 9 Eq. 636; *Master v. Hansard* (1876), 46 L. J. Ch. 506, n.; *Renals v. Cowlishaw* (1879), 11 Ch. D. 866; *Russell v. Watts* (1885), 55 L. J. Ch. 158; *Foster v. Fraser*, [1893] 3 Ch. 158; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Long Eaton Recreation Grounds Co. v. Mid. Ry.* (1901), 71 L. J. K. B. 74; *Long v. Gray* (1913), 58 Sol. Jo. 46; *L. C. C. v. Allen*, [1914] 3 K. B. 642; *Westhoughton U. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159.

SUB-SECT. 3.—TERMS IMPOSED.

A. Granting or Continuing Injunction.

(a) In General.

150. Terms will be imposed.]—*Semble*: the *ct.* will, in no case, interfere, upon an interlocutory application, to prevent a party from enforcing a legal right, without putting the party applying upon such terms as will enable the *ct.* to do justice to the party restrained in the event of *pltf.* in equity failing to make out a case for equitable relief at the hearing.—*SANXTER v. FOSTER* (1841), Cr. & Ph. 302; 41 E. R. 506, L. C.

151. —.]—Where it is manifest from the pleadings that issues have been raised in the cause which must necessarily be discussed at the hearing, the *ct.* will grant an *interim* injunction upon terms.—*COLEMAN v. WEST HARTLEPOOL RY. CO.* (1861), 3 L. T. 847.

Sect. 1.—Discretion of court: Sub-sect. 3, A. (a), (b) & (c), & B. (a).]

152. Undertaking to abide by any order made at hearing.]—A mining co., admitting the forfeiture of their lease at law, sought relief in equity, on the ground of accidental stoppage of works, substituted performance of certain covenants, & implied acquiescence on the part of the lessor's agent. There appearing reasonable grounds for the exercise of equitable jurisdiction, an *interim* injunction was granted, *pltf.* undertaking to abide by any order the *ct.* might make at the hearing, & to allow judgment to go at law.—*NORTH STAFFORD STEEL, IRON & COAL CO. (BURSLEM), LTD. v. CAMOYS (LORD) (1865)*, 6 New Rep. 345; 12 L. T. 780; 29 J. P. 628; 11 Jur. N. S. 555, L. JJ.

(b) Payment into Court.

153. As condition of granting injunction.]—Upon a bill filed by underwriters for an injunction against an action on a policy of insurance, & for a commission to examine witnesses abroad, the *ct.* will not grant the injunction & commission, except upon the terms of having the money paid into *ct.*; even though it should appear, on the answer of *defts.*, that there is a case for inquiry in a *ct.* of equity.—*IRVING v. HARRISON (1824)*, 3 L. J. O. S. Ch. 48.

154. —.]—An order for an injunction to restrain *comrs.* under a local drainage Act from signing their final award, & from proceeding to enforce payment of rates, although the Act gave jurisdiction to the quarter sessions, affirmed on appeal; but the Lord Chancellor attached to it the condition of bringing the money into *ct.*—*ARMITSTEAD v. DURHAM (1848)*, 11 Beav. 556; 50 E. R. 932.

155. —.]—In 1830, W. conveyed certain real estate to R. & T. & their heirs by way of *mtge.* for securing £400, with a power of sale in case of default. W. died in 1839, having devised the same property, subject to certain charges created by his will, to his sons A., B. & C. as tenants in common in fee. In 1839, after W.'s death, B. conveyed all his one-third share under his father's will to R., H. & N. by way of *mtge.* with

power of sale in case of default. R., the surviving *mtgee.* of the deed of 1830, threatened to sell under the power in that deed unless A., the acting *exor.* of W., would redeem both *mtges.* Upon bill by A. to redeem & for an injunction, the *ct.* upon motion, on payment into *ct.* by A. of the money due upon the first *mtge.*, restrained R. from selling under the power contained in the deed of 1830, & from conveying the legal estate in the one-third share of B. comprised in the *mtge.* of 1839.—*WHITWORTH v. RHODES (1850)*, 20 L. J. Ch. 105, L. C.

Annotation:—Refd. Warner v. Jacob (1882), 20 Ch. D. 220.

156. —.]—The *ct.* declined to grant *ex p.* an injunction to restrain *defts.* who had been successful in an action at law, against them, from levying execution for the costs, except upon the terms of *pltf.*'s bringing the amount of the costs into *ct.*—*FISHER v. BALDWIN (1853)*, 1 Eq. Rep. 367; 22 L. J. Ch. 966; 1 W. R. 484, L. JJ.; 11 Hare, 352.

157. —.]—An injunction to restrain a landlord from exercising the legal right of distress, will be granted only "upon such terms & conditions as the *ct.* shall think just," under Jud. Act, 1873 (c. 66), s. 25 (8).

The terms & conditions which the *ct.* thought just & imposed on tenants who sought to restrain their landlord from distraining for certain rent until the determination of an action brought by them against him to try his right to the rent, were that an injunction should be granted for a fortnight, & continued only if the rent was in the meantime paid into *ct.*—*SHAW v. JERSEY (EARL) (1879)*, 4 O. P. D. 359; 28 W. R. 142, C. A.

Annotations:—Consd. Quartz Hill Consolidated Gold Mining Co. v. Beall (1882), 20 Ch. D. 501. *Refd. Bonnard v. Perryman, [1891]* 2 Ch. 269.

158. —.]—*EVERINGHAM v. CO-OPERATIVE PURE FAMILY BEER CO.*, [1880] W. N. 99, C. A.

159. —.]—On an interlocutory motion by the grantor of a bill of sale to restrain the grantee, who has taken possession, from continuing such possession, the *ct.* will not grant relief except on the grantor paying into *ct.* the amount claimed by the grantee, unless by some decision binding on the *ct.*, the bill of sale is clearly invalid.—*HILL v.*

PART III. SECT. 1, SUB-SECT. 3.— A. (a).

152 i. Undertaking to abide by any order made at hearing.]—An *interim* injunction was granted, without going into the case, in terms of an undertaking given by the *defts.* upon a prior return of the motion, that nothing should be done in the meantime.—*HENDRIE v. BEATTY (1881)*, 29 Gr. 423.—CAN.

152 ii. —.]—Where an injunction is granted "until the trial or other final disposition of the action, or until further order," or an undertaking is given to that effect, it remains in force until the action is finally disposed of or until some other order is made with regard to the injunction or undertaking. The action is not finally disposed of until final judgment is entered, because until then it cannot be certain what the final judgment will be.—*CARROLL v. PROVINCIAL NATURAL GAS CO. (1894)*, 16 P. R. 518.—CAN.

1. Undertaking to bring case for trial.]—Injunction to stay the sale until the validity, or otherwise, of judgment at the suit of a bank was settled, continued, but only on the condition that *pltf.* should give an undertaking to bring on the case for trial at the next term of the Supreme Ct. in the County, or that their bill be

dismissed.—*MOODY v. BANK OF NOVA SCOTIA (circa 1874)*, R. E. D. 129.—CAN.

m. Vendor restrained from entering—Occupier confessing ejectment.]—On an application for an injunction order, in a suit for the specific performance of an agreement for the sale of land, to restrain an action of ejectment by the vendor to recover possession of the land, the *ct.* ordered that, on *deft.* confessing the action of ejectment, *pltf.* should be restrained until further order from taking possession; otherwise the application should be dismissed.—*FREEMAN v. STEWART (1902)*, 2 N. B. Eq. Rep. 365.—CAN.

n. Applicant to keep account.]—Interim interdict granted against a party using roads adjacent to a canal, but the interdicting party required to keep an account of dues paid by the interdicted person for travelling by the canal.—*MONKLAND CANAL CO. v. DIXON (1822)*, 1 Sh. (Ct. of Sess.) 412.—SCOT.

PART III. SECT. 1, SUB-SECT. 3.— A. (b).

153 i. As condition of granting injunction.]—A purchaser at auction by consent of the auctioneer, paid the deposit by cheque instead of in cash as the contract provided. The purchaser subsequently stopped payment of the cheque on the ground that the

contract was induced by mistake. The auctioneer sued the purchaser at law upon the cheque in a suit to rescind the contract & stay the action at law. The *ct.* refused to grant an interlocutory injunction to the hearing except on terms of the purchaser paying into *ct.* forthwith the amount of the deposit.—*LISTER v. COWDERY (1900)*, 21 N. S. W. Eq. 4; 16 N. S. W. W. N. 142.—AUS.

153 ii. —.]—A bill in equity was filed to obtain a decree of partnership between *pltf.* & *deft.* & for an account & an *ex parte* injunction obtained restraining *deft.* from interfering with *pltf.* in making the assets available for payment of the debts. *Deft.* denied the partnership. Before the hearing *pltf.* collected money belonging to the alleged partnership, which he appropriated to his own use, whereupon *deft.* brought an action against him to recover the money. On application by *pltf.* for an injunction to restrain that action:—*Held:* the judge in granting it was justified in requiring the present *pltf.* to pay the money into *ct.*—*SAYRE v. HARRIS (1882)*, 22 N. B. R. 142.—CAN.

153 iii. —.]—The *ct.* refused an injunction against proceeding on the promissory note, except on the terms of lodging its amount in *ct.*—*CARTER v. UNIAKKE (1853)*, 4 L. Ch. R. 30.—IR.

KIRKWOOD (1880), 42 L. T. 105 ; 28 W. R. 358, C. A.

Annotations:—*Reid*. Hickson v. Darlow (1883), 23 Ch. D. 690. *Mentd.* *Re* Haynes, *Ex p.* National Mercantile Bank (1880), 15 Ch. D. 42 ; Penwarden v. Roberts, Wilson v. Roberts, Heath v. Roberts (1882), 9 Q. B. D. 137 ; Peace v. Brookes, [1895] 2 Q. B. 451.

160. —.]—If, while an action is pending against a co. for the rescission of a contract to take shares, the co. give notice to pltf. to forfeit the shares in consequence of non-payment of calls, the ct. will, on pltf. paying into ct. the amount of the call with interest, restrain the co. until the trial of the action from forfeiting the shares.—JONES v. PACAYA RUBBER & PRODUCE CO., LTD., [1911] 1 K. B. 455 ; 80 L. J. K. B. 155 ; 104 L. T. 446 ; 18 Mans. 139, C. A.

161. —.]—CAVENAGH v. COHEN (1919), 147 L. T. Jo. 252.

162. *As condition of continuing injunction.*—Where a verdict has been obtained at law & an injunction bill is filed while pltf. at law is out of the kingdom, & an injunction obtained against him for want of his answer, the ct. will direct pltf. in equity to pay into ct. the money recovered, & in default thereof will dissolve the injunction.—PORTS v. BUTLER (1787), 1 Cox, Eq. Cas. 330 ; 2 Bro. C. C. 184, n. ; 29 E. R. 1189.

163. —.]—Bill for specific performance of a parol agreement to grant a farm lease with the usual & customary covenants of the neighbourhood & an injunction to prevent an ejectment ; pltf. having taken possession. Upon the answer, stating the insolvency of the pltf. & various breaches of the agreement during five years' possession, to the ruin of the estate, the injunction was continued on an undertaking to give judgment in ejectment, go to commission, & set down the cause for next term, paying the rent into ct. Deft. also insisting on a covenant not to assign, that is the subject of inquiry as to the custom of the neighbourhood.—BOARDMAN v. MOSTYN (1801), 6 Ves. 467 ; 31 E. R. 1147, L. C.

Annotation:—*Mentd.* Church v. Brown (1808), 15 Ves. 258.

164. —.]—Where an order was made for payment into ct. of 50 per cent. on the subscriptions of the parties:—*Held*: this meant not a payment of half the gross amount of the subscriptions, without regard to the parties contributing, as a condition of continuing the injunction, but a separate payment of one moiety of his individual subscription by each subscriber ; & the injunction was to be dissolved against such parties only, as did not pay in, & to be retained in favour of such as did.—MARRYATT v. NOBRE (1824), M'Cle. & Yo. 101 ; 148 E. R. 342.

165. —.]—PLAYFAIR v. BIRMINGHAM, BRISTOL & THAMES JUNCTION RY. CO., No. 64, ante.

166. —.]—WHITE v. CRISP (1847), 10 L. T. O. S. 128.

167. —.]—Where a pltf. at law, being abroad, has recovered judgment in the action, & deft. at law files his bill for an account & injunction, & obtains the common injunction, if the ct. sees, on a motion to dissolve the injunction upon affidavit before answer, that there has been culpable

delay on the part of pltf. in equity, he will be ordered to pay the money recovered into ct., or the injunction will be dissolved, whether the bill was filed before or after verdict.—ANDERSON v. NOBLE (1852), 1 Drew. 143 ; 21 L. J. Ch. 586 ; 61 E. R. 406.

(c) Undertaking in Damages.

See Part XI., Sect. 6, post.

B. Withholding or Suspending Injunction.

(a) In General.

168. *Undertaking to abide by any order made at hearing.*—A ct. of equity interferes by injunction to prevent an injury in respect of a legal right, simply on the ground of the damage it produces to property ; & the jurisdiction of the ct. is not confined to restraining injury to the enjoyment & comfort in the occupation : therefore it is not necessary that pltf. filing a bill for an injunction to restrain such an injury should be in the actual occupation of the property.

Where a pltf. filed a bill for an injunction to restrain the erection of an addition to the house adjoining one of his own, so as to interfere with the windows, which he alleged were ancient lights, some of which had been recently enlarged, & some new lengths had been opened, & an interim order had been granted ; upon a motion for an injunction the ct. gave pltf. liberty to bring an action at law, but allowed deft. to proceed with the new building to a specified height, on his undertaking to abide by any order the ct. might make as to pulling down any addition which might be made to the erection complained of by the bill, & also undertaking to admit at the trial that the erection had been carried to such specified height.—WILSON v. TOWNEND (1860), 1 Drew. & Sm. 324 ; 30 L. J. Ch. 25 ; 3 L. T. 352 ; 25 J. P. 116 ; 6 Jur. N. S. 1109 ; 9 W. R. 30 ; 62 E. R. 403.

Annotations:—*Expld.* Cooper v. Hubbuck (1860), 30 Beav. 160. *Reid*. Jones v. Tapling (1862), 12 C. B. N. S. 826. *Mentd.* Wood v. Conway Corpn., [1914] 2 Ch. 47.

169. *Undertaking to repay moneys received.*—WRIGHT v. DORCHESTER (LORD) (1809), cited in 3 Russ. at p. 49 ; 2 L. J. O. S. Ch. 78 ; 38 E. R. 496.

Annotations:—*Reid*. Meux v. Bell (1841), 1 Hare, 73 ; Ward v. Duncombe, [1893] A. C. 369. *Mentd.* Dearle v. Hall, Loveridge v. Cooper (1828), 3 Russ. 1.

170. *Undertaking to assess & pay damages—Compulsory taking of land.*—By an agreement between pltf. & the agent of a railway co., the former agreed to sell to the co. a certain portion of a field for the price of £229 in the whole, being £120 for the land, & £109 for compensation for damage by severance to the remaining portion. The agreement contained a stipulation that in case additional land shall be wanted by the co., the same shall be taken & paid for after the same rate per acre. The co. subsequently took possession of a second portion of the field for purposes authorised by their Act, & entered upon the same without having previously paid the purchase-money for that second portion, after the rate specified in the agreement, & without having previously agreed upon or ascertained by reference

162 i. *As condition of continuing injunction.*—A bill filed to restrain proceedings at law to enforce a judgment having been dismissed, the ct. continued the interim injunction obtained during the progress of the cause until the decision of the ct. of appeal, upon paying into ct. the amount of the judgment, or giving security to the satisfaction of defts.—COTTON v. CORBY (1868), 7 Gr. 50.—CAN.

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PART III. SECT. 1, SUB-SECT. 3.—B. (a).

168 i. *Undertaking to abide by any order made at hearing.*—A motion for an injunction to restrain the infringement of a patent, was ordered to stand until pltf. brought an action at law. There was a verdict for pltf. Deft. tendered a bill of exceptions, pending

which the motion was renewed. The ct. granted an injunction ; pltf. undertaking to abide any order which the ct. might make, by directing an issue, or otherwise, to ascertain the damage, if any, which deft. should sustain by obeying the order, if deft. obtaining judgment in the action.—BAXTER v. COMBE (1851), 3 I. Ch. R. 245.—IR.

Sect. 1.—Discretion of court: Sub-sect. 3, B. (a) (b).]

to a jury the damage occasioned by the severance of the second portion from the remaining portion of the field. Upon the undertaking of the co. to pay the amount of damage to the land by the severance, & to take proper proceedings, if necessary, for ascertaining the amount of such damage, the injunction was withheld.—*JONES v. GREAT WESTERN RY. CO.* (1840), 1 Ry. & Can. Cas. 684, L. C.

171. Undertaking to proceed with due diligence.]

—Sects. 70, 71 of its special Act provided for the crossing by the railway of roads not being turnpike roads. Sect. 72 provided, that a turnpike road which shall be crossed by the railway shall be raised or sunk so as to pass over or under the railway. The railway being proposed to cross the N. road in the mode provided for by sects. 70, 71, pl'tfs., the proprietors of the road, filed their bill, insisting that the road was a turnpike road, & praying to restrain the railway co. from crossing over, or using same, until they should have complied with sect. 72. On a motion for an injunction, the judge being of opinion that the road was not a turnpike road, & therefore not within sect. 72, refused the motion, but on the application of pl'tfs. directed a case for the opinion of a ct. of law upon the question. A case was accordingly made for the opinion of the Exch. Ct., & a certificate returned by the judges of that ct., stating, that the N. road was a turnpike road. The judge, on an application by the railway co., refused to send the legal question for the opinion of another ct. of law. Upon a motion for the injunction as consequent upon the above certificate:—*Held*: as the objects of pl'tfs. must be to procure for the public using the road a compliance with sect. 72 of the special Act, upon the railway co. entering into an undertaking to proceed with & complete a bridge over the road with all possible despatch, an injunction ought not to be granted during the time that must necessarily elapse in building the bridge.—*NORTHAM BRIDGE & ROAD CO. v. LONDON & SOUTHAMPTON RY. CO.* (1840), 11 Sim. 42; 1 Ry. & Can. Cas. 653; 9 L. J. Ch. 277; 4 Jur. 529; 59 E. R. 789.

172. —.]—*ORMFORD & HIGH PEAK RY. CO. v. STOCKPORT, DISLEY & WHALEY BRIDGE RY. CO.* (1857), 1 De G. & J. 326; 29 L. T. O. S. 245; 21 J. P. 468; 3 Jur. N. S. 628; 5 W. R. 636; 44 E. R. 749, L. JJ.

173. —.]—Deft. owned a warehouse at H., which he had insured for about a third of its value in several insurance offices, & which was burnt down by the negligence of servants of the corp'n. of H. On a motion in a suit instituted by the insurance cos. to restrain deft. from suing the corp'n. for less than the whole loss, & from compromising the action to the prejudice of pl'tfs., & from refusing to allow pl'tfs. to sue the corp'n. in his name, he undertook to sue the corp'n. for the whole loss, & not to compromise the action otherwise than *bond fide*:—*Held*: this undertaking gave pl'tfs. all the relief to which they were entitled before the hearing.—*COMMERCIAL UNION ASSURANCE CO. v. LISTER* (1874), 9 Ch. App. 483; 43 L. J. Ch. 601, L. JJ.

Annotations:—Mentd. North British & Mercantile Insce. v. London, Liverpool & Globe Insce. (1876), 45 L. J. Ch. 548; *Law Fire Assce. v. Oakley* (1888), 4 T. L. R. 309.

174. Undertaking not to proceed further—Unless authorised by Parliament.]—The committee of management of an incorporated navigation co. having entered into an agreement with a proposed railway co., for the sale of the navigation, etc.,

on a bill being filed by the shareholders in the navigation co. to restrain the committee from carrying this agreement into effect, it was held that the parties to the agreement on the part of the railway co. were necessary parties to the suit; & upon a motion for an injunction for the purposes aforesaid, the ct. refused the motion upon the committee undertaking to do nothing in the matter unless authorised by Parliament, & the railway co. undertaking to permit pl'tfs. to be heard in Parliament against the proposed railway bill.—*PARKER v. RIVER DUNN NAVIGATION CO.* (1847), 1 De G. & Sm. 192; 9 L. T. O. S. 292; 11 Jur. 624; 63 E. R. 1028.

Annotations:—Reid. Stevens v. South Devon Ry. (1851), 13 Beav. 48; *Hare v. L. & N. W. Ry.* (1861), 30 L. J. Ch. 817.

175. Without leave of court.]—On an application for an injunction to restrain a railway co. from taking proceedings to summon a jury under the compulsory clauses of the Lands Clauses Act, 1845 (c. 18), the ct. thought that pl'tf. would have been entitled to an injunction but for the circumstance that the time limited for the exercise of the compulsory powers was on the point of expiring; but that the doubt as to the validity of such proceedings after that period, although the usual notice had been given of the intention of the co. to take the land, was sufficient ground for declining to grant the injunction, on the co. undertaking not to act on the result of the jury process without the leave of the ct.—*WOOD v. NORTH STAFFORDSHIRE RY. CO.* (1849), 3 De G. & Sm. 368; 64 E. R. 519.

176. — Until hearing.]—A motion for injunction was by arrangement turned into a motion for decree, a time fixed by which pl'tf. was to file any affidavits he might desire, & also for deft. to file his affidavits in answer; while deft. until the hearing undertook not to continue the act complained of, erection of a building to the injury of pl'tf.'s lights, so as to increase the obstruction of light.—*OLARKE v. OLARK* (1864), 5 New Rep. 72; 11 L. T. 366; 13 W. R. 133; *subsequent proceedings* (1865), 1 Ch. App. 16, L. C.

177. —.]—The objects of the A. co. as stated by art. 3 of its memorandum were (*inter alia*) to raise capital & invest it in such bonds, stocks, & securities as therein mentioned; to sell any part of the assets & to accept the consideration in cash, shares, or other securities, & to divide any assets of the co. in specie among its shareholders; to amalgamate with any person, cos., or firms carrying on business of a like nature. The D. co. carried on a similar business. The A. co. agreed with the D. co. to sell to the D. co. all its assets, except 3,325 £2 shares in the D. co. which the A. co. held, for £60,991, to be satisfied as to £59,736 by allotment of 29,868, fully paid-up shares of £2 each in the D. co., & the balance of £1,255 in cash or fully paid-up shares at the option of the A. co. It was provided by the agreement that the shares so allotted & the shares in the D. co. already held by the A. co. were to be divided among the shareholders of the A. co. in manner therein mentioned. It was doubtful whether the mode of division was not illegal as interfering with the rights of the shareholders under the memorandum & arts.:—*Held*: the proposed division of shares, being a matter with which the D. co. had nothing to do, did not, even if illegal, affect the validity of the agreement for sale, & that an interlocutory injunction to prevent the A. co. from carrying the agreement into effect had been properly refused on an undertaking by the A. co. not to divide the shares till after the trial otherwise

than in accordance with the rights of the shareholders under the memorandum & arts.—*WALL v. LONDON & NORTHERN ASSETS CORPN.*, [1898] 2 Ch. 469; 87 L. J. Ch. 596; 79 L. T. 249; 47 W. R. 219; 14 T. L. R. 547, C. A.

Annotations:—*Mentd. Torbock v. Westbury*, [1902] 2 Ch. 871; *Bisgood v. Henderson's Transvaal Estates* (1908), 77 L. J. Ch. 486.

178. Undertaking not to continue acts complained of.—On deft. undertaking not to attempt to induce certain persons to break their contracts, the ct. refused an injunction to restrain him either from persuading persons not to enter into contracts or from inducing persons to go out on strike.—*WRIGHT v. HENNESSEY* (1894), 11 T. L. R. 14, D. C.

179. —.] — *RALEIGH PRINTING & PUBLISHING CO. v. ARTHUR* (1896), 40 Sol. Jo. 781, 813.

180. Undertaking to submit plans of proposed building to plaintiff.—*SMITH v. BAXTER*, No. 1179, *post*.

(b) *Account in lieu of Injunction.*

181. If justice thereby secured to plaintiff.—Where an undertaking by deft. to keep an account will afford to the ct. ample means of doing justice to pltf., should his legal right be established, the ct. rarely grants the *interim* injunction. The profits made by deft. are generally no very inadequate compensation to pltf. for the infringement. But should it turn out, as it not unfrequently does, notwithstanding the favourable opinion the ct. may entertain of pltf.'s case, that nevertheless he was not entitled to the injunction, in what way can the ct. compensate deft.? Let this motion for an injunction stand over until after the trial of the action, deft. undertaking to keep an account of all moneys received by him in respect of his having sold carriage wheels constructed upon the principle of pltf.'s invention (*per CUR.*).—*JONES v. PEARCE* (1831), 1 Web. Pat. Cas. 121; 2 Coop. temp. Cott. 58; 47 E. R. 1049.

182. —.] — (1) An injunction will not be granted where irreparable mischief would ensue.

The legal right of a pltf. ought to be established beyond all possibility of doubt, before the ct. will be justified in granting an injunction which, by stopping extensive works, will do a mischief to deft. that, if pltf. do not succeed can never be repaired (*LORD COTTENHAM, C.*).

(2) The object of the ct. is to preserve to each party the benefit he is entitled to, until the question of right is tried, & that may be entirely secured by deft. undertaking to keep an account (*LORD COTTENHAM, C.*).—*NEILSON v. FORMAN* (1841), 2 Coop. temp. Cott. 61; 47 E. R. 1050; *sub nom. NEILSON v. THOMPSON*, 1 Web. Pat. Cas. 278, L. C.

Annotations:—*As to* (1) *Reid. Stevens v. Keating* (1847), 2 Ph. 333; *Davenport v. Jepson* (1862), 4 De G. F. & J. 440; *Plimpton v. Spiller* (1876), 4 Ch. D. 286.

183. —.] — *NORTH UNION RY. CO. v. BOLTON*

& *PRESTON RY. CO.* (1843), 3 Ry. & Can. Cas. 345; 1 L. T. O. S. 478.

Annotation:—*Reid. Aldis v. Fraser* (1852), 15 Beav. 215.

184. —.] — *CORY v. YARMOUTH & NORWICH RY. CO.*, No. 122, *ante*.

—.] — Where, upon motion for an injunction in a matter involving the making of profits, the granting of the injunction is suspended. it is the usual practice to direct deft. to keep an account of profits in the meantime.—*SWALLOW v. WALLINGFORD* (1848), 11 L. T. O. S. 217; 12 Jur. 403, L. C.

186. —.] — The bill was filed to restrain the co. from running certain trains without stopping at the S. station for the purpose of refreshment of passengers, in violation of a contract between pltf. & the co. for that purpose. Upon the motion for the injunction being made, the Vice-Chancellor, before granting it, required pltf. to establish his right at law, the co. undertaking to keep certain accounts. Proceedings were accordingly taken at law, & resulted in favour of pltf. Upon the application for the injunction being thereupon renewed, the co. asked for a case to a ct. of law, upon a question of law which they by inadvertence had omitted to have tried under the former proceedings, & they resisted the injunction being granted in the meantime. The Vice-Chancellor thought the co. entitled to a case, but granted an interim injunction to pltf. Upon appeal the Lord Chancellor discharged that part of the Vice-Chancellor's order which granted an *interim* injunction, & in lieu thereof required an undertaking from the co. not only to keep the accounts which had been directed in the first instance, but also to pay what might be found due to pltf. for the injury he might sustain by their continuing to run their trains in the manner complained of. A case was accordingly taken at law, & the opinion thereon was in favour of pltf. Pending the proceedings at law pltf.'s interest under the covenant ceased, & the injunction became unnecessary. The ct. on motion by pltf. for the costs of the proceedings at law & in equity, & for a reference to take the accounts which the co. had been ordered to keep, made an order for a reference, but reserved its direction as to the costs, on the ground that they might possibly be affected by the result of the account.—*RIGBY v. GREAT WESTERN RY. CO.* (1849), 19 L. J. Ch. 470; 14 Jur. 710.

Annotations:—*Reid. Wood v. Charing Cross Ry.* (1863), 33 Beav. 290; *Lyde v. Eastern Bengal Ry.* (1866), 36 Beav. 10.

187. —.] — award made by comrs. under an Act of Parliament empowering a co. to take the lands of an infant for a canal, since converted into a railroad, was informal, & it was repudiated by the infant on attaining twenty-one. No subsequent steps were taken either to fix the price of the land or the amount of rentcharge to be paid; but a rent was paid, which was, however, varied

178 i. Undertaking not to continue acts complained of.—*APPLEBY v. ERIE TOBACCO CO.* (1910), 17 O. W. R. 931; 2 O. W. N. 449; 22 O. L. R. 533.—CAN.

o. Where permission given to continue act.—P. granted permission to W., an adjoining owner, to dig a drain partly on his land, for the purpose of draining a pit on the lands of W. which had been in use for some years, & which it was alleged had created a nuisance:—*Held*: P., after having granted the permission & lying by so long, was not in a position to obtain an interlocutory injunction restraining such nuisance, unless he could show

that the nuisance had increased of late beyond what it formerly was.—*SWAN v. ADAMS* (1876), 23 Gr. 220.—CAN.

p. Undertaking to remove obstruction.—The injunction was suspended for one year to enable deft. to remove obstructions complained of.—*IRIDE v. STARR* (1910), 18 O. W. R. 473; 21 O. L. R. 407; 1 O. W. N. 909.—CAN.

q. Undertaking to settle compensation.—*BANNATYNE v. SUBURBAN RAPID TRANSIT CO.* (1904), 15 Man. L. R. 7.—CAN.

r. Injunction by consent.—Defts., in 1918, sought an order to suspend for a few weeks the operation of an injunction contained in a consent judgment

pronounced in January, 1916:—*Held*: the ct. had no jurisdiction to make the order. There is no law which enables the ct. to sanction the breach of a contract or the violation of a judgment granting an injunction.—*LEWIS v. CHATHAM GAS CO.* (1918), 42 O. L. R. 102; 13 O. W. N. 431.—CAN.

PART III. SECT. 1, SUB-SECT. 3.—
B. (b).

t. Where legal title doubtful.—Where the evidence adduced leaves it doubtful as to the person to whom a trading concern belongs the ct. will not at the instance of a party claiming an interest in the funds invested therein,

Sect. 1.—Discretion of court: Sub-sect. 3, B. (b). Sects. 2, 3, 4, 5 & 6. Part IV. Sect. 1: Sub-sect. 1.]

from time to time, &, with the exception of a small part, which was given up to the landlord, the co. remained in possession of the greater part of the land. Fifty-seven years after disputes arose, & each party gave the other notice to quit such part of the land taken by the co. as each held. The co. then filed a bill, asking for a conveyance of the lands comprised in the award, & to restrain defts. from making a bridge over the railroad:—*Held*: the mistakes of the mutual agents of the parties acting under the compulsory clauses of the Act of Parliament, could not bind the land or give vitality to an informal award on such a contract, & the co. could not ask for a conveyance of the lands on their securing a perpetual rentcharge of £14 a year to defts., as stated in the award.

The ct. refused to restrain defts. from using the bridge which had been completed, upon their undertaking to keep an account of all coal & goods which should pass over it.—*SOMERSET COAL CANAL CO. v. HARCOURT* (1857), 24 Beav. 571; 27 L. J. Ch. 139; 30 L. T. O. S. 194; 4 Jur. N. S. 1; 6 W. R. 96; 53 E. R. 478; *on appeal* (1858), 2 De G. & J. 596, L. C.

Annotations:—Refd. Mold v. Wheatcroft (1859), 27 Beav. 510. *Mentd. Martin v. L. C. & D. Ry.* (1866), 1 Ch. App. 501; *River Lee Navigation Conservators v. Button* (1881), 6 App. Cas. 685.

188. —*ELWES v. PAYNE*, No. 137, *ante*.

189. —Pltf. having brought an action against defts. for infringement of a patent granted in 1881 moved for an interlocutory injunction until the trial of the action, to restrain defts. from selling certain articles which pltf. alleged were infringements of his patent:—*Held*: in the case of a new patent, if deft. disputes the validity of the patent, & shows a case to be tried, an interlocutory injunction will not be granted, but defts. must undertake to keep an account of the profits made by the sale of the articles of which pltf. complains, & in this case, on defts. undertaking to keep such an account without prejudice to any question, the motion should stand over till the trial of the action.—*LISTER v. NORTON BROTHERS & Co., LTD.* (1884), 1 R. P. C. 114; *Griffin's Patent Cases*, 148.

190. —.]—The patentee of a compass card brought an action for infringement, & moved for an *interim* injunction. On defts.' undertaking not to make the M. card & to keep an account of the H. cards sold by them, no order was made. The validity of the patent had been previously upheld in an action against B. in England in the High Ct., & the patent had also, in an action against M. come under the consideration of the Ct. of Appeal in Ireland, in which last case it was held that the M. card was an infringement, but the ct. stayed the execution of the injunction pending an appeal to the House of Lords. In the present action defts., after their undertaking, commenced to make & sell the P. card. Pltf. moved for an *interim* injunction to restrain them, alleging that the P. card was the same as the M. card:—*Held*: the P. card was practically the same as the M. card; but, on the balance of convenience, an injunction was not granted, although defts. were ordered to give an undertaking to keep an account.—*THOMSON v. HUGHES* (1890), 7 R. P. C. 71.

restrain the carrying on of the business, but will direct an account of the dealings thereof to be kept.—*SMITH v. SMITH* (1878), 25 Gr. 317.—*CAN.*

191. —.]—Pltfs. as owners of a patent of 1893, the validity of which had not been established by legal process, brought an action for infringement, & moved for an interlocutory injunction. Defts. had advertised but had not begun to sell any of the alleged infringing articles at the commencement of the action. In opposition to the motion, they challenged the validity of the patent, on the ground of anticipation, by matters of common knowledge, & by a prior patent:—*Held*: an injunction ought not to be granted, on defts. undertaking to keep an account of their sales.—*HOLOPHANE, LTD., O'CLERY & DAVIS v. BEREND (O.) & Co., LTD.* (1897), 15 R. P. C. 18.

192. —.]—In an action by certain members of a partnership firm, which had been dissolved, to restrain another member of the late firm from (*inter alia*) attending the patients of the firm at his private house:—*Held*: upon the true construction of the restrictive clause in the partnership deed, the ct. would not grant an *interim* injunction, deft. undertaking to keep an account.—*CLIFFORD v. PHILLIPS* (1907), 51 Sol. Jo. 748.

193. —.]—*MILLS v. FOX FILMS Co.* (1923), 58 L. Jo. 511.

See COPYRIGHT, Vol. XIII., pp. 191, 205, 206, 222, 224, Nos. 256, 406, 414, 604, 634, 635.

SECT. 2.—AT WHAT STAGE GRANTED.

194. Whether granted after decision—To preserve property pending appeal.]—Where a bill has been dismissed & the decree has been enrolled, the ct. has exhausted its jurisdiction in that suit, & will not grant an injunction to preserve the property which was in question in the cause pending an appeal to the House of Lords; & where pltf. is desirous of having the property thus temporarily protected, it is incumbent on him to see that the decree is framed so as to keep alive the jurisdiction pending the appeal.—*GALLOWAY v. LONDON CORPN.* (No. 2) (1865), 3 De G. J. & Sm. 59; 12 L. T. 623; 11 Jur. N. S. 537; 13 W. R. 933; 46 E. R. 560, L. JJ.

Annotations:—Consd. Polini v. Gray, Sturla v. Freccia (1879), 12 Ch. D. 438. *Distd. Swanston v. Twickenham L. B.* (1879), 11 Ch. D. 838.

195. —.]—When an action has been altogether dismissed by a Div. Ct. no order can be made under R. S. C., 1875, Ord. 58, r. 16, to stay proceedings pending an appeal; but the Ct. of Appeal will, in a proper case, grant an injunction to restrain any of the parties parting with property till the hearing of the appeal.—*WILSON v. CHURCH* (1879), 11 Ch. D. 576; 48 L. J. Ch. 690; 27 W. R. 843, C. A.

Annotations:—Refd. Otto v. Lindford (1881), 18 Ch. D. 394; *Cropper v. Smith* (1883), 24 Ch. D. 305.

196. —.]—A decree was made in three suits for the administration of the personal estate of an intestate, directing the usual inquiry as to her next of kin. A certificate was made finding five persons of the name of F., who were resident abroad, to be the next of kin, & an order was made for distribution of the fund in ct. among them. S., who had not been a party to the proceedings, applied by motion to stay the distribution of the fund, alleging herself to be next of kin. The Vice-Chancellor suspended the giving out

pleted cannot be granted.—*GLEN v. CALEDONIAN RY. Co.* (1868), 6 Macph. (Ct. of Sess.) 797; 40 Sc. Jur. 434.—*SCOT.*

PART III. SECT. 2.

a. When act completed.]—*Interim* interdict against an act already com-

of the order, & directed his chief clerk to inquire whether S. had made out a *prima facie* case, & the chief clerk finding that she had not, the Vice-Chancellor directed the order to be given out without prejudice to any independent proceeding by S. Four of the five shares were at once transferred to four of the persons found entitled; the fifth remained in ct. Two of the shares which had been transferred were sold out, & the proceeds received by the vendors. S. then commenced an action, & obtained in it an order granting an injunction to restrain any dealing with the three shares which had not been sold, & directing an inquiry who were the next of kin, & this order was subsequently directed to be taken as made in the three suits as well as in the action. The chief clerk again found the F. family to be the next of kin. The action & a summons to vary the certificate were heard before the Vice-Chancellor, who dismissed the summons & the action, but continued the injunction in the three causes until further order. S. appealed, & the Ct. of Appeal affirmed the decision of the Vice-Chancellor dismissing her bill, but S. being about to appeal to the House of Lords:—*Held*: as, if S. ultimately succeeded in the House of Lords, her success would be useless unless the fund was protected in the meantime, the injunction ought to be continued pending the appeal.

The principle which underlies all orders for the preservation of property pending litigation

is this, that the ultimately successful party in the litigation is to reap the fruits of that litigation, & not obtain merely a barren success (JESSEL, M.R.).—*POLINI v. GRAY, STURLA v. FRECCIA* (1879), 12 Ch. D. 438; 41 L. T. 173; 28 W. R. 360, C. A.

SECT. 3.—THREATENED DAMAGE.

See Part VI., *post*.

SECT. 4.—MANDATORY INJUNCTION.

See Part V., Sect. 2, *post*.

SECT. 5.—FORM OF ORDER.

See Part XI., Sect. 5, sub-sect. 1, *post*.

SECT. 6.—EFFECT OF ORDER.

197. Order does not affect decision in cause.]—An interlocutory order for an injunction cannot be considered in argument as affecting the ultimate decision of a cause.—*DREW v. HARMAN* (1818), 5 Price, 319; 146 E. R. 620.

Part IV.—Perpetual Injunctions.

SECT. 1.—WHEN GRANTED.

SUB-SECT. 1.—MUST BE CAUSE OF ACTION.

198. General rule.]—To call for the exercise of that power [to grant an injunction] it would be necessary to show that there was an actionable wrong well laid, & if the statement only showed a part of that which was necessary to make up a

cause of action, that is to say, if special damage was necessary to the maintenance of the action, & that special damage was not shown, a tort in the eye of the law would not be disclosed, the case would not be within those provisions, & no injunction would be granted (LORD HERSCHELL, C.).—*WHITE v. MELLIN*, [1895] A. C. 154; 64 L. J. Ch. 308; 72 L. T. 334; 59 J. P. 628; 43

PART III. SECT. 6.

197 i. Order does not affect decision in cause.]—*Interim* injunction had been affirmed on appeal before the hearing of the cause:—*Held*: that decision was not binding on the trial judge, & did not vest him of the responsibility of deciding the case upon the merits of the hearing.—*FRASER v. CANADIAN PACIFIC RY. CO.* (1908), 8 W. L. R. 380; 17 Man. L. R. 667; 8 Can. Ry. Cas. 205.—CAN.

PART IV. SECT. 1, SUB-SECT. 1.

198 i. General rule.]—A pleading on equitable grounds must state facts showing that a ct. of equity would give the relief which the party pleading claims. In an action for obtaining a deed by fraud, it is no answer on equitable grounds, to a plea of Stat. Limitations, that the action was brought within six years after notice to pltf. of the fraud; for that, without showing a title to any other relief, would not entitle pltf. to an injunction in equity.—*URQUHART v. MCPHERSON* (1877), 3 V. L. R. 65.—AUS.

198 ii. —.]—Declaration for breaking & entering pltf.'s close & cutting & carrying away the grain. Plea, on equitable grounds, that pltf. held the land under an indenture of lease from deft., on the negotiation for & execution of which it was orally agreed between them, & the true agreement was, that deft. should have the right

to enter & harvest the crop then in the ground sowed by him: that when the lease was executed a reservation of such right in it was suggested, but omitted on pltf.'s assurance that it was unnecessary, as the agreement between them was well understood, & deft. would be allowed to take the crop; & that the entry, etc., in pursuance of such agreement, was the trespass complained of:—*Held*: as equity in such a case would decree specific performance, there was ground for a perpetual injunction against this action.—*MCGINNESS v. KENNEDY* (1869), 29 U. C. R. 93.—CAN.

198 iii. —.]—*A.-G. v. FRASER* (1878), 3 R. & C. 351.—CAN.

198 iv. —.]—An action claiming an injunction restraining defts. from removing any more top soil from pltf.'s land, or any clay other than that referred to in the agreement, for a mandatory order requiring defts. to restore top soil for damages, reformation of the deed & agreement in question, dismissed without prejudice to any action which pltf. might bring after Apr. 1, 1913, in respect of any claim for breach of agreement respecting top soil, at which time defts.' right under the agreement would expire.—*GALLAGHER v. ONTARIO SEWER PIPE CO.* (1912), 21 O. W. R. 550, 1002; 3 O. W. N. 742, 1240; 3 D. L. R. 394.—CAN.

198 v. —It was contended that

pltf. had a sufficient interest in the soil to entitle him to object to the working of minerals in or under it without his consent:—*Held*: pltf.'s right being limited to the receipt of rents for the life of his lessor, & there being no evidence that the security of those rents would be in any degree impaired by anything defts. had done or might do, or that the enjoyment of the right vested in pltf. had been or would be interfered with by them, the ct. refused to grant an injunction.—*TITURAM MUKERJI v. COHEN* (1906), 1 L. R. 33 Calc. 203.—IND.

198 vi. —.]—Pltf., a Roman Catholic, was appointed to give manual instruction in a national school under Presbyterian management. Deft. called a meeting of parents of children attending the school, at which several of those present came to an arrangement to withdraw their children from the school. The result of this action was to injure pltf. by reducing her salary, which depended on a capitulation grant. In an action brought by pltf., claiming an injunction & damages:—*Held*: deft. with other parents withdrew their children from the school, & such withdrawal resulted in loss to pltf.; but the object of the combination was not unlawful, & no unlawful means were used to attain it, & therefore pltf. had no cause of action.—*SWEENEY v. COOTE*, [1906] 1 I. R. 51, 92, [1907] 1 I. R. 233; 41 I. L. T. 117.—IR.

Sect. 1.—When granted: Sub-sects. 1 & 2.]

W. R. 353; 11 T. L. R. 236; 11 R. 141, H. L.; *reversq.* S. C. *sub nom.* *MELLIN v. WHITE*, [1894] 3 Ch. 276, C. A.

Annotations:—*Refd.* *Dunlop Pneumatic Tyre Co. v. Maison Talbot, Shrewsbury & Talbot & Welgel, Clipper Pneumatic Tyre Co. v. Maison Talbot, Shrewsbury & Talbot & Welgel* (1904), 20 T. L. R. 579; *Cundey v. Lerwill & Pike* (1908), 99 L. T. 273; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. Co.*, [1922] 2 K. B. 260. *Mentd.* *Bullivant v. Wright* (1897), 13 T. L. R. 201; *Empire Typesetting Machine Co. of New York v. Linotype Co.* (1898), 79 L. T. 8; *Hubbuck v. Wilkinson, Heywood & Clark*, [1899] 1 Q. B. 86; *Royal Baking Powder Co. v. Wright, Crossley* (1900), 18 R. P. C. 95; *Alcott v. Millar's Karri & Jarrah Forests* (1904), 91 L. T. 722; *Lyne v. Nicholls* (1906), 23 T. L. R. 86.

199. —.]—An action does not lie against a married woman at the suit of her husband claiming an injunction to restrain her from pledging his credit so as to cause him damage, there having been no prohibition by the husband, because the act of pledging another's credit so as to cause him damage gives rise to an action in tort, & Married Women's Property Act, 1882 (c. 75), s. 12, a husband cannot sue his wife in tort, & the ct. will not grant an injunction restraining an act which does not give rise to a cause of action.—*WEBSTER v. WEBSTER*, [1916] 1 K. B. 714; 85 L. J. K. B. 691; 114 L. T. 701; 32 T. L. R. 290.

Annotation:—*Mentd.* *Hulton v. Hulton*, [1916] 2 K. B. 642.

200. —.]—An exclusive right to take photographs is not a form of property known to the law.

The promoters of a dog show purported to assign the sole photographic rights in connection with the show. The assignee purported to assign to pltf. the sole press photographic rights at the show. The promoters of the show did not cause any notice to be placed on the tickets of admission or otherwise forbid the taking of photographs at the show. An independent photographer took photographs of the dogs exhibited & sold certain of them to

defts., & defts. published the photographs so bought in an illustrated journal. In an action by pltf. for an injunction to restrain them from continuing to do so:—*Held*: the action would not lie, inasmuch as the promoters of the dog show had, in law, no exclusive right of photographing anything there, & therefore could not assign that right as property. They could have acquired such a right by contract by making conditions as to admission, but they had not done so, & therefore pltf. had failed to make out any cause of action.—*SPORTS & GENERAL PRESS AGENCY, LTD. v. "OUR DOGS" PUBLISHING CO., LTD.*, [1917] 2 K. B. 125; 86 L. J. K. B. 702; 116 L. T. 626; 33 T. L. R. 204; 61 Sol. Jo. 299, C. A.

SUB-SECT. 2.—LEGAL RIGHT.

201. *There must be a legal right.*—Motion by the King's patentees for an injunction to stop the sale of English bibles printed beyond the seas. Denied till the validity of the patent had been tried at law.

I do not apprehend the Chancery to be in the least a ct. of state; neither can I grant an injunction in any case, but where a man has a plain right to be quieted in it (*LORD GUILFORD, LORD KEEPER*).—*ANON.* (1682), 1 Vern. 120; 23 E. R. 357.

202. —.]—Where there is any doubt as to the exclusive legal title of a party claiming an injunction in aid of that legal title, the ct. will not exercise jurisdiction without giving an opportunity of trying the legal title by proceedings at law.

I can only make the order [dissolving the injunction] as to the party who applies. The injunction, in my opinion, ought not to stand; but the matter should be put in the course of legal inquiry

198 vii. —.]—In order to warrant the granting of an interdict, the party applying for it must satisfy the ct. that a wrong has been done, or threatened to be done, by the party against whom he applies.—*KING v. HAMILTON* (1844), 6 Dunl. (Ct. of Sess.) 399; 16 Sc. Jur. 207.—*SCOT.*

198 viii. —.]—Pltf., after alleging in his declaration that he was a taxpayer, secretary to the Manufacturers' Assoon. & interested in the due observance of Customs Act, 1906, & that deft., as Treasurer of the colony, was permitting to be imported into the colony printed catalogues in parcels under a certain weight without payment of the duty by the said Act provided, prayed for a declaration that deft. was not entitled to give such permission, & for an interdict restraining him from granting such permission:—*Held*: in the absence of any averment of special damage or of breaches of duty, owing to pltf., or of infringement of any right belonging to pltf., the declaration disclosed no cause of action at the suit of pltf.—*BAGNALL v. COLONIAL GOVERNMENT* (1907), 24 S. C. 470; 17 C. T. R. 689.—*S. AF.*

PART IV. SECT. 1, SUB-SECT. 2.

201 i. *There must be a legal right.*—The owner of land through which a stream flowed into land on which a former proprietor had erected a mill-dam, which forced back the water & overflowed about two acres of the adjoining land, damaging it to the extent of about £2 per annum, brought trespass against the former owner of the mill for the value of the land so damaged in which he established his

legal right, & now applied for a perpetual injunction:—*Held*: the small amount of damages occasioned was not a sufficient reason for withholding the aid of the ct., & pltf., having established a clear right both at law & in chancery, was entitled to a perpetual injunction to stay further trespass.—*WRIGHT v. TURNER* (1863), 10 Gr. 67.—*CAN.*

201 ii. —.]—*KERR Co., LTD. v. SEELY* (1910), 40 N. B. R. 8.—*CAN.*

201 iii. —.]—*GODSON v. McLEOD* (1913), 24 O. W. R. 565; 4 O. W. N. 1205; 10 D. L. R. 519.—*CAN.*

201 iv. —.]—An injunction will not go to restrain the action of the taxing power except where it may be necessary to protect the rights of the citizen whose property is taxed & who has no remedy by the ordinary process of law.—*SMART HARDWARE, ETC. Co. & SMART v. MELFORT* (1915), 32 W. L. R. 382; 9 W. W. R. 134; 24 D. L. R. 540.—*CAN.*

201 v. —.]—Under Specific Relief Act, 1877, s. 54. The ct. may grant a perpetual injunction against a deft. who invades or threatens to invade a pltf.'s right in cases there specified, & *inter alia*, when the invasion is such that pecuniary compensation would not afford adequate relief. The rule so laid down differs from the rule upon which the decisions are based in English law. In the latter the right to an injunction is a *prima facie* right to which a pltf. is entitled on proof that material injury has been sustained, provided that no circumstances are disclosed to deprive him of that *prima facie* right.—*BOYSON v. DEANE* (1898), 1. L. R. 22 Mad. 251.—*IND.*

201 vi. —.]—*APAJI PATIL v. APA* (1902), 1. L. R. 26 Bom. 735.—*IND.*

201 vii. —.]—An interdict of a sale of horses at the instance of a party alleging himself to be a creditor of the seller, but having no constituted claim, refused as incompetent, although it was averred that the object of the seller was to defeat the right of the creditor.—*COMMERCIAL BANK v. GILCHRIST* (1831), 9 Sh. (Ct. of Sess.) 646.—*SCOT.*

201 viii. —.]—A petition to the sheriff at the instance of the presentee to a parish, praying that certain parties should be interdicted from parting with or destroying a letter alleged to contain statements injurious to him, held to be incompetent, in respect that there was no proper title or interest set forth in the petition, & petitioner had not brought any action in which the letter might be required as evidence, or stated any intention of doing so.—*BARCLAY v. GIFFORD* (1843), 5 Dunl. (Ct. of Sess.) 1136; 15 Sc. Jur. 452.—*SCOT.*

201 ix. —.]—Where a proprietor, pending a declarator of a public right of way through certain footpaths in his grounds, applied for an interdict against parties trespassing upon them, or pulling down the walls or fences & the interdict had been granted, the ct. in respect that he had produced no title, instructing a *prima facie* right to the sea shore (which was included in the interdict sought) recalled the interdict, in so far as it might apply to prevent persons passing along the beach but continued it *quoad netra*.—*MORTON (EARL) v. ANDERSON* (1846), 8 Dunl. (Ct. of Sess.) 1249; 18 Sc. Jur. 593.—*SCOT.*

(LORD COTTENHAM, C.).—**BRAMWELL v. HALCOMB** (1836), 3 My. & Cr. 737; 40 E. R. 1110, L. C.

Annotations:—**Apld.** *Saunders v. Smith* (1838), 3 My. & Cr. 711. **Refd.** *Sweet v. Shaw* (1839), 3 Jur. 217; *Jarrold v. Houlston* (1857), 3 Jur. N. S. 1051. **Mentd.** *Spiers v. Brown* (1858), 6 W. R. 352; *Hotten v. Arthur* (1863), 11 W. R. 934; *Tinsley v. Lacy* (1863), 1 Hem. & M. 747; *Chatterton v. Cave* (1878), 3 App. Cas. 483.

203. —.] — **PICKFORD v. GRAND JUNCTION RY. Co.**, No. 454, *post*.

204. —.] — (1) Reasons why, in doubtful cases, it is the duty of the ct. to exercise its jurisdiction by injunction, only where the legal right of property has been ascertained.

(2) The ct. should take into its consideration in granting, or withholding, the injunction on which side the balance of harm will preponderate. — **SPOTTISWOODE v. CLARK** (1846), 2 Ph. 154; 1 Coop. *temp.* Cott. 254; 8 L. T. O. S. 230; 10 Jur. 1043; 47 E. R. 844, L. C.

Annotations:—*As to* (1) **Refd.** *Purser v. Brain* (1848), 17 L. J. Ch. 141. *As to* (2) **Refd.** *Dalglish v. Jarvie* (1850), 2 Mac. & G. 231.

205. —.] — (1) If a pltf. applies for an injunction in respect of a violation of a common law right, & the existence of that right, or the fact of its violation is denied, he must establish his right at law, but having done that, he is, except under special circumstances, entitled to an injunction to prevent a recurrence of that violation.

(2) For such a purpose the award of an arbitrator is equivalent to a verdict.

(3) If between the time of the case being referred & the award being made there has been an alteration in the mode of carrying on the business complained of, it may, if in diminution of the cause of injury, be shown as an answer to the application for an injunction; but if in increase of the cause of injury, it need not be the subject of a fresh proceeding at law; that is matter for the discretion of the Ct. of Equity.

(4) Pltf. brought an action to recover damages for an injury to his business, occasioned by the erection of gas works; the action was referred to arbn.; nearly two years elapsed before the award was made, in the course of which time alterations in the mode of carrying on the business complained of were effected; two months after the date of the award the injunction was applied for:—**Held**: there had not been any such acquiescence as to deprive pltf. of his right to the injunction.

He [pltf.] gave notice to applts. of his complaint & that complaint not being listened to, he brought his action. I see no laches whatever to be imputed to him in bringing his action at law (LORD CAMPBELL, C.).—**IMPERIAL GAS LIGHT & COKE CO. (DIRECTORS, ETC.) v. BROADBENT** (1859), 7 H. L. Cas. 600; 29 L. J. Ch. 377; 34 L. T. O. S. 1; 23 J. P. 675; 5 Jur. N. S. 1319; 11 E. R. 239, H. L.; *affg.* S. C. *sub nom.* **BROADBENT v. IMPERIAL GAS CO.** (1857), 7 De G. M. & G. 436, L. C.

Annotations:—*As to* (1) **Consd.** *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. London Electric Lighting Co.*, [1895] 1 Ch. 287; *A.-G. v. Birmingham, Tame & Rea Drainage Board*, [1910] 1 Ch. 48. **Refd.** *Crump v. Lambert* (1867), 17 L. T. 133; *A.-G. v. Cambridge Consumers Gas Co.* (1868), 4 Ch. App. 71; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614; *Cowper v. Laidler*, [1903] 2 Ch. 337; *Price's Patent Candle Co. v. L. C. Co.* (1908), 78 L. J. Ch. 1; *Wood v. Conway Corpn.*, [1914] 2 Ch. 47; *Stollmeyer v. Petroleum Development Co.*, [1918] A. C. 498, n.; *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 481. *As to* (2) **Refd.** *Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 8 Ch. App. 125. **Generally, Mentd.** *Southampton & Itchin Floating Bridge Co. v. Southampton L. B. of Health* (1858), 4 Jur. N. S. 1298; *Ware v. Regent's Canal Co.* (1858), 3 De G. & J. 212; *Re Brogden & Llynvi Valley Ry.* (1860), 9 C. B. N. S. 229; *New River Co. Johnson* (1860), 2 E. & E. 435; *Bagnall v. L. & N. W. Ry.* (1861), 7 H. & N. 423; *R. v. Cheshire Clerk of the Peace* (1864), 4 New Rep. 167; *Coe v. Wise* (1866), L. R.

1 Q. B. 711; *Dungey v. London Corpn.* (1869), 38 L. J. C. P. 298; *Ferrar v. City of London Sewers Comrs.* (1869), L. R. 4 Exch. 227; *Hammersmith, etc. Ry. v. Brand* (1869), L. R. 4 H. L. 171; *Bedford v. Dawson* (1875), 39 J. P. 804; *Saunby v. London (Ontario) Water Comrs.*, [1906] A. C. 110.

206. —.] — A co. which purchases the land of a riparian owner stands in the same situation as he did with respect to the water rights connected with that land.

A canal co. was established by certain Acts of Parliament. The Acts gave the canal proprietors rights as to taking water from streams within the distance of 2,000 yards, for the purpose of making & maintaining the canal. They purchased a mill on a stream, from which stream they had the right to take water. In this way they became riparian owners. As such they were entitled to the flow of water from brooks & streams running into that stream, subject only to the rights which other riparian owners at the upper part of the stream might lawfully exercise. The directors of a waterworks co. purchased a mill on the upper part of the same stream, & so became riparian owners as the owner of that mill had been. They not only used the water for the purposes & in the manner allowed by law to every riparian owner, but collected it into a permanent reservoir for the supply of an adjacent town, & claimed, as their legal right, such a user of it:—**Held**: this use of the water by the directors of the waterworks co. was not a reasonable use of the stream, such as could justifiably be made by an upper riparian owner, & the canal proprietors, who were also riparian owners, whose flow of water was thereby affected, were entitled to come into equity, & obtain an injunction to restrain this use of the water.—**SWINDON WATERWORKS CO. v. WILTS & BERKS CANAL NAVIGATION CO.** (1875), L. R. 7 H. L. 697; 45 L. J. Ch. 638; 33 L. T. 513; 40 J. P. 117; 24 W. R. 284, H. L.; *varying* S. C. *sub nom.* **WILTS & BERKS CANAL NAVIGATION CO. v. SWINDON WATERWORKS CO.** (1874), 9 Ch. App. 451, L. JJ.

Annotations:—**Consd.** *Bonner v. G. W. Ry.* (1883), 24 Ch. D. 1. **Mentd.** *Owen v. Davies*, [1874] W. N. 175; *Ormerod v. Todmorden Mill Co.* (1883), 11 Q. B. D. 155; *Roberts v. Gwyrfael District Council*, [1899] 2 Ch. 608; *McCartney v. Londonderry & Lough Swilly Ry.*, [1904] A. C. 301; *Attwood v. Ilay Main Collieries* (1925), 70 Sol. Jo. 265.

207. —.] — When an injunction is sought in aid of a legal right, the ct. is bound to grant it if the legal right is established. Therefore mere lapse of time will not be a bar to the granting of the injunction, unless it would be a bar to the legal right. To an action for an injunction to restrain deft. from representing that the business carried on by him was the same as that carried on by pltf. it was objected that pltf. had known for between two & three years before issuing his writ the facts on which he relied:—**Held**: this delay was no bar to the action.—**FULLWOOD v. FULLWOOD** (1878), 9 Ch. D. 176; 47 L. J. Ch. 459; 26 W. R. 435; *sub nom.* **FULWOOD v. FULWOOD**, 38 L. T. 380.

Annotations:—**Folld.** *Rowland v. Michell* (1896), 75 L. T. 65. **Refd.** *Raggett v. Findlater* (1873), L. R. 17 Eq. 29; *Evans v. Davis* (1878), 27 W. R. 285; *Jamieson v. Jamieson* (1898), 15 R. P. C. 169; *London General Omnibus Co. v. Lavell* (1900), 83 L. T. 453; *Reliance Rubber Co. v. Reliance Tyre Co.* (1924), 42 R. P. C. 91.

208. —.] — Pltf. society, which was registered under the Cos. Acts as a co. limited by guarantee, was formed for the purpose of enforcing on behalf of its members, being the composers, authors, publishers or proprietors of musical, literary or dramatic works, who alone were eligible as members, all rights & remedies in respect of the public performance of their works. By the arts. of assocn. every member who was a publisher

Sect. 1.—When granted: Sub-sects. 2, 3 & 4.]

undertook during the period of his membership to assign to the society his interest present & future in the performing rights of any works which had been or should thereafter be published by him, & invested the society with the sole right to authorise or forbid the public performance of any such works.

In 1916 a firm of music publishers, being members of pltf. society, assigned by deed to the society the performing right of every song the right of performance of which they then possessed or should thereafter acquire, to be held by the society for the period of the assignors' membership. Subsequently a certain song was written, & the copyright in it, together with the right of performance, was assigned by the author to the said firm. Defts., music hall proprietors, permitted this song to be publicly sung in their music hall without the consent of pltf. society, who sued defts. for infringement of their performing rights. Pltfs. claimed an injunction & damages, but they ultimately abandoned their claim for damages:—*Held*: the interest of pltfs. in the performing

rights being equitable only, they were not entitled to obtain a perpetual injunction against an infringement of their rights without joining the legal owners of the copyright as parties to the action.—**PERFORMING RIGHT SOCIETY, LTD. v. LONDON THEATRE OF VARIETIES, LTD.**, [1924] A. C. 1; 93 L. J. K. B. 33; 130 L. T. 450; 40 T. L. R. 52; 68 Sol. Jo. 99, H. L.

Annotation:—**Mentd. Imperial Tobacco Co. of India v. Bonnan**, [1924] A. C. 755.

209. Legal right must be violated.]—IMPERIAL GAS LIGHT & COKE CO. (DIRECTORS, ETC.) v. BROADBENT, No. 205, *ante*.

210. —.]—Pltf. was the owner & occupier of a dwelling-house & park which adjoined defts.' gasworks. The house was situated at a distance of between 400 & 500 yards from the gasworks. Immediately adjoining defts.' premises was a plantation of trees 16 yards in width & 75 yards in length which had been planted by pltf. to screen off the gasworks. The fumes & smoke from the gasworks were carried by the prevailing wind across the plantation for a distance of 100 to 200 yards on to pltf.'s premises & had destroyed & injuriously affected them to such an extent that

209 i. Legal right must be violated.]—The right of pltf. to interference of the ct. rests not merely on his showing a bare legal right, or on his having obtained a verdict establishing it, but on his also showing an interruption of that right attended with such actual loss or inconvenience to him as on equitable ground be prevented.—**HOWATT v. LAIRD** (1851), 1 P. K. I. 21.—**CAN.**

209 ii. —.]—Pltf. & defts. were both engaged in furnishing refreshments & dresses to persons wishing to go under the Niagara falls; there was a certain public stairway for such persons down the bank; defts. intending to injure pltf. falsely & maliciously, & without reasonable or probable cause, represented to the public wishing to go down the stairway that they had a right to prevent them, & forbade & refused to allow persons wearing dresses furnished by pltf. to pass down, by reason whereof hundreds of persons who would have procured dresses from pltf., were forced & obliged to get their dresses from defts., & pltf. lost the profits of hiring his dresses & selling refreshments, etc.:—*Held*: no violation of any right of pltf., therefore no cause of action.—**DAVIS v. BARNETT** (1866), 26 U. C. R. 109.—**CAN.**

209 iii. —.]—**BELL TELEPHONE CO. v. BELLEVILLE ELECTRIC LIGHT CO.** (1886), 12 O. R. 571.—**CAN.**

209 iv. —.]—A railway co. had the right by statute to take & use the land below high water mark in any stream, lake, etc., so far as required for the purposes of the railway:—*Held*: the right of the public to have access to a harbour, the foreshore of which had been taken by the co., was subordinate to the rights given to the co., & the latter could prevent by injunction an interference with the use of the foreshore so taken.—**VANCOUVER CITY CORPN. v. CANADIAN PACIFIC RY. CO.** (1894), 23 S. C. R. 1.—**CAN.**

209 v. —.]—**GALLIGHER v. BONANZA**

209 vi. —.]—Motion to continue to trial an *interim* injunction restraining deft., the president of a Hebrew congregation, a corpn. incorporated under Ontario Cos. Act from leasing the basement of the synagogue & from selling pews without the consent of the pew-owners. By the constitution of the corpn. only pew-owning members could vote on property matters:—*Held*: *prima facie* the action of the president in permitting the whole

membership to vote on the proposed lease was invalid & he should be enjoined from carrying out the lease, but the selling of pews was a matter wholly for the executive to deal with & the pew-owners had no right to interfere with their discretion.—**GOLD v. MALDAVER** (1912), 23 O. W. R. 75; 4 O. W. N. 106; 6 D. L. R. 333.—**CAN.**

209 vii. —.]—**O'NEIL v. HARPER** (1913), 28 O. L. R. 635; 4 O. W. N. 1276.—**CAN.**

209 viii. —.]—An injunction should not be sought where the alleged trespass is at best only technical & trivial.—**DOUGLASS v. BULLEN** (1913), 24 O. W. R. 890; 4 O. W. N. 1587; 12 D. L. R. 652.—**CAN.**

209 ix. —.]—The ct. will not restrain by injunction trivial infringements of rights of owners of land.—**BERTRAM v. BUILDERS ASSOCN. OF NORTH WINNIPEG** (1915), 31 W. L. R. 430; 8 W. W. R. 814.—**CAN.**

209 x. —.]—One of several co-sharers in a *mehal* having begun to erect certain *kachcha* buildings upon the common land, another co-sharer, three or four days after the building had commenced, brought a suit for an injunction to restrain the continuance thereof, on the ground that deft. was ousting pltf. as a co-sharer from a portion of the common land. It was found that deft. was building upon land which was in excess of the share which would come to him on partition, & that on partition pltf. could not be adequately compensated:—*Held*: pltf. was entitled to a perpetual injunction restraining deft. from proceeding further with the building, & directing that the building, so far as it had proceeded, be pulled down, & prohibiting deft. from building on the land as exclusive owner at any future time.—**SHADI v. ANUP SINGH** (1889), 1 L. R. 12 All. 436.—**IND.**

209 xi. —.]—In a case where the act of deft. amounts to an ouster of pltf. from the possession of joint property, pecuniary compensation not being an adequate relief, an injunction would be the proper remedy.—**SOSHI BHUSAN GHOSE v. GONESH CHUNDER GHOSH** (1902), 1 L. R. 29 Calc. 500.—**IND.**

209 xii. —.]—The interference with contractual relations without sufficient justification is a violation of legal right which gives a right of action to the party, whose rights are infringed.—**RAMA ODAYAN v. SUBRAMANIA AİYAR** (1907), 1 L. R. 31 Mad. 171.—**IND.**

209 xiii. —.]—Where there is a

breach of an existing legal right which is vested in appcts., the breach thereof may be restrained by injunction.—**RAM KISSEN, ETC. v. POORAN** (1920), 1 L. R. 47 Calc. 733.—**IND.**

209 xiv. —.]—**MOUNTCASHELL v. O'NEILL** (1854), 3 I. Ch. R. 619.—**IR.**

209 xv. —.]—Defts. had acquired a plot of land under an improvement scheme under Labourers (Ireland) Acts, & built a cottage on it. Pltf., who was an agricultural labourer, but who had not signed the representation on which the scheme was founded, & was not one of the persons on whose representation it was founded, applied to defts. to have the first letting of the cottage made to him. No other person, qualified to have a letting made to him under the Acts, applied for a letting. Defts. rejected pltf.'s application, & let the cottage to a person not an agricultural labourer. Pltf. having brought an action claiming an injunction & damages:—*Held*: as no private legal right of pltf. had been infringed, he could not sustain the action; & even if the A.-G. were joined as a pltf., the action would not be maintainable.—**O'SHEA v. CORK RURAL DISTRICT COUNCIL**, [1914] 1 I. R. 16.—**IR.**

209 xvi. —.]—**ANGLO-AMERICAN TELEGRAPH CO. v. DIRECT UNITED STATES CABLE CO.** (1874), 6 Nfld. L. R. 1.—**NFLD.**

209 xvii. —.]—It is not necessary that the injury should be serious to entitle pltf. to an injunction; it is enough that pltf.'s right is invaded.—**EAGLE v. BOOTH, BOOTH v. EAGLE** (1883), 2 N. Z. L. R. 165 (S. C.).—**N.Z.**

209 xviii. —.]—The proprietor of lands on one side of a burn sought to interdict a mining co., who occupied the ground on the other side for mining purposes, & one of whose levels driven underground discharged the water therein collected into the burn, from driving another level under it, which would have the effect of discharging the water into another stream flowing through a different valley:—*Held*: the party seeking the interdict had not averred on record facts relevant in law to entitle him to interdict.—**IRVING v. LEADHILLS MINING CO.** (1856), 18 Dunl. (Ct. of Sess.) 833; 28 Sc. Jur. 382.—**SCOT.**

b. Not necessary to establish by action—Before application.]—Since the general orders of 1853 it is not necessary for a party to establish his legal right by an action at law before applying for an injunction.—**RADENHURST v. COATE** (1856), 6 Gr. 139.—**CAN.**

the tops of some of the trees were dying whilst the others were dead. There was no house on pltf.'s property within the affected area. In an action brought by pltf. for an injunction to restrain defts. from carrying on their works so as to cause a nuisance or injury to pltf. or his property:—*Held*: the fumes & smoke discharged by defts.' gasworks over pltf.'s premises caused a serious, growing & permanent injury to pltf.'s property; the injury being of a continuous nature it was impossible to measure the damage thereby occasioned with any certainty; & pltf. was therefore entitled to the injunction he asked.

If any owner of property, be it a house or a garden, or a park, or anything else, not necessarily a house or structure at all, is so substantially injured in the reasonable enjoyment of his property as that he sustains that which is equivalent to a legal nuisance, he is entitled to an injunction to restrain the continuance of that nuisance (BUCKLEY, L.J.).

It seems to me that this is a case in which the ct. cannot reasonably act upon its discretion & give damages in lieu of an injunction (CHANNEL, J.).—WOOD v. CONWAY CORPN., [1914] 2 Ch. 47; 83 L. J. Ch. 498; 110 L. T. 917; 78 J. P. 249; 12 L. G. R. 571, C. A.

211. —.] — A stream which flows in a permanent defined channel, although it is fed exclusively by rain water running off the surface of the land & ceases to flow during a considerable part of each year, is a watercourse; an owner of land upon its bank is consequently entitled to have the natural flow of the water without sensible diminution or increase, subject to the lawful rights of upper riparian owners & without sensible alteration in its character or quality.

In applying the English law as to watercourses to the circumstances of a very different country, & particularly to a tract of land which is of great value as a petroleum area, & of little value in any other connection, regard must be had to those circumstances in moulding the remedy to be granted to a riparian owner, & in considering whether there has been a sensible diminution or pollution of the water; but the distinction between *injuria* & *damnum* is fundamental.

A stream of the above description flowed through lands the whole of which belonged to resps. with the exception of a plot, situated at its mouth, which belonged to applts. Applts.' land was unsuitable for agriculture & was not used for any purpose. Resps. carried on upon their land the business of boring for oil, which was the sole industry of the locality. For the purpose of that business & in order to supply water to other properties which were not riparian, resps. diverted part of the water of the stream, & thereby sensibly diminished the flow of water past applts.' land, they also, without negligence, caused by their works a sensible pollution of the water by oil & salt. Applts. had suffered no pecuniary damage, & the cts. in Trinidad dismissed an action by them for damages & an injunction:—*Held*: applts.' rights were being infringed, & they were consequently entitled to relief; under the circumstances of the case there should be declarations as to their rights, but no injunction should issue until resps. had had time to execute works which would enable them to conduct their operations differently; it should be ordered accordingly that, resps. undertaking to pay from time to time any pecuniary damage which the ct. of first instance should find that applts. had suffered, applts. should have liberty to apply to that ct. for an injunction after a period of two years.—STOLLMEYER v. TRINIDAD LAKE PETROLEUM CO., [1918] A. C. 485; 87 L. J. P. C. 77; 118 L. T. 514, P. C.

212. —.] — Resps. & applts. were respectively upper & lower riparian owners of a stream in Trinidad. Both parties carried, on the business of boring for oil. Applts.' proprietary rights & the unpolluted flow of the water in the watercourse had been violated by resps. allowing noxious water from their works to get into the stream, & would continue to be so violated unless the nuisance was stopped. In an action by applt. claiming an injunction & damages:—*Held*: as the rights of applt. had been violated he was entitled also to an injunction. As, however, an injunction enforceable forthwith would inflict a loss on resps., out of all proportion to applt.'s gain, the operation of the injunction would be suspended for two years in order to give resps. time to abate the nuisance.—STOLLMEYER v. PETROLEUM DEVELOPMENT CO., LTD., [1918] A. C. 498, n.; 87 L. J. P. C. 83; 118 L. T. 518, P. C.

213. Mere inconvenience not enough.] — CLARENCE RY. CO. v. GREAT NORTH OF ENGLAND, CLARENCE & HARTLEPOOL JUNCTION RY. CO., No. 120, *ante*.

SUB-SECT. 3.—MUST BE INJURY AS WELL AS DAMAGE.

214. —.] — DAY v. BROWNRIGG, No. 899, *post*.

215. —.] — STREET v. UNION BANK OF SPAIN & ENGLAND, No. 900, *post*.

216. —.] — FOLI v. DEVONSHIRE CLUB (1887), 3 T. L. R. 706.

SUB-SECT. 4.—WHEN DAMAGES THE PROPER REMEDY.

Damages in lieu of injunction.]—See Part VII., *post*.

217. General rule — Injunction not granted.]—(1) Although an injury had been committed, yet, if it be done under circumstances which are of a temporary nature, & the past mischief may be remedied at law, the ct. will not interfere by injunction.

PART IV. SECT. 1, SUB-SECT. 3.

218 i. *Mere inconvenience not enough.*] — The fact that a riparian proprietor has recovered nominal damages at law establishing his legal right, does not necessarily entitle him to an injunction to restrain the injury complained of. The exercise of this jurisdiction is discretionary, depending very much on the reality & irreparable nature of the injury complained of, & when no *mala fides* exists, on the balance of inconvenience.—GRAHAM v. NORTHERN RY. CO. (1863), 10 Gr. 259.—CAN.

218 ii. —.] — Nauseous & offensive odours & fumes emitted by a pulp mill to the detriment of a neighbouring property, causing to its occupants intolerable inconvenience & rendering it, at times, uninhabitable are a proper subject of restraint; & in such a case, the cts. are not restricted to awarding relief by way of damages, but may grant a perpetual injunction to restrain the manufacturer from continuing or repetition of the nuisance.—CANADA PAPER CO. v. BROWN (1922), 63 S. C. R. 243; 66 D. L. R. 287.—CAN.

PART IV. SECT. 1, SUB-SECT. 4.

217 i. *General rule—Injunction not granted.*]—The ct. will not issue an injunction when the mischief complained of can be properly, fully & adequately compensated by a pecuniary sum.—MARCONI WIRELESS TELEGRAPH CO. v. CANADIAN CAR & FOUNDRY CO., LTD. & SIMON (1918), Q. R. 54 S. C. 535; 43 D. L. R. 382.—CAN.

217 ii. —.] — An injunction should not be granted where damages will fully compensate.—CAMPBELL v.

Sect. 1.—When granted: Sub-sect. 4. Sects. 2 & 3. Part V. Sect. 1.]

(2) In all applications for a special injunction, the parties seeking the assistance of the ct. must show that there has been no unreasonable delay between the injury done & the application for relief.—*SHERSBY v. SOUTH EASTERN RY. CO.* (1849), 13 L. T. O. S. 252; 13 Jur. 689.

218. ———.]—The ct. in its discretion will restrain an intended breach of contract where the damages recoverable at law may not afford a sufficient remedy; but the cases have not gone beyond this. Here is an alleged contract, the measure of damages for the breach of which can be adequately ascertained in an action for the breach of contract (*KNIGHT BRUCE, L.J.*).

In these cases the question is, will the damages awarded in an action at law afford a sufficient remedy to the party aggrieved, & in this case I clearly think the measure of damages may be adequate to repair the wrong sustained (*TURNER, L.J.*).—*DOLLEFUS v. PICKFORD* (1854), 2 W. R. 220, L. JJ.

219. ———.]—*STRAIGHT v. BURN*, No. 448, *post.*

220. ———.]—*LONDON & BLACKWALL RY. Co. v. CROSS*, No. 25, *ante.*

221. Pauper defendant.]—A pauper deft. had committed various acts of trespass against pltf. which it was sought to restrain by injunction:—*Held*: the power of recovering damages at law against a pauper did not constitute an adequate remedy & bill for an injunction would consequently lie.—*HONGSON v. DUCE* (1856), 28 L. T. O. S. 155; 2 Jur. N. S. 1014; 4 W. R. 576.

SECT. 2.—HOW FAR CONSEQUENTIAL EFFECT CONSIDERED.

222. On rights of third parties.]—In granting an injunction this ct. is bound to consider the amount of injury which may be thereby inflicted on strangers to the suit & third parties.

Pltf. filed a bill for an injunction to restrain deft. from setting up or entering into business, on his own account or otherwise, within a specified distance from pltf.'s place of business, & in contravention of a covenant into which he had entered with pltf. to that effect. It appeared that deft. was, after leaving the pltf.'s service as a coachmaker in 1862, employed by W. as his foreman; & that on the occasion of his being so taken into service, viz. in Jan. 1863, W. wrote to pltf., who replied, "deft. would not suit him as a foreman." W. nevertheless engaged him as such. W. was not a party to this suit, which was instituted in Dec. 1863:—*Held*: the bill must be dismissed; but as deft. had improperly disputed the question of the distance, without costs.

Pltf. knew for some time before he filed this bill that deft. was in his employment, & he was therefore guilty of delay, & by granting the injunc-

tion now, I should be doing an injury to a third party, who is innocent (*per CUR.*).—*MAYTHORN v. PALMER* (1864), 11 L. T. 261; 28 J. P. 760; 29 J. P. 532; 11 Jur. N. S. 230; 13 W. R. 37.

223. ———.]—(1) The B. co., possessing springs of water of their own, covenanted, upon selling to the A. co. a portion of those springs, to take from the A. co. the entire supply of water they might require for certain specified purposes, & that they would not supply any of the places, their own premises forming part of the district, which the A. co. was authorised to supply by their Act of Parliament. The B. co. afterwards leased a portion of their premises, through which portion their own stream of water ran, thus supplying their lessees with water from this stream:—*Held*: it could not be decided, in the absence of the lessees of the B. co., whether the supply of water furnished to them by the B. co. could be stopped, but the ct. directed an inquiry as to what damages the A. co. had sustained, & were sustaining, by reason of the B. co. supplying their lessees with water.

(2) A delay of twelve years in making the complaint did not amount to acquiescence, or to an abandonment of pltf.'s rights.—*HARTLEPOOL GAS & WATER CO. v. WEST HARTLEPOOL HARBOUR & RY. CO.* (1865), 12 L. T. 366, C. A.

224. On collateral rights of parties.]—An injunction will not be refused because it will probably have a consequential effect upon the rights of the parties in another direction.—*CROSSLEY & SONS, LTD. v. LIGHTOWLER* (1867), 2 Ch. App. 478; 36 L. J. Ch. 584; 16 L. T. 438; 15 W. R. 801, L. C.

Annotations:—*Mentd. Cook v. Bath Corpn.* (1868), L. R. 6 Eq. 177; *Glover v. Coleman* (1874), 44 L. J. C. P. 66; *Wheeldon v. Burrows* (1879), 12 Ch. D. 31; *Russell v. Watts* (1883), 25 Ch. D. 559; *Monson v. Boehm* (1884), 26 Ch. D. 398; *Scott v. Pape* (1886), 31 Ch. D. 554; *Blair & Sumner v. Deakin, Eden & Thwaites v. Deakin* (1887), 57 L. T. 522; *James v. Stevenson*, [1893] A. C. 162; *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557; *Rushmer v. Polsue & Alfieri*, [1906] 1 Ch. 234; *Jones v. Llanrwst U. C.*, [1911] 1 Ch. 393; *Hulley v. Silversprings Bleaching & Dyeing Co.* (1921), 126 L. T. 499; *Swan v. Sinclair*, [1925] A. C. 227.

SECT. 3.—AT WHAT STAGE GRANTED.

225. General rule—Not till hearing.]—Motion to dismiss the bill for want of prosecution since the answer not prevented by an injunction until answer.

The practice of this ct. is to grant injunctions sometimes until further order, sometimes until answer, & sometimes until the hearing, but never before hearing does this ct. grant a perpetual injunction (*LORD ELDON, C.*).—*DAY v. SNEE* (1814), 3 Ves. & B. 170; 35 E. R. 443, L. C.

226. By consent upon motion.]—By consent an injunction was made perpetual upon motion.—*MORRELL v. PEARSON* (1849), 12 Beav. 284; 50 E. R. 1070.

227. ——— Hearing treated as trial of action.]—

MONTREUIL, [1920] 2 W. W. R. 4; 51 D. L. R. 326; 13 Sask. L. R. 212.—CAN.

217 iii. ———.]—An injunction is not to be given when the remedy in damages is considered adequate.—*BOYSON v. DEANE* (1898), 1 L. R. 22 Mad. 251.—IND.

217 iv. ———.]—Pltf. sued for an injunction restraining deft. from erecting a building which interfered with the light & air coming to pltf.'s house:—*Held*: though the light & air of

pltf.'s house was sensibly diminished by deft.'s building, there was not such substantial damage done as would justify an injunction; pltf.'s remedy, if any, was a suit for damages.—*KALLANDAS v. TULSIDAS* (1899), 1 L. R. 23 Bom. 786.—IND.

217 v. ———.]—Where pltf. has another adequate remedy, & where if an injunction were granted it would be of the vaguest description, no injunction ought to be granted in such cases.—*KESHO PRASAD SINGH v. SRINIBAST PRASAD SINGH* (1911),

1 L. R. 38 Calc. 791.—IND.

PART IV. SECT. 2.

a. Prevention of multiplicity of suits.]—The ct. in considering the propriety of granting an injunction, will have regard to the fact that the injunction, if granted, will prevent that multiplicity of suits on which an injunction is authorised by Specific Relief Act, s. 54.—*LAND MORTGAGE BANK OF INDIA v. AHMEDSHOH BUBIBHOY* (1883), 1 L. R. 8 Bom. 35.—IND.

ASLATT v. SOUTHAMPTON CORPN. (1880), 16 Ch. D. 143; 50 L. J. Ch. 31; 43 L. T. 464; 45 J. P. 111; 29 W. R. 117.

Annotations:—**Mentd.** *Donahoo v. L. G. Board* (1882), 46 L. T. 300; *North London Ry. v. G. N. Ry.* (1883), 11 Q. B. D. 30; *London & Blackwall Ry. v. Cross* (1886), 31 Ch. D. 354; *Holland v. Dickson* (1888), 37 Ch. D. 669; *Richardson v. Methley School Board*, [1893] 3 Ch. 510; *Harris v. Beauchamp*, [1894] 1 Q. B. 801.

228. ———.] — (1) The jurisdiction of the High Ct. of Justice to grant an injunction does not depend on the existence of a right of property requiring protection.

A photographer who had taken a negative likeness of a lady to supply her with copies for money, was restrained from selling or exhibiting copies both on the ground that there was an implied contract not to use the negative for such purposes & also on the ground that such sale or exhibition was a breach of confidence.

Independently of any question as to the right at law the Ct. of Ch. always had an original & independent jurisdiction to prevent what that ct.

considered & treated as a wrong, whether arising from a violation of an unquestionable right or from breach of contract or confidence (**NORTH, J.**).

(2) As the parties have agreed that this motion is to be treated as the trial of the action, the injunction will be perpetual (**NORTH, J.**).—**POLLARD v. PHOTOGRAPHIC CO.** (1888), 40 Ch. D. 345; 58 L. J. Ch. 251; 60 L. T. 418; 37 W. R. 266; 5 T. L. R. 157.

Annotations:—*As to* (1) **Appld.** *Stedall v. Houghton* (1901), 18 T. L. R. 126. **Refd.** *Merryweather v. Moore*, [1892] 2 Ch. 518; *Monson v. Madame Tussaud*, *Monson v. Louis Tussaud* (1894), 63 L. J. Q. B. 454; *Robb v. Green*, [1895] 64 L. J. Q. B. 593; *Boucas v. Cooke*, [1903] 2 K. B. 227.

229. ———.] — **RAYNER v. STEPNEY CORPN.**, [1911] 2 Ch. 312; 80 L. J. Ch. 678; 105 L. T. 362; 75 J. P. 468; 27 T. L. R. 512; 10 L. G. R. 307.

Annotation:—**Mentd.** *Arlidge v. Tottenham U. D. C.*, [1922] 2 K. B. 719.

230. ———.] — **HEATH (HENRY), LTD. v. GORRINGE (FREDK.), LTD.** (1924), 41 R. P. C. 457.

Part V.—Mandatory Injunctions.

SECT. 1.—IN GENERAL.

231. Exercise of jurisdiction—Particular caution needed.]—Defts. prevented pltfs. from building a bridge according to a certain plan, whereupon they purchased land upon which to build the abutments, & submitted a new plan to defts.' engineer. No notice having been taken of this new plan, pltfs. referred it to the county surveyor, & a day was fixed for proceeding on the reference. Defts. did not attend the reference, but built up walls which rendered it impossible for pltfs. to erect their bridge; whereupon they filed a bill, praying an injunction which would, in effect, be mandatory, & compel defts. to pull down their walls, & withdraw all obstructions to pltfs.' proceeding in their works.

A ct. of law having decided the legal right in favour of pltfs., the V.-C. accordingly granted the injunction sought by the bill, with a proviso, that it should be exercised *bond fide*, & so as not at any time or in any manner to obstruct or interfere with the traffic of the railway.

That injunctions, in substance mandatory, though in form merely prohibitory, have been & may be granted by the ct., is clear. This branch of its jurisdiction may be one not fit to be exercised without particular caution, but certainly it is one fit & necessary under certain circumstances to be exercised. Under what circumstances it should be exercised must be matter for judicial discretion in each several case (**KNIGHT BRUCE, V.-C.**).—**GREAT NORTH OF ENGLAND, CLARENCE & HARTLEPOOL JUNCTION RY. CO. v. CLARENCE RY. CO.** (1845), 1 Coll. 507; 3 Ry. & Can. Cas. 605; 4 L. T. O. S. 229; 63 E. R. 520.

232. ———.] — **ISENBERG v. EAST INDIA HOUSE ESTATE CO., LTD.**, No. 268, *post*.

233. ———.] — (1) The ct. will not refuse to grant a mandatory injunction to compel the removal of new buildings for the mere reason that the buildings were completed before the bill was filed, or that the damage admits of pecuniary compensation.

(2) The ct. has no more hesitation in granting a mandatory injunction in a proper case than any other injunction.

(3) At one time it was supposed that the ct. would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining deft. from continuing the notice. The ct. seems to have thought that there was some wonderful virtue in that form, & that extra caution was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care & caution, & I do not know what is meant by extraordinary caution. Every judge ought to exercise care, & it is not more needed in one case than the other (**JESSEL, M.R.**).

(4) By that Act [Chancery Amendment Act, 1858 (c. 27)] the ct. had a jurisdiction to substitute damages where it thought proper. Now this discretion must be a judicial discretion, exercised according to something like a settled rule, & in such a way as to prevent deft. doing a wrongful act, & thinking that he could pay damages for it (**JESSEL, M.R.**).—**SMITH v. SMITH** (1875), L. R. 20 Eq. 500; 44 L. J. Ch. 630; 32 L. T. 787; 23 W. R. 771.

Annotations:—*As to* (1) **Refd.** *Laurence v. Horton* (1890), 62 L. T. 749. *As to* (4) **Consd.** *Holland v. Worley* (1884), 26 Ch. D. 578. **Refd.** *National Provincial Plate Glass Insce. v. Prudential Asce.* (1877), 6 Ch. D. 757; *Martin v. Price*, [1894] 1 Ch. 276; *Cowper v. Laidler*, [1903] 2 Ch. 337.

234. ———.] — **LAWRENCE v. HORTON**, No. 301, *post*.

235. Interlocutory application — Whether condition precedent to obtaining injunction.]—**B.**, in consideration of certain improvements he had made in his house, including the opening of two new windows, was granted a new lease by his landlord, in which the words "ancient lights & appurtenances" were used. After the death of the lessor his assignee allowed C., his lessee of the next house, to make certain additions thereto.

PART V. SECT. 1.

d. Exercise of jurisdiction.] — Injunction granted, ordering deft. to

remove logs of timber left by him on premises, of which he had agreed to give up possession at the end of his lease, & from which he was evicted by

a writ of possession.—**GUINNESS v. FITZSIMONS** (1884), 13 L. R. Ir. 71.—**IR.**

Sect. 1.—*In general.* Sects. 2 & 3.]

She proceeded to erect a high wall, which obstructed the light from B.'s windows, contending she had a right to do so, as he had thrown out new lights. B. filed his bill for an injunction, but, before moving, other parties had obtained one, & the cause now came on to be heard:—*Held*: as the lease referred not only to the ancient lights, but also under the word "appurtenances" to the new lights, it was not competent for the lessor, or any one claiming under him, to obstruct them; & a decree for an injunction ought now to be granted during the continuance of B.'s lease, although he had not made an interlocutory application.—*DAVIES v. MARSHALL* (No. 1) (1861), 1 Drew. & Sm. 557; 4 L. T. 105; 25 J. P. 548; 7 Jur. N. S. 720; 9 W. R. 368; 62 E. R. 491.

Annotations:—*Consd.* *Gale v. Abbott* (1862), 6 L. T. 852. *Apld.* *Cable v. Bryant*, [1908] 1 Ch. 259. *Refd.* *Westwood v. Heywood*, [1921] 2 Ch. 130.

236. —.]—(1) Where an obstruction to an ancient light had existed more than twelve months, but a promise had been given to remove the obstruction, & twelve months had not elapsed from the date of that promise before proceedings were taken:—*Held*: there had been no such an interruption of the enjoyment as would deprive the owner of the light of his remedy, the delay not having occasioned mischief to deft.

(2) Where a mandatory injunction is asked for, pltf. need not apply for an interlocutory injunction before the hearing.

(3) Where an act constituting an interference with light & air is done before it is discovered the ct. will not ordinarily compel the undoing it except at the hearing.—*GALE v. ABBOTT* (1862), 6 L. T. 852; 26 J. P. 563; 8 Jur. N. S. 987; 10 W. R. 748.

Annotations:—*As to* (1) *Refd.* *Glover v. Coleman* (1874), L. R. 10 C. P. 108; *Bass v. Gregory* (1890), 25 Q. B. D. 481; *Chastey v. Ackland*, [1895] 2 Ch. 389.

237. At suit of Attorney-General—On behalf of public—Discretion of court.—In an action by the A.-G. at the relation of pltf. council, & by pltf. council, for an injunction to restrain deft. from diverting from the river more water than they were entitled to under a local Act, & for an injunction to restrain them from permitting the works to remain so constructed as not to comply with the Act:—*Held*: (1) defts. had only allowed the works, executed more than sixty years ago, to operate as they had done from the first, & had acquired by lapse of time an absolute right to the use of the water diverted by those works; the action of pltf. as distinct from the claim of the A.-G. therefore failed; (2) with respect to the action by the A.-G., the ct. had a discretion as to granting a mandatory injunction in such a case, & having regard to the length of time which had elapsed without objection or complaint, no such injunction ought to be granted.—*A.-G. v. GRAND JUNCTION CANAL CO.*, [1909] 2 Ch. 505; 78 L. J. Ch. 681; 101 L. T. 150; 73 J. P. 421; 25 T. L. R. 720; 7 L. G. R. 1014.

A.-G. & Godstone R. D. C. v.

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PART V. SECT. 2.

240 i. General rule—Injunction not granted—Unless in exceptional case.—The ct. may interfere by mandatory injunction on an interlocutory application, but the right must be very clear indeed.—*TORONTO BREWING & MALTING CO. v. BLAKE* (1883), 2 O. R.

175.—CAN.

e. Temporary injunction in mandatory form—Power of court to grant.—Defts. erected on their own land a screen for blocking up the openings which pltf. had made in his wall. Pltf. filed a suit to have the screen removed, & pending the suit applied for & obtained a mandatory injunction

SECT. 2.—INTERLOCUTORY MANDATORY INJUNCTIONS.

238. General rule—Injunction not granted.—Injunction against stopping lights until trial of the right; which was directed on the motion. Ct. will never on motion make an adverse order to pull down what has been done.—*RYDER v. BENTHAM* (1750), 1 Ves. Sen. 543; 27 E. R. 1194, L. C.

Annotations:—*Consd.* *Lond v. Murray* (1851), 17 L. T. O. S. 248. *Refd.* *A.-G. v. Cleaver* (1811), 18 Ves. 211; *Blakemore v. Glamorganshire Canal Navigation* (1832), 1 My. & K. 154.

239. —.]—Where A. by erecting across a river a mill weir, between B.'s mill & the mill of A. had occasioned the mill of B. to be flooded, & B. brought an action & obtained a verdict thereon against A. for the special damage:—*Held*: the ct. had jurisdiction by injunction to compel A. to discontinue the nuisance.—*LOND v. MURRAY* (1851), 17 L. T. O. S. 248, L. C.

240. — — — **Unless in exceptional case.**—*BLAKEMORE v. GLAMORGANSHIRE CANAL NAVIGATION*, No. 79, *ante*.

241. — — —.]—*GALE v. ABBOTT*, No. 236, *ante*.

242. — — —.]—*JOHNSTONE v. ROYAL COURTS OF JUSTICE CHAMBERS CO.*, [1883] W. N. 5, C. A.

243. — — —.]—Ratepayers in a borough issued a writ claiming an injunction to restrain the borough council from approving certain deposited plans, an injunction restraining them from refusing to allow pltf. to inspect the plans, & an injunction to restrain the persons who had deposited the plans from carrying them out. They then moved for *interim* injunctions in the terms of the indorsement on the writ. On appeal against the refusal of the judge in chambers to grant any relief on the motion:—*Held*: (1) with regard to the approval of the plans by deft. council; as at the time of the hearing of the appeal the plans had in fact been approved, though only on the day when the appeal was opened, no injunction could be granted; (2) with regard to the council's refusal to allow inspection of the plans; an injunction to restrain a refusal to allow inspection was equivalent to a mandatory order to allow inspection, & such an order could not be made on an interlocutory application; (3) with regard to the carrying out of the plans by the other defts.; as pltf. had not joined the A.-G., & had not sued on behalf of themselves & all other ratepayers in the borough, & had not shown any special injury to themselves beyond a mere grievance, they could not succeed without amending their writ, & no leave to amend would be given for the purpose of an interlocutory application.—*DOVER PICTURE PALACE, LTD. & PESSERS v. DOVER CORPN. & CRUNDALL, WRAITH, GURR & KNIGHT* (1913), 11 L. G. R. 971, C. A.

244. Constructive notice of plaintiff's rights.—A. sold to B., the owner of the adjoining premises, the right of using two chimneys in A.'s wall. The consideration was paid, & they were used for eleven years, but no grant was executed. C. purchased A.'s house without notice of the right;

directing defts. to remove the screen. Defts., applied to the High Ct.:—*Held*: setting aside the order, the lower ct. had acted illegally & with material irregularity in the exercise of its jurisdiction, in granting the mandatory injunction. *Qu.*: whether a mandatory injunction can be considered as a "temporary" injunction under

but there being fourteen chimney pots on the wall & only twelve flues in A.'s house:—*Held*: (1) C. was put on inquiry; he had constructive notice of the right, & was bound by it, & an injunction was granted to restrain him from stopping up the two chimneys; (2) it was not necessary that the bill should pray for a specific performance, & the absence of a grant was immaterial.—*HERVEY v. SMITH* (1856), 22 Beav. 299; 52 E. R. 1123; *previous proceedings* (1855), 1 K. & J. 389.

Annotations:—As to (1) *Consd.* L. & N. W. Ry. v. L. & Y. Ry. (1867), L. R. 4 Eq. 174; *Allen v. Seckham* (1879), 11 Ch. D. 790. *Refd.* *Baxter v. Bower* (1875), 23 W. R. 805; *Bonner v. G. W. Ry.* (1883), 48 L. T. 619; *Cory v. Davies*, [1923] 2 Ch. 95. *Generally, Mentd.* *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557.

245. Serious damage probable—Preservation of status quo.—The barrier between two mines having been perforated, the owner of one of them artificially conducted his water so as to pass by the perforations into the other, that mode of removing it from his mine being most beneficial to himself, thereby causing irreparable damage to pltf.:—*Held*: the ct. would, on an interlocutory application, grant a mandatory injunction, so as to keep things in the state in which they were *ante litem motam* until the hearing. *Semble*: it would be immaterial whether the perforation were the wrongful act of the injured owner or not.—*WESTMINSTER BRYMBO COAL & COKE CO. v. CLAYTON* (1867), 36 L. J. Ch. 476.

Annotation:—*Mentd.* *West Cumberland Iron & Steel Co. v. Kenyon* (1879), 11 Ch. D. 782.

246. —.]—*GOODRICH v. EVERGLYN COAL CO.*, [1889] W. N. 152.

247. Enforcement of compliance with covenant.—*BROCKLESBY v. MUNN*, [1870] W. N. 42.

248. Establishment of *prima facie* case. — The right conferred or recognised by Prescription Act, 1832 (c. 71), is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it is used. Mandatory injunction granted on an interlocutory application, deft., against whom it was sought, failing to show that the buildings he was erecting would not materially interfere with pltf.'s ancient lights.—*YOUNGE v. SHAPER* (1872), 27 L. T. 643; 21 W. R. 135.

249. —.] — *ANON.* (1875), 20 Sol. Jo. 162; *Bitt. Prac. Cas.* 77; 1 *Char. Cham. Cas.* 17.

250. —.] — *BONNER v. GREAT WESTERN RY. CO.*, No. 756, *post*.

251. Breach of express agreement. — Deft. having, after express notice, erected a porch in breach of a covenant entered into by him was upon interlocutory motion ordered to remove the erection, although the same had been completed before the filing of the bill.—*MORRIS v. GRANT* (1875), 24 W. R. 55.

Annotation:—*Consd.* *Allport v. Securities Corpn.* (1895), 64 L. J. Ch. 491.

252. Dangerous structure.—*COHEN v. POLAND*, [1887] W. N. 159.

253. Previous notice of action to defendant — Notice ignored or evaded—Building operations continued.—Deft. in an action to restrain him from building so as to darken pltf.'s lights upon receiving notice of motion for injunction, put on a number of extra men, & by working night & day ran up his wall to a height of nearly 40 feet before receiving notice that an *ex p. interim* injunction had been granted. It appeared to be a question of some nicety whether the lights were ancient lights. On

the motion coming on the judge restrained deft. from further building & from permitting the wall which he had erected to remain:—*Held*: this order was right, as deft. had endeavoured to anticipate the action of the ct. by hurrying on his building & what he had erected ought to be at once pulled down, without regard to the ultimate result of the action.—*DANIEL v. FERGUSON*, [1891] 2 Ch. 27; 39 W. R. 599, C. A.

Annotations:—*Apld.* *Von Joel v. Hornsey*, [1895] 2 Ch. 774; *Keeble v. Poole & Lucas* (1898), 42 Sol. Jo. 791.

254. —.]—Deft. was erecting a building near pltf.'s house. Pltf. warned deft. that if the building were continued he would sue to restrain it as an obstruction of his ancient lights. After action brought deft. evaded service of the writ for several days, & in the meantime continued the building till substituted service on him was effected:—*Held*: deft.'s evasion of the writ brought the case within the principle of *Daniel v. Ferguson*, No. 253, *ante*, & pltf. was entitled to an interlocutory mandatory injunction ordering deft. to pull down so much of the building as had been erected after pltf. had warned deft. that he intended to bring an action.—*VON JOEL v. HORNSEY*, [1895] 2 Ch. 774; 65 L. J. Ch. 102; 73 L. T. 372, C. A.

Annotation:—*Apld.* *Keeble v. Poole & Lucas* (1898), 42 Sol. Jo. 791.

255. Immediate decision desirable.—A tenant was in possession of rooms on the fourth & fifth floors of certain premises for residential purposes, with the use of the entrance hall, staircase, & lift. The landlord, without the consent of the tenant, & during his temporary absence, proceeded to make structural alterations in the premises, including (*inter alia*) the removal of the staircase, the tenant's access to his rooms being now by another staircase, which was a circuitous & less convenient route. On motion for injunction by pltf. the ct. granted a mandatory order against the landlord to reinstate the staircase.

I think it is a case which should be decided at once & therefore I make the order now instead of directing that the motion stand to the hearing (*NORTH, J.*)—*ALLPORT v. SECURITIES CORPN.* (1895), 64 L. J. Ch. 491; 72 L. T. 533; 11 T. L. R. 310; 39 Sol. Jo. 362; 13 R. 420.

256. Operation of injunction suspended — Pending fulfilment of conditions by plaintiff.—*HILL v. HILL*, [1916] W. N. 59.

SECT. 3.—FORM OF ORDER.

257. Negative form. — Order specifically to repair the banks of a canal, & stop gates, & other works, refused. But the effect was obtained by an order, to restrain impeding pltf. from navigating, using & enjoying, by continuing to keep the canals, banks, or works, out of repair, by diverting the water, or preventing it by the use of locks from remaining in the canals, or by continuing the removal of a stop gate.—*LANE v. NEWDIGATE* (1804), 10 Ves. 192; 32 E. R. 818, L. O.

Annotations:—*Consd.* *Blakemore v. Glamorganshire Canal Navigation* (1832), 1 My. & K. 154; *Lond v. Murray* (1851), 17 L. T. O. S. 248. *Folld.* *Cooke v. Chilcott* (1876), 3 Ch. D. 694. *N.F.* *Ryan v. Mutual Tontine Westminster Chambers Assoon.*, [1893] 1 Ch. 116. *Refd.* *Spencer v. London & Birmingham Ry.* (1838), 1 Ry. & Can. Cas. 159; *Allport v. Securities Corpn.* (1895), 64 L. J. Ch. 491.

258. —.] — *GREAT NORTH OF ENGLAND,*

Sect. 3.—Form of order. Sect. 4.]

CLARENCE & HARTLEPOOL, JUNCTION RY. CO. v. CLARENCE RY. CO., No. 231, ante.

259. —.]—A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building-sites, to erect a pump & reservoir, & to supply water from the well to all houses built on the vendor's land:—*Held*: though the covenant was not one of which the ct. would decree specific performance directly as being for the construction of works which the ct. could not superintend, it could be enforced indirectly by an injunction restraining deft. from allowing the work to remain unperformed.—**COOKE v. CHILCOTT** (1876), 3 Ch. D. 694; 34 L. T. 207.

Annotations:—**Mentd.** **Haywood v. Brunswick Bldg. Soc.** (1881), 8 Q. B. D. 403; **Andrew v. Aitken** (1882), 22 Ch. D. 218; **London & S. W. Ry. v. Gomm** (1882), 20 Ch. D. 562; **Austerberry v. Oldham Corp.** (1885), 29 Ch. D. 750; **Hall v. Ewin** (1887), 37 Ch. D. 74.

260. —.]—**MANSELL v. JONES** (1905), 49 Sol. Jo. 350, C. A.

261. Positive form.]—In an action to restrain deft. from permitting certain fences to remain broken down & removed, the ct. ordered deft., who was in a humble position in life, to restore & replace the fences which he had broken down & removed, instead of making a negative order restraining him from permitting the fences to remain broken down & removed.—**BIDWELL v. HOLDEN** (1890), 63 L. T. 104.

262. —.]—An injunction the effect of which is to require the performance of a certain act, such as the pulling down & removal of buildings, should now be made in a direct mandatory form, & not in the indirect form hitherto in use.—**JACKSON v. NORMANBY BRICK CO.,** [1890] 1 Ch. 438; 68 L. J. Ch. 407; 80 L. T. 482; 43 Sol. Jo. 436, C. A. *Annotation*:—**Reid.** **A.-G. v. Grand Junction Canal Co.,** [1909] 2 Ch. 505.

263. No distinction in principle between negative & positive form.]—There is no distinction in principle between granting an injunction to restrain a co. from interfering with a right & granting an affirmative order compelling a co. to grant the right.—**DAVIES v. GAS LIGHT & COKE CO.,** [1909] 1 Ch. 708; 78 L. J. Ch. 445; 100 L. T. 553; 25 T. L. R. 428; 53 Sol. Jo. 399; 16 Mans. 147, C. A.

SECT. 4.—GROUNDS FOR GRANTING OR REFUSING RELIEF.

264. Enforcement of clear right.]—The ct. has jurisdiction to restrain by injunction a person from making oral statements as well as written statements calculated to injure another person in his business; but with regard to oral statements such jurisdiction will be exercised with great caution.

The ct. will not hesitate to grant a mandatory injunction where it sees that a wrong is being

committed; where therefore A., who had been the agent of B., gave notice to the post office to forward to him all letters addressed to him at B.'s office, & had, & had retained for some time, letters forwarded to him which belonged to B., the ct. granted an injunction restraining him from giving such notice to the post office, & from interfering with B.'s opening such letters other than those which related to A.'s private business, subject to an undertaking by B. not to open letters which were addressed to A. at his office, except at two hours in the day, in the morning & afternoon, when the post came in, & when A. should be at liberty to be present.—**HERMANN LOOG v. BEAN** (1884), 26 Ch. D. 306; 53 L. J. Ch. 1128; 51 L. T. 442; 48 J. P. 708; 32 W. R. 994, C. A.

Annotations:—**Distd.** **Liverpool Household Stores Assocn. v. Smith** (1887), 37 Ch. D. 170. **Fold.** **Puddephatt v. Leith,** [1916] 1 Ch. 200. **Reid.** **Monson v. Tussauds,** **Monson v. Tussaud,** [1894] 1 Q. B. 671.

265. —.]—A right to the access of air to a defined aperture over a servient tenement may be acquired though there is not defined channel over the servient tenement through which the air flows.

The grant of such a right may be implied from general words in a conveyance of a building from a grantor entitled in fee to the adjoining land though such land is subject to a lease.

On Jan. 19, 1905, the H. co. conveyed to pltf. in fee a piece of land with a stable on it. The stable was ventilated by apertures to which the air had access over an open yard which the co. owned in fee subject to a lease for a term of which twenty-eight years were unexpired. On Aug. 3, 1905, the co. conveyed the yard to deft., the lessee joining to merge the term. Deft. put up a hoarding entirely closing the ventilators of the stable:—*Held*: on the principle of derogation from a grant, neither the co. nor deft. as their assignee could erect anything on the yard which prevented the use of the stable as a stable. A mandatory injunction granted to remove the hoarding.—**CABLE v. BRYANT,** [1908] 1 Ch. 259; 77 L. J. Ch. 78; 98 L. T. 98.

Annotations:—**Consd.** **Westwood v. Heywood,** [1921] 2 Ch. 130. **Reid.** **Schwann v. Cotton,** [1916] 2 Ch. 459.

266. —.]—A mandatory injunction will be granted to enforce an agreement by the mtgee. of shares in a limited co. to vote in accordance with the wishes of the mtgor.

This ct. is bound as **COTTON, L.J.,** said in **Herman Loog v. Bean,** No. 264, *ante*, to give effect to a clear right by way of a mandatory injunction . . . & inasmuch as there is one definite thing to be done about which there can be no possible doubt, I am of opinion that I ought to grant not only the prohibitive but also the mandatory injunction (**SARGANT, J.**).—**PUDDEPHATT v. LEITH,** [1916] 1 Ch. 200; 85 L. J. Ch. 185; 114 L. T. 454; 32 T. L. R. 228; 60 Sol. Jo. 210.

267. Damages adequate compensation for injury.]—The ct. has jurisdiction to order the delivery up to an artist of a picture painted by

PART V. SECT. 4.

264 i. Enforcement of clear right.] In a mtge. suit & for an injunction to compel defts., who had removed buildings from the land, to restore them to their former foundations, an *ex p.* injunction to restrain further removal had been obtained, & a motion was now made to continue this injunction & for a mandatory injunction to restore the buildings removed. The injunction was continued until the hearing but, as it remained to be decided whether or not the buildings

formed part of the mtge. security, a mandatory injunction to restore them to their former foundations was refused in the meantime.—**STEWART v. TURPIN** (1884), 1 Man. L. R. 323.—**CAN.**

264 ii. —.]—**CAPITAL CITY CANNING & PACKING CO. v. ANGLO-BRITISH COLUMBIA PACKING CO.** (1905), 2 W. L. R. 59.—**CAN.**

264 iii. —.]—A mandatory order will not be made before trial except upon a very clear case.—**HUNTLEY v. JEFFERS** (1906), 1 E. L. R. 385, 434.—**CAN.**

264 iv. —.]—The wide power possessed by the ct. of interdicting illegal acts implies the power of compelling the performance of a specific duty, at all events on the part of a public officer, by mandatory interdict or other form of "mandament." Relief will only be given where the existence & continued infringement of an absolute legal right have been clearly established.—**MOLL v. PAARL** (CIVIL COMR.) (1897), 14 S. C. 463.—**S. AF.**

267 i. Damages adequate compensation for injury.]—A mandatory injunction is granted only when remedy for

himself, as having a special value, the legal remedy being inadequate. But where, by the terms of an agreement & the frame of the pleadings, pltf., an artist, seeking restitution of a picture, had, in effect, put a fixed price upon it:—*Held*: damages would be an adequate remedy, & there was no jurisdiction in a ct. of equity to interfere.—*DOWLING v. BETJEMANN* (1862), 2 John. & H. 544; 6 L. T. 512; 26 J. P. 531; 8 Jur. N. S. 538; 10 W. R. 574; 70 E. R. 1175.

Annotation:—*Reid*. *Whiteley v. Hilt*, [1918] 2 K. B. 808.

268. —.]—(1) The jurisdiction of the ct. to interfere by way of mandatory injunction should be exercised with great caution; & *semble*, not at all where damages afford an adequate compensation for the injury done.

(2) It is the duty of the ct. in a case in which it considers damage has been done, though not of such a character as to warrant the exercise of its jurisdiction by mandatory injunction, to direct an inquiry before itself, in order to ascertain the measure of damage that has been actually sustained.

(3) In granting a mandatory injunction, the ct. should take care to define clearly in the order, what is ordered to be done.—*ISENBERG v. EAST INDIA HOUSE ESTATE CO., LTD.* (1863), 3 De G. J. & Sm. 263; 3 New Rep. 345; 33 L. J. Ch. 392; 9 L. T. 625; 28 J. P. 228; 10 Jur. N. S. 221; 12 W. R. 450; 46 E. R. 637, L. C.

Annotations:—*As to* (1) *Consd. R. v. Darlington Local Health Board* (1865), 6 B. & S. 562. *Follid. Stanley of Alderley v. Shrewsbury* (1875), L. R. 19 Eq. 616. *Consd. Petter v. Parsons*, [1914] 1 Ch. 704. *Reid. Betts v. De Vitre* (No. 2) (1864), 11 L. T. 533; *Martyr v. Lawrence* (1864), 10 L. T. 188; *Senior v. Pawson* (1866), L. R. 3 Eq. 330. *As to* (2) *Follid. Curriers Co. v. Corbett* (1865), 29 J. P. 469; *Stanley of Alderley v. Shrewsbury* (1875), L. R. 19 Eq. 616. *Reid. Stretton v. Great Western & Brentford Ry.* (1870), 5 Ch. App. 751. *Generally, Reid. Clowes v. Staffordshire Potteries Waterworks Co.* (1872), 27 L. T. 521; *Slack v. Leeds Industrial Co. op. Soc.*, [1923] 1 Ch. 431.

269. —.]—A local board of health withdrew its opposition to a railway bill upon the insertion in the Act of a clause providing that no bridge carrying a road over the railway within their district should have an approach with a slope of more than 1 in 30. The making a slope of 1 in 30 required an encroachment on the land of a person who obtained an injunction to prevent such encroachment, & the co. thereupon made a bridge with a slope of 1 in 20:—*Held*: the co. must not have a bridge with a slope of more than 1 in 30, & it was no answer to say that this requisition could not be complied with without stopping the railway.

The principles of the ct. as to granting mandatory injunctions considered, with reference to the difference between cases of nuisance & cases of contract, & to the suit being by an individual or by the A.-G.

damages is inadequate or there is no other remedy.—*HAIR v. MEAFORD* (1914), 26 O. W. R. 454; 31 O. L. R. 124; 20 D. L. R. 475; 6 O. W. N. 115.—CAN.

274 i. *Injury must be material.*—A mandatory injunction will only be granted for the prevention of serious damage.—*TOBIQUE VALLEY RY. CO. v. CANADIAN PACIFIC RY. CO.* (1900), 21 O. L. T. 148; 2 N. B. Eq. Rep. 195.—CAN.

274 ii. —.]—A mandatory injunction will not be granted except in cases where extreme or very serious damage will ensue.—*SAUNDERS v. RICHARDS CO.* (1901), 21 O. L. T. 510; 2 N. B. Eq. Rep. 303.—CAN.

274 iii. —.]—When a trespass is being continued & substantial damage

is being caused, the ct. will generally interfere to restrain the further commission of the trespass & may grant a mandatory injunction.—*SMITH v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE* (1905), 15 Man. L. R. 249.—CAN.

274 iv. —.]—*SINGER v. PROSKY* (1913), 24 O. R. 353; 4 O. W. N. 1000.—CAN.

274 v. —.]—No suit can lie to close doors opened by a person in his own wall, on the ground of a possibility of his committing trespass on the land of pltf., or of his having actually committed such trespass. It will only lie when the opening of the doors is in itself such an irremediable injury that pltf. would not be sufficiently compensated by money damages.—*GIB-*

It was said, however, that here, although there was a contract, yet, as the injury was small & the works complete, the remedy was only at law. I doubt whether the injury is small. I am disposed to consider it substantial, & I do not think the case one that ought to be left to law on the ground that damages are an adequate remedy. Assuming that there is a complete remedy at law, by *mandamus*, that does not oust the jurisdiction of a ct. of equity, even where a subject is suing for his individual rights. Here the A.-G. is suing in a matter of public interest, & it is a question whether he is not entitled to elect in which ct. he will sue (*ROLT, L.J.*).—*A.-G. v. MID-KENT RY. CO. & SOUTH-EASTERN RY. CO.* (1867), 3 Ch. App. 100; 32 J. P. 244; 16 W. R. 258, L. JJ.

Annotations:—*Follid. A.-G. v. L. & N. W. Ry.*, [1900] 1 Q. B. 78. *Reid. Dowling v. Pontypool, Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714.

270. —.]—A local board in repairing & improving a road under the powers of the Public Health Act, 1848 (c. 63), raised a footpath by the side of the road a few inches, the effect of which was to prevent water which fell upon the space between a warehouse of pltf. in which needles were stored & the road from draining into the road. On a bill filed by pltf. against the local board for an injunction:—*Held*: (1) the local board had no right to make improvements in a way calculated to cause unnecessary injury to pltf.; (2) the evil complained of was one of easy remedy, & the case was not one for pecuniary compensation; (3) a mandatory injunction was granted to prevent defts. from allowing such water to remain dammed up to the injury of pltf.—*MILWARD v. REDDITCH LOCAL BOARD OF HEALTH* (1873), 21 W. R. 429.

271. —.]—*SMITH v. SMITH*, No. 233, *ante*.

272. —.]—*STANLEY OF ALDERLEY (LADY) v. SHREWSBURY (EARL)*, No. 277, *post*.

273. —.]—*SHIEL v. GODFREY & CO.*, [1893] W. N. 115.

274. *Injury must be material.*—The bed of a flowing stream is the property of each riparian owner to the middle of the stream, & each is entitled to make use of it so long as he does not injure his neighbour or interfere with the flow of the water, & an encroachment on the *alveus* of a running stream may be complained of without the necessity of proving that damage has been sustained or is likely to be sustained. But where upon a balance of testimony it appears that the quantity of water sent on to pltf.'s works will not, in all probability, be substantially diminished in quantity or quality, by the means adopted by defts. with that object, the ct. will not proceed by mandatory injunction, but leave pltf. to their remedy at law, if any.—*EDLESTON v. CROSSLEY & SONS, LTD.* (1868), 18 L. T. 15.

275. —.]—The ct. will grant a mandatory injunction only in cases of extreme & serious injury.

BON v. ABDUR RAHMAN KHAN (1869), 3 B. L. R. A. C. 411.—IND.

274 vi. —.]—Before a ct. will, in the case of co-sharers, make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-sharers, without the consent of the other should be restored to its former condition, a pltf. must show that he has sustained, by the act he complains of, some injury which materially affects his position.—*JOY CHUNDER RUKHIT v. BIPRO CHURN RUKHIT* (1886), 1 L. R. 14 Cde. 236.—IND.

g. *Breach of statutory contract.*—The ct., in determining whether pltf.'s remedy should be an injunction or compensation, makes a distinction between a breach of a statutory

Sect. 4.—Grounds for granting or refusing relief.
Sects. 5, 6 & 7.]

A. & B., were two houses, separated from each other by a gullet 2 feet wide. In house A. there was a window a foot square, 5 feet above the ground, on one side of the gullet, the window in question being the only window of the pantry of house A. The owner of house B., in the lifetime of a tenant for life of A., & with her approval pulled down house B., & built a new house in such a manner as to encroach upon the gullet, & to exclude the light & air from the pantry of house A. After the death of the tenant for life of A., the reversioners filed a bill against the owner of house B. for a mandatory injunction, or, alternatively, for damages for the obstruction of light & air:—*Held*: the inconvenience was not sufficiently serious to entitle pltf. to relief, either by mandatory injunction, or by an inquiry to assess damages. *SPARLING v. CLARSON* (1869), 17 W. R. 518.

276. —.]—The owner of an ancient light is entitled to prevent his neighbour from obstructing the access of light so as to render the house possessing the ancient light substantially less fit for occupation.

On the part of pltf. it is a very serious deprivation of the comfort of his house & a very serious diminution of the lettable value of his house. That being so . . . this ct. ought to interfere & grant a [mandatory] injunction (*JAMES, L.J.*).—*KELK v. PEARSON* (1871), 6 Ch. App. 809; 24 L. T. 890; 36 J. P. 196; 19 W. R. 665, L. J.J.

Annotations:—*Consd.* *Dickinson v. Harbottle* (1873), 28 L. T. 186. *Refd.* *City of London Brewery Co. v. Tennant* (1873), 9 Ch. App. 212; *Stanley of Alderley v. Shrewsbury* (1875), L. R. 19 Eq. 616. *Mentd.* *Leech v. Schweder* (1874), 9 Ch. App. 463; *Baltic Co. v. Simpson* (1876), 24 W. R. 390; *Ecclesiastical Comrs. for England v. Kino* (1880), 14 Ch. D. 213; *Scott v. Pape* (1886), 31 Ch. D. 554; *Warren v. Brown*, [1902] 1 K. B. 15; *Colls v. Home & Colonial Stores*, [1904] A. C. 179; *Jolly v. Kine*, [1907] A. C. 1; *Paul v. Robson* (1914), 83 L. J. P. C. 304.

277. —.]—A mandatory injunction for the removal of a building whereby the ancient lights of the dining & other rooms in pltf.'s messuage which had always been the town residence of her family, were obstructed, refused on the ground that the injury was not serious enough, & could be sufficiently compensated in damages, & that the building was almost completed at the time of the filing of the bill. But the obstruction being sufficient to interfere with the comfortable enjoyment of the house as a dwelling-house, & the circumstances of the case being such as fairly entitled pltf. to come to a ct. of equity to try whether she had a right to a mandatory injunction or not, the ct. directed an inquiry as to damages, although pltf. failed as to the relief she had sought, & the bill did not pray for damages in lieu of it.—*STANLEY OF ALDERLEY (LADY) v. SHREWSBURY (EARL)* (1875), L. R. 19 Eq. 616; 44 L. J. Ch. 389; 32 L. T. 248; 23 W. R. 678.

278. —.]—*NATIONAL PROVINCIAL PLATE GLASS INSURANCE CO. v. PRUDENTIAL ASSURANCE CO.*, No. 423, *post*.

279. —.]—*ALLEN v. SECKHAM* (1879), 11 Ch. D. 790; 48 L. J. Ch. 611; 41 L. T. 260; 43 J. P. 685; 28 W. R. 26, C. A.

Annotations:—*Mentd.* *English & Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q. B. 700; *Poulton v. Moore* (1913), 83 L. J. K. B. 875.

contract & what is merely a nuisance; & where there is a statutory contract the ct. will not consider the question of relative cost of carrying out the contract & doing something else in substitution for it, but will compel the performance of the contract at any cost:—*Held*: pltf. co. were entitled

to a mandatory injunction to restrain the breach of a statutory contract, & their rights were not limited to a claim for compensation.—*SCOTTISH-AUSTRALIAN COAL MINING CO. v. REDHEAD COAL MINING CO.* (1891), 12 N. S. W. Eq. 111.—*AUS.*

h. Removal of encroachment.]—A

280. —.]—In cases of obstruction to ancient lights, the question whether a mandatory injunction will be granted to compel the removal of the obstruction depends on whether the damages which would be granted in lieu of injunction would or would not be substantial. Where, therefore, the total damages recoverable for such an obstruction, coupled with two other causes of complaint, amounted to less than £20:—*Held*: the damages were not substantial, & no injunction could be granted, but only damages.—*WEBSTER v. WHEWALL* (1880), 15 Ch. D. 120; 49 L. J. Ch. 704; 42 L. T. 868; 28 W. R. 951.

Annotations:—*Mentd.* *Quilter v. Heatly* (1883), 23 Ch. D. 42; *Roberts v. Oppenheim* (1884), 26 Ch. D. 724; *Re Hinchliffe* (1894), 12 R. 33.

281. Defendant powerless to comply.]—*MEDINA RIVER OYSTER FISHERY CO., LTD. & ULLMANN v. NEWPORT, ISLE OF WIGHT CORPN.* (1897), 61 J. P. Jo. 467, C. A.

282. Compliance necessitating prosecution of legal proceedings.]—*Semble*: an order in the nature of a mandatory injunction obedience to which will necessitate the prosecution of legal proceedings, cannot be made.—*YORKSHIRE (W. R.) RIVERS BOARD v. LINTHWAITE URBAN COUNCIL* (No. 2) (1915), 84 L. J. K. B. 1610; *sub nom.* *WEST RIDING OF YORKSHIRE RIVERS BOARD v. LINTHWAITE URBAN DISTRICT COUNCIL* (No. 2), 113 L. T. 547; 79 J. P. 433; 13 L. G. R. 772, D. C.

Annotation:—*Mentd.* *R. v. Cheshire County Court Judge & United Soc. of Bollermakers, Ex p. Malone*, [1921] 2 K. B. 694.

283. Performance of successive operations.]—Under a licence of pltf., defts., a colliery co., tipped refuse on the side of a mountain on land belonging to pltf. Defts. so tipped as to give rise to a landslide causing injury to pltf.' buildings. In the course of the action brought by pltf. an order was made by consent for the execution of remedial works, consisting mainly of drainage works to prevent any further slide, the works to be paid for ultimately by the unsuccessful parties. Pltf. succeeded in the action & obtained a declaration that the landslide was caused by the acts of the colliery co., & that the co. were liable to pltf. for all damages sustained or thereafter to be sustained by them by reason of the movement or any recurrence or continuation thereof; a perpetual injunction to restrain deft. co. from any further tipping to the prejudice of pltf.; & an injury as to any damages sustained by pltf. by reason of deft. co.'s acts. Liberty was also granted to pltf. to apply in case of apprehended damage for a mandatory injunction to compel deft. co. to do & execute such works as might be necessary (*inter alia*) to keep open the remedial works. Part of the remedial works being out of order, pltf. moved in the action for a mandatory injunction to compel defts. to restore the works to order:—*Held*: although it was not the practice of the ct. to grant a mandatory order for the execution of a series of successive operations, it could & ought to grant a mandatory order compelling the execution of the specific work required to remedy the existing defect in the remedial works.—*KENNARD v. CORY BROTHERS & CO., LTD.*, [1922] 2 Ch. 1; 91 L. J. Ch. 452; 127 L. T. 137; 38 T. L. R. 489, C. A.

mandatory injunction should not be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him.—*NAVROJI MANEKJI WADIA v. DASTUR KHARSEDJI MANCHERJI* (1904), 1 L. R. 28 Bom. 20.—*IND.*

SECT. 5.—PURPOSES FOR WHICH GRANTED.

See Part X., *post*.

SECT. 6.—CONTINUATION OF ACT AFTER NOTICE OF OBJECTION.

284. Defendant acts at his peril—If act continued.]—HOLMES v. UPTON (1840), 9 Ch. App. 214, n., L. C.

*Annotations:—*Consd. City of London Brewery Co. v. Tennant (1873), 9 Ch. App. 212. *Refd.* Stanley of Alderley v. Shrewsbury (1875), 23 W. R. 678.

285. ———.]—MANNERS (LORD) v. JOHNSON, No. 670, *post*.

286. ———.]—MORRIS v. GRANT, No. 251, *ante*.

287. ———.]—Where deft. after action brought to restrain the erection of a building on land over which pltf. had a right of way, continued the erection of & completed building:—*Held*: pltf. was entitled to a mandatory injunction, & the ct. had no power under Chancery Amendment Act, 1858 (c. 27), to compel him to accept damages instead of the injunction.

It was not intended . . . by the legislature . . . to compel a man who is wronged to sell his property to the person who has wronged him (JAMES, L.J.).—KREHL v. BURRELL (1879), 11 Ch. D. 146; 40 L. T. 637; 27 W. R. 805, C. A.

*Annotations:—*Consd. Holland v. Worley (1884), 26 Ch. D. 578. *Fold.* Greenwood v. Hornsey (1886), 33 Ch. D. 471. *Refd.* Gaskin v. Balls (1879), 13 Ch. D. 324; Martin v. Price, [1894] 1 Ch. 276; Allport v. Security Co. (1895), 13 R. 420; Shelter v. London Electric Lighting Co., Meux's Brewery Co. v. London Electric Lighting Co., [1895] 1 Ch. 287; Westmoreland v. New Sharlston Colliery Co. (1898), 79 L. T. 716; Leeds Industrial Co-op. Soc. v. Slack, [1924] A. C. 851. *Mentd.* Mayfair Property Co. v. Johnston, [1894] 1 Ch. 508.

288. ———.]—An order having been made restraining deft. from proceeding with certain buildings, he appealed, offering an undertaking to abide by any order the ct. might make at the hearing as to pulling down or altering any buildings erected by him. The Ct. of Appeal, being of opinion that the right to an interlocutory injunction was not established, discharged the order, taking from deft. an undertaking in the terms of his offer:—*Held*: the ct. would, without any undertaking, have jurisdiction at the trial to order the pulling down of any buildings erected after the commencement of the action or after notice had been given to deft. that pltf. objected to the building.—SMITH v. DAY (1880), 13 Ch. D. 651; 28 W. R. 712, C. A.; *subsequent proceedings* (1882), 21 Ch. D. 421, C. A.

289. ———.]—Unless damages adequate compensation.]—ISENBERG v. EAST INDIA HOUSE

ESTATE Co., LTD. (1863), 3 De G. J. & Sm. 263; 3 New Rep. 345; 33 L. J. Ch. 392; 9 L. T. 625; 28 J. P. 228; 10 Jur. N. S. 221; 12 W. R. 450; 46 E. R. 637, L. C.

*Annotations:—*Consd. Slack v. Leeds Industrial Co-op. Soc., [1923] 1 Ch. 431. *Refd.* Betts v. De Vitre (No. 2) (1864), 11 L. T. 533; Martyn v. Lawrence (1864), 10 L. T. 188; Curriers Co. v. Corbett (1865), 29 J. P. 469; R. v. Darlington L. B. of Health (1865), 6 B. & S. 562; Senior v. Pawson (1866), L. R. 3 Eq. 330; Stretton v. Great Western & Brentford Ry. (1870), 5 Ch. App. 751; Clowes v. Staffordshire Potteries Waterworks Co. (1872), 27 L. T. 521; Stanley of Alderley v. Shrewsbury (1875), L. R. 19 Eq. 616; Petter v. Parsons, [1914] 1 Ch. 704.

290. ———.]—Unless merits against plaintiff.]—Pltf. was tenant from year to year of premises adjoining those of deft., who was his landlord, & who began raising a new building upon the land in his own occupation, so as to interfere to some extent with the light & air of pltf.'s house. Upon pltf. objecting, deft. gave him notice to quit which would determine his tenancy in Dec.:—*Held*: the inconvenience of compelling deft. to pull down his building would be greater than any which pltf. could endure by having to seek his remedy in an action, & having the building inflicted upon him in the meantime, & pltf.'s bill for an injunction must be dismissed.

The fact that the injunction in the case was mandatory was not so important as it might sometimes be, because in the present instance the building had not been completed until after objection to its erection had been taken by pltf. . . . A considerable portion of the work was in fact done by defts. after their knowledge that pltf. objected to it; & there only remained the question upon the merits, as to the extent & nature of pltf.'s interest . . . considering the inconvenience of granting the injunction & the inconvenience of not granting it, the consideration in favour of refusing to interfere by injunction greatly preponderated (KNIGHT BRUCE, L.J.).—JACOMB v. KNIGHT (1863), 3 De G. J. & Sm. 533; 2 New Rep. 295; 32 L. J. Ch. 601; 8 L. T. 621; 27 J. P. 547; 11 W. R. 812; 46 E. R. 743, L. J.

291. Assurance by defendant as to avoidance of injury.]—HEPBURN v. LORDAN, No. 333, *post*.

292. ———.]—GRAND JUNCTION CANAL Co. v. SHUGAR, No. 788, *post*.

293. Objection to building—State of building at date of objection—Materiality.]—LAWRENCE v. HORTON, No. 301, *post*.

SECT. 7.—WHERE ACT ALREADY COMPLETED.

294. Jurisdiction of court to grant.]—There is no equity to restrain by injunction the owners of a railroad made over pltf.'s land, from using the

latter co. asked for interdict against the former circulating the document in question, the ct. found that the publication & circulation by officials of defender's co. having been allowed to continue after the action was raised & the facts brought to the directors' knowledge, pursuers were entitled to interdict.—BRITISH LEGAL LIFE ASSURANCE & LOAN Co., LTD. v. PEARL LIFE ASSURANCE Co., LTD. (1887), 14 R. (Ct. of Sess.) 818; 24 Sc. L. R. 589. —SCOT.

PART V. SECT. 7.

294 i. Jurisdiction of court to grant.]—DICKSON v. KEARNEY (1887), 20 N. S. R. (8 R. & G.) 95; 14 S. C. R. 743.—CAN.

294 ii. ———.]—In an action to restrain defts. from enforcing a bye-law to compel pltf. to remove a verandah projecting some distance

for its removal when erected, pltf. could not obtain the latter relief in this suit, but must file a fresh suit:—*Held*: on the suit as framed the ct. could grant a mandatory injunction for the removal of the door; the suit was rightly framed in the light of the circumstances which existed when it was brought; & it was deft.'s subsequent conduct which rendered it necessary that pltf. should be given such other relief as the ct. might think fit.—MAGANLAL PUNJASA v. CHHOTALAL GHELA (1901), 1 L. R. 26 Bom. 136.—IND.

284 iii. ———.]—WOODHOUSE v. NEWRY NAVIGATION Co., [1898] 1 L. R. 161.—IR.

284 iv. ———.]—Where the officials of a co. had prepared & published, but without the authority, knowledge, or assent of the directors, a libellous circular concerning another co., & the

PART V. SECT. 6.

284 i. Defendant acts at his peril—If act continued.]—If anything is done after notice of the application for a restraining order it will be ordered to be undone if the restraining order is granted but as to anything done before the application it cannot be ordered to be undone unless it was done wrongfully.—HUNTLEY v. JEFFERS (1906), 1 E. L. R. 385, 434.—CAN.

284 ii. ———.]—Pltf. sued to restrain defts. from erecting a certain door. The plaint also contained a prayer for "such other relief as the ct. might think fit." After filing the plaint, pltf. applied for an interim injunction pending the hearing of the suit, which, however, was refused. Defts. thereupon erected the door, & at the hearing contended that, inasmuch as the plaint prayed only to prevent the erection of the door & not

Sect. 7.—Where act already completed. Sect. 8.]

railroad after it has been completed, or from interrupting pltf.'s workmen in removing it & restoring the land to its original state, although the possession of the land for the purpose of constructing the railroad may have been obtained from a tenant of pltf. by means of circumvention & fraud.—**DEERE v. GUEST** (1836), 1 My. & Cr. 516; 6 L. J. Ch. 69; 40 E. R. 478, L. C.

Annotations:—**Folld.** Carnochan v. Norwich & Spalding Ry. (1858), 26 Beav. 169. **Consd.** M. S. & L. Ry. v. L. & N. W. Ry. (1858), 22 J. P. 176; A.-G. v. United Kingdom Electric Telegraph Co. (1861), 30 Beav. 287. **Expld.** Perks v. Wycombe Ry. (1862), 3 Giff. 662. **Expld. & Distd.** Durell v. Pritchard (1865), 1 Ch. App. 244. **Expld.** Calcraft v. Thompson (1866), 35 Beav. 559. **Distd.** Goodson v. Richardson (1874), 9 Ch. App. 221. **Refd.** A.-G. v. Norwich Corpn. (1837), 2 My. & Cr. 406; Moreland v. Richardson (1856), 22 Beav. 596; Bowser v. Maclean (1860), 2 De G. F. & J. 415.

295. —.]—A railway co. gave notice to a tenant at will to take part of the lands, & they were allowed to take possession & complete their line. Afterwards, a person, who had subsequently to the notice purchased one-ninth of the land, filed a bill, merely praying an injunction to restrain the railway co. from entering upon, continuing in possession of, or otherwise interfering with the land. The bill was dismissed, with costs.—**CARNOCHAN v. NORWICH & SPALDING RY. CO.** (1858), 26 Beav. 169; 53 E. R. 861.

Annotations:—**Mentd.** Mercer v. Liverpool, St. Helens & South Lancashire Ry., [1903] 1 K. B. 652; Cardiff Corpn. v. Cook, [1923] 2 Ch. 115.

296. Injury to easements & other rights not distinguished.]—(1) There is no rule which prevents the ct. from granting a mandatory injunction where the injury sought to be restrained has been completed before the filing of the bill; & there is no difference in this respect between injury to easements & to other rights. But the ct. will only grant such an injunction to prevent extreme or very serious damage.

(2) Under Chancery Amendment Act, 1858 (c. 27), it is discretionary with the ct. whether it will award damages or leave pltf. to obtain them at law.

(3) Under 25 & 26 Vict. c. 42, where pltf. has at the time of filing his bill no ground for equitable relief, the suit is improperly brought into equity, within the Act, & the ct. will leave the question of damages to a ct. of law.—**DURELL v. PRITCHARD** (1865), 1 Ch. App. 244; 35 L. J. Ch. 223; 13

over one of the streets of the town:—**Held:** the verandah had been built after the street had been dedicated & laid out, & it was therefore an unlawful construction; but, as it had been in existence for a great many years, & as no special necessity for its removal was made out, the ct. refused to grant defts. a mandatory injunction against pltf. for its removal, leaving them to enforce their bye-law in such way as they should be advised.—**CALDWELL v. GALT** (1900), 20 C. L. T. 203; 27 A. R. 162.—**CAN.**

294 iii. —.]—Deflt. encroached on an abutment of the wall of pltf., which stood on a piece of ground belonging to pltf. The wall divided the properties belonging to the parties. The abutment was on deflt.'s side of the wall:—**Held:** relief by way of injunction was the proper remedy in such a case, for to allow compensation would be to let a trespasser put a value on money's worth on another man's property & deprive him of it against his will.—**JETHALAL HIRACHAND v. LAL-BHAI DALPATBHAI** (1904), 1 L. R. 28 Bom. 298.—**IND.**

294 iv. —.]—Defts. were a corpn.,

constituted by Act of Parliament, for improving the navigation of the N. River & O. Lough. In 1884 they obtained a further Act of Parliament, which Act expressly referred to certain oyster beds in the lough, the property of the original sole pltf., as equitable tenant for life, & provided that defts. should, during the construction of their works, protect these oyster beds from injury. Between May, 1890, & Jan. 1891, defts. cast a quantity of stones, ballast, & rubbish upon a portion of the ground within the ambit of the oyster beds. They were expressly warned against so doing by pltf. & his lessee, but the present action was not commenced until 1895. It was proved that the expense of removing the deposit & restoring the beds as far as possible to their original state would occasion an expense to defts. considerably out of proportion to any advantage pltf. would derive from such restoration. The trustees of the property, who intervened in the action, having insisted on a mandatory injunction instead of damages:—**Held:** there was no acquiescence which would deprive pltf. of their right to such relief, & they were entitled

L. T. 545; 14 W. R. 212; *sub nom.* **DARRELL v. PRITCHARD**, 12 Jur. N. S. 16, L. JJ.

Annotations:—**As to (1) Consd.** A.-G. v. Mid-Kent Ry. & S. E. Ry. (1867), 3 Ch. App. 100; Calcraft v. Thompson (1867), 31 J. P. 675; Gort v. Clark (1868), 18 L. T. 343; Sparling v. Clarson (1869), 17 W. R. 518. **Apld.** McManus v. Cooke (1887), 35 Ch. D. 681. **Refd.** Martin v. Headon (1866), L. R. 2 Eq. 425; Robson v. Whittingham (1866), 1 Ch. App. 442; Dickinson v. Harbottle (1873), 28 L. T. 186; Goodson v. Richardson (1874), 9 Ch. App. 221; Baxter v. Bower (1875), 44 L. J. Ch. 625; Chastey v. Ackland, [1895] 2 Ch. 389; Warren v. Brown, [1900] 2 Q. B. 722. **As to (2) Consd.** Krehl v. Burrell (1879), 11 Ch. D. 146. **As to (3) Folld.** Calcraft v. Thompson (1866), 35 Beav. 559; Martin v. Douglas (1867), 18 W. R. 268. **Expld.** City of London Brewery Co. v. Tennant (1873), 9 Ch. App. 212. **N.F.** Stanley of Alderley v. Shrewsbury (1875), L. R. 19 Eq. 616. **Refd.** Curriers Co. v. Corbett (1865), 4 De G. J. & Sm. 764.

—**GORT (VISCOUNTESS) v. CLARK**,

No. 516, *post*

298. —.—Where water-pipes had, without the consent of the owner of the soil, been laid in the soil of a highway, an injunction to restrain the continuance of the pipes was granted; the owner of the soil not being left to his remedy at law, & not being required to establish his right at law. The facts that the soil under the highway was of no value to the owner, & that his motive for applying to the ct. was not connected with the enjoyment of his land:—**Held:** not to be reasons against the granting of the injunction.—**GOODSON v. RICHARDSON** (1874), 9 Ch. App. 221; 43 L. J. Ch. 790; 30 L. T. 142; 38 J. P. 436; 22 W. R. 337, L. C. & L. JJ.

Annotations:—**Apld.** Allen v. Martin (1875), L. R. 20 Eq. 462. **Folld.** Bardley v. Granville (1876), 3 Ch. D. 826. **Distd.** Cooper v. Crabtree (1882), 20 Ch. D. 589. **Consd.** St. Mary, Battersea, Vestry v. County of London & Brush Provincial Electric Lighting Co. (1899), 80 L. T. 31. **Apld.** Marriott v. East Grinstead Gas & Water Co., [1909] 1 Ch. 70. **Refd.** Elias v. Griffith (1878), 8 Ch. D. 521; L. & N. W. Ry. v. Westminster Corpn., [1904] 1 Ch. 759; Riley v. Halifax Corpn. (1907), 71 J. P. 428; Kennard v. Cory, [1922] 1 Ch. 265. **Mentd.** Wimbledon & Putney Commons Conservators v. Dixon (1875), 33 L. T. 679; Butterley Co. v. New Hucknall Colliery Co., [1909] 1 Ch. 37.

299. —.]—**SMITH v. SMITH**, No. 233, *ante*.

300. —.]—Pltf. & deflt., the owners of adjoining houses, being about to rebuild, entered into a verbal agreement that pltf. should pull down a party-wall & rebuild it lower & thinner, & that each party should be at liberty to make a lean-to skylight with the lower end resting on the party-wall.

Pltf. rebuilt the party-wall & erected a lean-to skylight on his side of it as agreed: deflt. also

to an injunction directing defts. to remove from the oyster beds the ballast & rubbish so deposited, & to restore them to their previous condition & levels.—**WOODHOUSE v. NEWRY NAVIGATION CO.**, [1898] 1 L. R. 161.—**IR.**

294 v. —.]—In an advocacy of a summary petition to the sheriff praying for interdict against a contentious proprietor erecting buildings on a piece of ground over which the petitioner had a servitude *non ædificandi* & for removal of the buildings, resp. alleged that the buildings were entirely on his own ground & were in no degree on the ground over which the servitude extended:—**Held:** as the building was nearly completed when the application was presented, the petition, in so far as it prayed for interdict was not presented tempestive & ought not to be granted; & in so far as it prayed for removal of the buildings the petition involved a question of heritable right & the sheriff had no jurisdiction to entertain it.—**LOWSON'S TRUSTEES v. CRAMMOND** (1864), 3 Macph. (Ct. of Sess.) 53; 37 Sc. Jur. 28.—**SCOT.**

erected a skylight on his side, but, instead of a lean-to, so shaped it as to obstruct the access of light to pltf.'s premises more than the agreed lean-to skylight would have done:—*Held*: the effect of the agreement was to give to each party an easement of light over the other's land; & pltf., having performed the agreement on his part, was entitled to have it enforced on the part of deft. A mandatory injunction was accordingly granted, pltf. being put under a corresponding undertaking.—*McMANUS v. COOKE* (1887), 35 Ch. D. 681; 56 L. J. Ch. 662; 56 L. T. 900; 51 J. P. 708; 35 W. R. 754; 3 T. L. R. 622.

Annotations:—*Mentd.* Wimbledon & Putney Commons Conservators v. Nicol (1894), 10 T. L. R. 247; Turner v. Melladew (1903), 19 T. L. R. 273; Dickinson v. Barrow, [1904] 2 Ch. 339; Elliott v. Roberts (1912), 107 L. T. 18; Hurst v. Picture Theatres, [1915] 1 K. B. 1.

301. —.]—The fact that a building which obstructs ancient lights has been completed before writ issued will not prevent the granting of a mandatory injunction for its removal. The material point for consideration is the state of the new building when pltf. first complains.

In granting mandatory injunctions, the ct. exercises its discretion with caution . . . & in deciding whether that is or is not the appropriate remedy, it has regard to all the circumstances of the case (*CHITTY*, J.).—*LAWRENCE v. HORTON* (1890), 59 L. J. Ch. 440; 62 L. T. 749; 38 W. R. 555; 6 T. L. R. 317.

Annotations:—*Folld.* Shiel v. Godfrey, [1893] W. N. 115. *Apld.* Keeble v. Poole & Lucas (1898), 42 Sol. Jo. 791.

302. —.]—*SHIEL v. GODFREY & Co.*, [1893] W. N. 115.

303. Defendant compelled to purchase land.—Before the amount to be paid by a railway co. for land required by them for the purposes of their railway, had been determined, a verbal consent, by one party stated to be qualified, by the other alleged to be general, was given, whereupon the railway co. entered upon the land, & commenced works which would permanently affect it:—*Held*: the ct. will not interfere by injunction to stop the works, if perfect justice can be done, by compelling the co. to pay for the land; but will order the proximate value to be deposited until the amount be determined.—*LANGFORD v. BRIGHTON, LEWES & HASTINGS RY. Co.* (1845), 4 Ry. & Can. Cas. 69.

304. Injury must be serious.—*DURELL v. PRITCHARD*, No. 296, *ante*

305. Completion of building before complaint made.—*STANLEY OF ALDERLEY (LADY) v. SHREWSBURY (EARL)*, No. 277, *ante*.

306. — Work carried on therein.]—(1) On a bill filed to compel the removal of so much of a large shed as interfered with the lights of a chapel & schoolroom below it, & to restrain the carrying on of the business of defts. as boiler makers so as to interfere with the user of the chapel:—*Held*: having regard to the nature of the building, relief as prayed would be granted at the hearing, though the shed was allowed to be erected & completed & the works carried on for some months without complaint

(2) It is to be understood that an injunction is

not to be used oppressively, but ct. will not too carefully limit its orders, but will leave any abuse to be dealt with when it arises.—*BAXTER v. BOWER* (1875), 44 L. J. Ch. 625; 33 L. T. 41; 23 W. R. 805, L. JJ. *Annotation*:—*Expld.* Gaskin v. Balls (1879), 13 Ch. D. 324.

307. — Complaint after delay.]—*GASKIN v. BALLS*, No. 31, *ante*.

308. —.]—Pltfs., as owners of certain lands situate in the borough of C., had a right of way over a strip of land 10 ft. wide on adjoining property in the occupation of defts. Some years before action brought, pltfs. erected a summer house which projected over the strip of land to the extent of 2 ft. 4 in. Before action brought, defts. erected, & eight months prior to the date of the writ they completed the erection of a stable on the strip of land which obstructed pltfs.' right of way. Pltfs. brought an action for a declaration that they were entitled to the right of way, an order requiring defts. to remove the buildings in question, & for an injunction to restrain defts., their servants & agents, from obstructing pltfs. & their tenants, in the exercise of such right of way. Defts. pleaded extinguishment or abandonment before action brought:—*Held*: pltfs. were entitled to an injunction & 40s. damages, but owing to the fact that defts.' obstructing building had been completed eight months before action, an order for its removal could not be made.—*YOUNG (TRUSTEES OF YOUNG, DECEASED) v. STAR OMNIBUS Co., LTD.* (1902), 86 L. T. 41.

309. — No delay in making complaint.]—*GASKIN v. BALLS*, No. 31, *ante*.

Delay & acquiescence generally, see Part VIII., Sects. 3 & 4, *post*.

310. —.]—Public Health (Buildings in Streets) Act, 1888 (c. 52), s. 3, provides that it shall not be lawful "without the written consent of the urban authority" to erect any building in any street beyond the front main wall of the building on either side. On Dec. 10, 1923, plans for a hotel were approved by the building committee of an urban authority without their attention being drawn to the fact that the proposed building would infringe the sect., & on the faith of that approval the building was commenced on Dec. 16. On May 12, 1924, when a substantial portion had been erected, & after a complaint by an adjoining owner raising the exact point, the urban authority gave a written consent to the hotel being erected beyond the front main wall of the adjoining house. In an action by the A.-G. for a mandatory injunction to restrain the breach of the sect.:—*Held*: (1) there was a sufficient written consent within the sect. & no breach; (2) in no case ought a mandatory injunction to be granted.—*A.-G. v. DENBY*, [1925] Ch. 596; 94 L. J. Ch. 434; 133 L. T. 722; 89 J. P. 145; 23 L. G. R. 625.

SECT. 8.—ACQUIESCENCE OR DELAY.

See Part VIII., Sects. 3 & 4, *post*.

Part VI.—Injunction quia timet.

SECT. 1.—GROUNDS FOR GRANTING OR REFUSING INJUNCTION.

SUB-SECT. 1.—CLEAR VIOLATION OF LEGAL RIGHT.

311. Court will interfere.]—A building was in course of erection at a distance of 30 feet from the windows of a mansion, & injunction was applied for to restrain deft. from proceeding with the erection:—*Held*: no case for an immediate injunction; but pltf. was put upon terms to try the legal right, deft. undertaking to abate if a verdict should go against him.

The jurisdiction of the ct., being merely to protect the legal right, is never exercised except for that purpose. There must be a legal right before the injunction is granted. Here it is granted in anticipation that that legal right would be invaded, & if the ct. should be of opinion that it is plain & free from doubt that it would be an invasion, it would grant the injunction. If it, on the other hand, saw doubt whether it would injure a property which ought not to be injured by doing that which the party had a right to do, it would not put pltf. upon trying the legal right (*per* CUR.).—*SMITH v. ELGER* (1839), 3 Jur. 790, L. C.

312. —.]—Where an Act of Parliament has been obtained, having for its object the improvement of a town, the ct. will not interfere by injunction to restrain an inhabitant from building a house in supposed contravention of the Act, unless the words of the Act be perfectly clear, & free from all doubt & uncertainty.—*LIVERPOOL CORPN. v. NORRIS* (1847), 9 L. T. O. S. 167.

313. —.]—*HERZ v. UNION BANK OF LONDON* (1854), 2 Giff. 686; 66 E. R. 287; *sub nom.* *HERTZ v. UNION BANK OF LONDON*, 24 L. T. O. S. 137; 1 Jur. N. S. 127; 3 W. R. 49; *on appeal*, *sub nom.* *HERTZ v. UNION BANK OF LONDON*, 24 L. T. O. S. 186, L. JJ.

Annotations:—*Appld.* *Lyon v. Dillmore* (1866), 14 L. T. 183. *Consd.* *Browne v. Flower*, [1911] 1 Ch. 219. *Refd.* *Gooch v. Marshall* (1859), 1 L. T. 210.

314. —.]—A policyholder cannot interfere in the affairs of the insuring co., so long as they are managed in accordance with the provisions of the deed of settlement, but if the funds liable for the payment of his policy are being applied contrary to such provision, he may file a bill to restrain the co. from so doing. The ct. will not interfere to restrain future acts of a wrongdoer, unless it is plain that they will be of a wrongful nature.—*KEARNS v. LEAF, ALDEBERT v. KEARNS* (1864), 1 Hem. & M. 681; 71 E. R. 299; *sub nom.* *ALDEBERT v. LEAF*, 3 New Rep. 455; 10 L. T. 185; 12 W. R. 462.

Annotations:—*Refd.* *Cummins v. Perkins*, [1899] 1 Ch. 16. *Mentd.* *Re International Life Assce., McIver's Claim* (1870), 18 W. R. 539; *Re Argus Life Assce.* (1888), 39 Ch. D. 571; *Moss S.S. Co. v. Whinney*, [1912] A. C. 254.

315. —.]—In order to obtain an injunction restraining a threatened act on the ground that, if done, it will be a violation of some legal right, pltf. must show that the act must result in a violation of such right. The owner of an estate, the

shooting over which had been let for a term of years, issued particulars of sale of the estate in thirteen lots, stating that the estate contained several plots of accommodation & building land suitable for the erection of villas & residences, & describing one lot in particular as well situated for the erection of a house. The particulars showed that it was intended to make a road through the estate & dedicate it to the public; but gave full notice of the right of shooting:—*Held*: the ct. would not, at the instance of the owner of the right of shooting, interfere to prevent the intended sale.—*PATISSON v. GILFORD* (1874), L. R. 18 Eq. 259; 43 L. J. Ch. 524; 22 W. R. 673.

Annotations:—*Refd.* *Goodhart v. Hyett* (1883), 25 Ch. D. 182; *Wright v. Shrubbs* (1887), 4 T. L. R. 32.

316. —.]—By an Act of Parliament passed in 1821 for amalgamating two canal cos., the amalgamated co. were empowered to maintain & keep navigable the united canal; & for that purpose to supply the united canal at all times for ever thereafter with water from all springs & streams which had been or should be found within 2,000 yards of the canal. Under the powers of their Act the co. diverted the waters of a stream within the prescribed limits by means of a new channel into their canal:—*Held*: the canal co., although they had suffered no present damage, were entitled to an injunction to restrain a waterworks co. from diverting the water of the stream so as to cause injury to the navigation of the canal.—*WILTS & BERKS CANAL NAVIGATION Co. v. SWINDON WATERWORKS Co.* (1874), 9 Ch. App. 451; 43 L. J. Ch. 393; 30 L. T. 443; 38 J. P. 580; 22 W. R. 444, L. JJ.; *varied, sub nom.* *SWINDON WATERWORKS Co. v. WILTS & BERKS CANAL NAVIGATION Co.* (1875), L. R. 7 H. L. 697, H. L.

Annotations:—*Expld.* *Roberts v. Gwyrfael District Council*, [1899] 1 Ch. 583. *Refd.* *Owen v. Davies*, [1874] W. N. 175; *Ormerod v. Todmorden Joint Stock Mill Co.* (1883), 11 Q. B. D. 155; *Roberts v. Gwyrfael District Council*, [1899] 2 Ch. 608; *McCartney v. Londonderry & Lough Swilly Ry.*, [1904] A. C. 301. *Mentd.* *Bonner v. G. W. Ry.* (1883), 24 Ch. D. 1; *Attwood v. Llay Main Collieries* (1925), 70 Sol. Jo. 265.

317. — Acts of infringement already committed.]—Where an injury has been done to the private rights of a person, whether tenant or landlord, that person is entitled to damages, although only nominal, & where in such a case an injury is apprehended an injunction will be granted as against the party in default. In an action by N., tenant of a certain farm for damages, & an injunction against T., a sanitary authority, for polluting pltf.'s stream:—*Held*: pltf.'s private right having been injured he was entitled to nominal damages & an injunction against T., although T. had only polluted the stream in conjunction with others.—*NIXON v. TYNEMOUTH UNION RURAL SANITARY AUTHORITY* (1888), 52 J. P. 504, D. C.

318. — —.]—*MARTIN v. PRICE*, No. 367, *post*.

319. — —.]—*SHELFER v. CITY OF LONDON ELECTRIC LIGHTING Co., MEUX'S BREWERY Co.*

Man. L. R. 253.—CAN.

311 ii. —.]—The ct. has power to grant an *interim* injunction *quia timet* in a fraudulent conveyance action brought by an execution creditor.—*CLINTON v. SELLARS* (1908), 6 W. L. R. 788; 1 Alta. L. R. 129.—CAN.

PART VI. SECT. 1, SUB-SECT. 1.

311 i. Court will interfere.]—Pltf. claimed to be tenant of deft. of certain lands upon which he sowed a crop of wheat. Deft. threatened to reap the crop, whereupon pltf. filed a bill for

an injunction. During the suit deft. did harvest a portion of the crop, but did not otherwise interfere with pltf.'s occupation. Pltf.'s right was not very clearly established by the evidence:—*Held*: an injunction should be refused.—*MONKMAN v. BABINGTON* (1888), 5

v. CITY OF LONDON ELECTRIC LIGHTING CO., No. 408, post.

320. — Damages not adequate remedy.] — It being proved that a proposed gasometer would obstruct ancient lights in pltf.'s houses:—*Held*: pltf. was entitled to an injunction to restrain the threatened infringement of his legal right, since it would not be adequately protected or vindicated by damages.—*JORDESON v. SUTTON, SOUTH-COATES & DRYPOOL GAS CO., [1899] 2 Ch. 217; 68 L. J. Ch. 457; 80 L. T. 815; 63 J. P. 692; 15 T. L. R. 374, C. A.*

Annotations:—*Mentd. Goldberg v. Liverpool Corpn. (1900), 82 L. T. 362; Batcheller v. Tunbridge Wells Gas Co. (1901), 84 L. T. 765; Home & Colonial Stores v. Colls (1901), 85 L. T. 701; Salt Union v. Brunner, Mond, [1906] 2 K. B. 822; English v. Metropolitan Water Board, [1907] 1 K. B. 588; Fletcher v. Birkenhead Corpn., [1907] 1 K. B. 205.*

321. —.]—(1) The decision in *Colls v. Home & Colonial Stores*, No. 1136, *post*, has not abrogated the jurisdiction of the ct. to grant an injunction in a *quia timet* action to restrain the threatened obstruction of ancient lights if the evidence shows that the new buildings when completed will be an actionable nuisance. (2) The ct. has discretion to make an order declaratory of pltf.'s rights with liberty to apply for an injunction if it should become necessary. (3) *Qu.*: whether the ct. in such an action has jurisdiction to award damages in lieu of an injunction even if it appears that the threatened injury can be adequately compensated by a moderate money payment.—*LITCHFIELD-SPEER v. QUEEN ANNE'S GATE SYNDICATE (No. 2), LTD., [1919] 1 Ch. 407; 88 L. J. Ch. 137; 120 L. T. 565; 35 T. L. R. 253; 63 Sol. Jo. 390.*

Annotation:—*As to (3) Rejd. Slack v. Leeds Industrial Co-op., [1923] 1 Ch. 431.*

SUB-SECT. 2.—MERE POSSIBILITY OF FUTURE INJURY.

322. Court will not interfere.]—A person having in articles of partnership covenanted not to do certain acts after a specified period of time. The ct. will not, before the arrival of that period, grant an injunction to restrain him from acting in breach of his agreement, nor for mischief, which is no breach at law of the covenant between the parties.—*COATES v. COATES (1821), 6 Madd. 287; 56 E. R. 1100.*

323. —.]—An injunction will not be granted unless for the purpose of preventing immediate injury, & there must be sufficient evidence of its

necessity on the facts of the case. A possible future injury, which may or may not happen, will not form a sufficient ground for exercising the extraordinary jurisdiction of the ct., especially where there is relief at law.—*MAXWELL v. DITCH-BURN (1845), 5 L. T. O. S. 405.*

324. —.]—The circumstance that a party is commencing operations avowedly for a purpose which another conceives to be injurious to him & illegal, does not warrant the latter in applying for an injunction, unless the circumstances of the case, at the time when the motion is made, are such as to enable the ct. either to form its own opinion as to the legality of the meditated purpose or to put that question into a course of immediate trial; & therefore, where that is not the case, the motion will not be allowed to stand over till the purpose has been so far executed as that its character may be judged of, but will be at once refused.—*HAINES v. TAYLOR (1847), 2 Ph. 209; 9 L. T. O. S. 193; 11 Jur. 73; 41 E. R. 922, L. C.*

Annotations:—*Consd. A.-G. & Sheffield United Gas Light Co. v. Sheffield Gas Consumers' Co. (1852), 19 L. T. O. S. 344; Hendriks v. Montagu (1881), 17 Ch. D. 638. Rejd. Pattison v. Gilford (1874), L. R. 18 Eq. 259; Fletcher v. Bealey (1885), 54 L. J. Ch. 424; A.-G. v. Manchester Corpn., [1893] 2 Ch. 87. Mentd. Adstread v. Chapman (1850), 15 L. T. O. S. 341; Soltau v. De Held (1851), 2 Sim. N. S. 133.*

325. —.]—Public works ordered by Act of Parliament must be so executed as not to interfere with the private rights of individuals; & in deciding on the right of a single proprietor to an injunction to restrain such interference, the circumstance that a vast population will suffer, *e.g.* by remaining undrained, unless his rights are invaded, is one which this ct. cannot take into consideration. The council of the borough of B. were bound by a local Act of Parliament effectually to drain the town:—*Held*: they were not justified in so carrying on their operations for this purpose as to drive away fish, & prevent cattle from drinking of the water of a river at a part seven miles below the town & where it belonged to pltf., & although pltf. had submitted to the injury for nearly four years, trusting to the assurance of the council that they were carrying out a scheme of sewage by which eventually the evil would be removed, he was not precluded on the ground of laches from now applying for an injunction, the rule in such cases being that the mere prospect of injury does not give a right to this relief.—*A.-G. v. BIRMINGHAM BOROUGH COUNCIL (1858), 4 K. & J. 528; 22 J. P. 561; 6 W. R. 811; 70 E. R. 220.*

Annotations:—*Consd. Lillywhite v. Trimmer (1867), 36*

PART VI. SECT. 1, SUB-SECT. 2.

322 i. Court will not interfere.]—A railway co. had, by statute, authority to arrange for the passage over a bridge; but it was alleged that the lessees refused them permission to cross the bridge. Thereupon the railway co. prayed for an injunction restraining defts. from preventing their using the bridge:—*Held*: the damage, if any, to the railway co. was only prospective, & they could not be said to have sustained any actual damage by the refusal of defts. to recognise their right to use the bridge, & the ct. dismissed their bill as against defts.—*A.-G. v. NIAGARA FALLS INTERNATIONAL BRIDGE CO. (1873), 20 Gr. 34.—CAN.*

322 ii. —.]—Deft., the owner of a saw-mill on a floatable river, erected booms in connection therewith, which, with logs of deft., impeded the passage of logs of pltf. The obstructions were removed before the hearing, but after notice of motion had been given for an *interim* mandatory injunction, which

was granted:—*Held*: the bill should be dismissed.—*WATSON v. PATTERSON (1903), 2 N. B. Eq. Rep. 488; 23 C. L. T. 268.—CAN.*

322 iii. —.]—Action by one co-owner against the owner of adjoining lot for an injunction restraining the throwing water upon pltf.'s land & for damages. At trial pltf. abandoned his claim for damages admitting that so far no damage had been sustained:—*Held*: as no damage had been shown, pltf. only asking that deft. be restrained from committing in future any trespass by causing surface water to flow upon pltf.'s land, an injunction should not be granted.—*WALKER v. WESTINGTON (1912), 23 O. W. R. 110; 4 O. W. N. 136; 6 D. L. R. 858.—CAN.*

322 iv. —.]—An injunction *quia timet* should not be allowed unless pltf. show a strong case of probability that the apprehended mischief will, in fact, arise.—*GUARDIAN ASSURANCE CO., LTD. v. MATTHEW, [1919] 1 W. W. R. 67.—CAN.*

322 v. —.]—An injunction should not be granted where there is only a

threat to do something.—*CAMPBELL v. MONTREUIL, [1920] 2 W. W. R. 4; 51 D. L. R. 326; 13 Sask. L. R. 212.—CAN.*

322 vi. —.]—Where a trespass of a continuing nature has been committed by deft., but has been discontinued before suit brought, the ct. will not interfere by injunction to restrain deft. from continuing such trespass, merely because pltf. entertains vague apprehensions that the trespass may be recommenced.—*CHABILDAS LALLUBHAI v. MUNICIPAL COMRS. OF BOMBAY (1871), 8 Bom. O. C. 85.—IND.*

322 vii. —.]—Deft. borough council proposed to erect in a street of the borough running off the main street, a public convenience. It was objected by pltf. that the proposed erection would, by reason of the smells, materially affect the comfort & convenience of pltf. in the enjoyment of their property:—*Held*: the complaint as to objectionable smells was premature, & injunction was refused.—*A.-G. v. NEW PLYMOUTH BOROUGH, [1920] N. Z. L. R. 761.—N.Z.*

Sect. 1.—Grounds for granting or refusing injunction: Sub-sects. 2, 3 & 4.]

L. J. Ch. 525; A.-G. v. Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 146. *Reid*. A.-G. v. Metropolitan Board of Works (1863), 9 L. T. 139; A.-G. v. Dorking Grdns. (1882), 20 Ch. D. 595; St. Mary, Islington, Vestry v. Hornsey U. D. C., [1900] 1 Ch. 695; Hove Corpn. v. Brighton Intercepting & Outfall Sewers Board (1903), 67 J. P. 335; Price's Patent Candle Co. v. L. C. C., [1908] 2 Ch. 526. *Mentd.* A.-G. v. Kingston-on-Thames Corpn. (1865), 34 L. J. Ch. 481; Spokes v. Banbury Board of Health (1865), L. R. 1 Eq. 42.

326. —.]—An information was instituted at the relation of the conservators of the river T. to restrain the corpn. of K. from altering their drains so as to discharge a greatly increased quantity of sewage into the river. The ct., considering upon the evidence that neither present nuisance nor probability of immediate prospective nuisance had been proved, dismissed the information without prejudice to future proceedings in the event of nuisance being subsequently occasioned.—A.-G. v. KINGSTON-ON-THAMES CORPN. (1865), 6 New Rep. 248; 34 L. J. Ch. 481; 12 L. T. 665; 29 J. P. 515; 11 Jur. N. S. 596; 13 W. R. 888.

Annotations:—*Consd.* A.-G. v. Bradford Canal Proprietors (1866), L. R. 2 Eq. 71; Fletcher v. Bealey (1885), 28 Ch. D. 688. *Reid*. Goldsmid v. Tunbridge Wells Improvement Comrs. (1865), L. R. 1 Eq. 161; A.-G. v. Richmond (1866), L. R. 2 Eq. 306; A.-G. v. Manchester Corpn., [1893] 2 Ch. 87. *Mentd.* A.-G. v. Lonsdale (1868), 17 W. R. 219; Mundy v. Rutland (1882), 46 L. T. 477.

327. —.]—A person who has covenanted not to use a building for certain purposes will not be restrained from erecting a building seemingly adapted only for such purposes.—WORSLEY v. SWANN (1882), 51 L. J. Ch. 576, C. A.

SUB-SECT. 3.—PROBABILITY OF DAMAGE.

328. Failure of defendant to rebut.]—Upon an interlocutory application the ct. will not decide a disputed question of title, but if it is satisfied that injury is threatened or apprehended, & the evidence that such is the case is not distinctly rebutted, an injunction will be granted.—CROSSE v. DUCKERS (1873), 27 L. T. 816; 21 W. R. 287.

329. Within reasonable time—Possible liability to penalties.]—Pltf. as manager of an omnibus co. became under the provisions of the statutes & rules for the regulation of metropolitan stage carriages, the licensee of their vehicles. Having

ceased to be such manager:—*Held*: he was entitled to an injunction to restrain the co. from continuing to use his name upon the number plates affixed to their carriages.—HODGES v. LONDON TRAMS OMNIBUS Co. (1883), 12 Q. B. D. 105; 50 L. T. 262; 32 W. R. 616, D. C.

330. —.]—In an action to restrain the obstruction of ancient lights, where the right of pltf. to relief rests mainly upon damage, not suffered at the time but likely to accrue within a reasonable time, the ct. will nevertheless grant an injunction to enforce that right, & not give compensation by way of damages. In a case of this character the possible future application of pltf.'s premises must be considered, in granting an injunction, or directing an inquiry as to damages.—DICKER v. POPHAM, RADFORD & Co. (1890), 63 L. T. 379.

331. —.]—A public highway vested in the Wenlock Corpn. ran for some 1,200 feet along the top of a slope rising about 20 feet up from the river Severn, & the slope continued on the other side of the road at varying heights of about 300 feet. In 1875 a serious landslide occurred which destroyed the road & houses along this slope. Engineers advised that to prevent future landslides a great weight should be placed on the toe of the slope alongside the river, & accordingly the co. which then owned the land on which the slope was dumped over 40,000 tons of slag along the toe. Trees have since grown on the slope, & houses have been built on it, & no further landslide has taken place except for trivial local slips. Defts., the present owners of the land on which the slag is, having recently commenced to work it, the Wenlock Corpn. brought this action to restrain them by injunction from excavating, removing or working the slag so as to create a nuisance to the public or to cause damage to the road:—*Held*: pltf. had made out no case upon which the ct. ought to grant an injunction to prevent the user by a person of his own property, as it was necessary to show that substantial damage at no remote period would result; but on the evidence the land on which the road was, & the whole of the slope, had come to rest, & the removal of the slag heap would not have the slightest effect on the road if a sufficient buttress to the road which was at the higher level was left.—A.-G. & WENLOCK CORPN. v. HARPER & COALPORT COLD BLAST SLAG Co., LTD. (1925), 89 J. P. 80.

PART VI. SECT. 1, SUB-SECT. 3.

330 i. Within reasonable time.]—When evidence is given to the satisfaction of the judge that there is a strong probability of injury to pltf.'s building by the continuance of blasting operations for the loosening of frozen earth on adjoining land, it is proper, on motion to continue *ex p.* injunction, to grant an interlocutory injunction restraining the contractor until the hearing of the action from carrying on such blasting in such a manner as to injure pltf.'s building, although there is no proof that any actual injury to such building has already resulted.—MILLER v. CAMPBELL (1903), 23 C. L. T. 233; 14 Man. L. R. 437.—CAN.

330 ii. —.]—Deft. L. held certain premises under a lease granted by pltf. N. to W. & assigned by W. to L. N. was an attorney, & occupied the premises as an office. L. was a retail dealer, & proposed to carry on this business in the premises:—*Held*: as no actual damage had been shown the action was in the nature of

a *quia timet* action; & as deft. was carrying on a legitimate business, & there was no probability of any immediate or irreparable damage to pltf. arising, the application for an injunction must be dismissed.—NEVERS v. LILLEY (1909), 4 N. B. Eq. Rep. 104; 6 E. L. R. 215.—CAN.

330 iii. —.]—Where an act threatening danger to a person's land is such that injury will inevitably follow, a ct. may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before institution of suit.—BINDU BASINI CHOWDERANI v. JAHNABI CHOWDERANI (1896), 1 L. L. R. 24 Cal. 260.—IND.

330 iv. —.]—The ct. will not in general interfere until an actual nuisance has been committed, but it may by virtue of its jurisdiction to restrain acts which when completed will result in a ground of action, interfere before any actual nuisance has been committed where it is satisfied that the act complained of will inevit-

ably result in a nuisance.—AMAVENDVA, ETC. v. BARANAJORE, ETC. (1922), 1 L. L. R. 49 Cal. 1059.—IND.

330 v. —.]—When irreparable waste has been committed, & is about to be repeated, the ct. will, without a positive affidavit of the facts, grant a conditional order for an injunction, & restrain the party in the meantime, if there be danger that the waste will be committed before such affidavit can be procured.—BEERE v. HEAD (1844), 7 L. Eq. R. 60.—IR.

330 vi. —.]—Where a mineral tenant sank a pit near his march, & exploded large charges of gunpowder with a view of getting rid of the water, & these explosions were followed by a rush of water in the coalfields of the lower inheritor:—*Held*: the lower inheritor was entitled to interdict, on the ground that the explosions were calculated to dislocate the strata of his coalfield, although there was no proof that dislocation had actually resulted from the previous explosions.—DURHAM v. HOOD (1871), 9 Macph. (Ct. of Sess.) 474; 43 Sc. Jur. 300.—SCOT.

SUB-SECT. 4.—IMMINENCE OF RISK.

332. Not amounting to certainty of damage.]—Injunction, at the instance of Parliamentary comrs. for cleansing & improving the river W. & its navigation, & the drainage of the adjacent lands, against the erection or use of a steam engine by Parliamentary trustees for draining a particular district, applied for on the ground of probable damage to the banks of the river, into which an increased body of water was thereby expected to be thrown, & also on the ground of apprehended injury to the drainage of the lands within the jurisdiction of the comrs., refused.

The law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. . . . It will even provide against a somewhat less imminent probability, in cases where the mischief, should it be done, would be vast & overwhelming (LORD BROUGHAM, C.).—RIPON (EARL) v. HOBART (1834), 3 My. & K. 169; Coop. temp. Brough. 333; 3 L. J. Ch. 145; 40 E. R. 65, L. C.

Annotations:—Consd. Fletcher v. Bealey (1885), 28 Ch. D. 688; A.-G. v. Manchester Corpn., [1893] 2 Ch. 87. Refd. Shrewsbury & Birmingham Ry. v. L. & N. W. Ry., etc. (1853), 7 Ry. & Can. Cas. 531; Isenberg v. East India House Estate Co. (1863), 3 De G. J. & Sm. 263; M'Murray v. Cadwell (1889), 6 T. L. R. 76; Litchfield-Speer v. Queen Anne's Gate Syndicate (No. 2), [1919] 1 Ch. 407.

333. —.]—The owners of premises, situated in a densely populated neighbourhood, having purchased large quantities of damp jute, being salvage from a fire, proceeded to bring it on their property for the purpose of drying it. It being established by evidence that jute when dry is highly inflammable & perhaps, though as to this the evidence was conflicting, liable when wet to ignite spontaneously, the ct., on an interlocutory application by the owner of adjoining premises, granted an *interim* injunction, until the hearing of the cause or further order, to restrain the owners of the jute from bringing more jute on to their premises, & from allowing the damp jute then there to remain in such quantities as to occasion danger to adjoining property; pltf's. undertaking at once to indict defts. as for a nuisance.

It should be observed that the jute has for the most part been brought to defts.' premises after distinct protest met by a statement that the jute was about to be removed (PAGE-WOOD, V.-C.).—HEPBURN v. LORDAN (1865), 2 Hem. & M. 345; 5 New Rep. 301; 34 L. J. Ch. 293; 13 L. T. 59; 29 J. P. 228; 11 Jur. N. S. 132; 13 W. R. 368; 71 E. R. 497; *on appeal*, 11 Jur. N. S. 254, L. JJ.

Annotations:—Consd. M'Murray v. Cadwell (1889), 6 T. L. R. 76. Refd. Cooke v. Forbes (1867), L. R. 5 Eq. 166; A.-G. v. Manchester Corpn., [1893] 2 Ch. 87; Wood v. Conway Corpn., [1914] 2 Ch. 47. Mentd. Belvedere Fish Guano Co. v. Rainham Chemical Works, Feldman & Partridge, Ind., Coope v. Same, [1920] 2 K. B. 487.

334. —.]—In order to maintain a *quia timet* action to restrain an apprehended injury pltf. must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable.

Pltf. was a manufacturer of paper, his mills being situate on the bank of a river, the water of which he used to a large extent in his process of manufacture, for which it was essential that the water should be very pure. Defts., who were alkali manufacturers, were depositing on a piece of land close to the river, & about one mile & a

half higher up than pltf.'s mills, a large heap of refuse from their works. It was proved that in the course of a few years a liquid of a very noxious character would flow from the heap, & would continue flowing for forty years or more, & that if this liquid should find its way into the river to any appreciable extent the water would be rendered unfit for pltf.'s manufacture, & his trade would be ruined. Pltf. did not allege that he had as yet sustained any actual injury. Defts. said that they intended to use all proper precautions to prevent the noxious liquid from getting into the river:—**Held:** it being quite possible by the use of due care to prevent the liquid from flowing into the river, & it being also possible that, before it began to flow from the heap, some method of rendering it innocuous might have been discovered, the action could not be maintained, & must be dismissed with costs. But the dismissal was expressly declared to be without prejudice to the right of pltf. to bring another action hereafter, in case of actual injury or imminent danger.—FLETCHER v. BEALEY (1885), 28 Ch. D. 688; 54 L. J. Ch. 424; 52 L. T. 541; 33 W. R. 745; 1 T. L. R. 233.

Annotations:—Consd. M'Murray v. Cadwell (1889), 6 T. L. R. 76. Refd. A.-G. v. Manchester Corpn., [1893] 2 Ch. 87; Wood v. Conway Corpn. (1914), 110 L. T. 917; Litchfield-Speer v. Queen Anne's Gate Syndicate (No. 2), [1919] 1 Ch. 407.

335. —.]—It is said by deft. that pltf.'s action is not maintainable unless he can prove imminent peril almost certain to occasion irreparable injury. . . . That if there again occurs such an explosion as occurred in Aug. 1888, it will almost certainly occasion injury to pltf.'s property cannot be doubted, &, although the injury inflicted might admit of repair or be capable of compensation in damages, yet it probably would be far-reaching in its consequences & of a character against which the ct. is bound to afford protection. Is there, then, imminent peril of such a result? . . . The task before me is to inquire whether, making due allowance for occasional carelessness, deft.'s trade is of such a character & is carried on under such circumstances that there is reasonable ground for apprehending a serious accident—that is, an accident producing serious results as likely to occur. . . . The probability [of an accident], to my mind, still constitutes an imminent danger which pltf. is not bound to endure. The injunction must therefore go as asked by pltf. (KEKEWICH, J.).—M'MURRAY v. CADWELL (1889), 6 T. L. R. 76.

Annotations:—Distd. A.-G. v. Dorchester Corpn. (1905), 93 L. T. 290. Refd. Savory & Moore v. London Electric Supply Corpn. (1891), 8 T. L. R. 192; Philip v. Pennell, [1907] 2 Ch. 577.

336. —.]—Anyone seeking an injunction to restrain an alleged future nuisance, whether public or private, must show a strong case of probability that the apprehended mischief will in fact arise.

Defts. proposed to establish a small-pox hospital on land of their own in an adjoining district, within 240 yards of two public roads, within 90 yards of a much used part of a cemetery, & within 256 yards of the nearest residence; pltf's. contended that what defts. proposed to do amounted to a public nuisance, as being dangerous to the health of the neighbourhood, & applied for an injunction:—**Held:** in the present state of science pltf's. had failed to show that there was a

PART VI. SECT. 1, SUB-SECT. 4.

332 1. Not amounting to certainty of damage.]—There are at least two

necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, & there must also be proof

that the apprehended damage will, if it comes, be very substantial.—GANGABAI v. PURSHOTAM (1907), 1 L. R. 32 Bom. 146.—IND.

Sect. 1.—Grounds for granting or refusing injunction: Sub-sects. 4, 5 & 6.]

probability that the apprehended danger would in fact ensue.

Where it is certain that the injury will arise, the ct. will at once interfere by injunction. . . . But the ct. does not require absolute certainty before it intervenes; something less will suffice. . . . The principle which I think may be properly & safely extracted from the *quia timet* authorities is, that pltf. must show a strong case of probability that the apprehended mischief will in fact arise (CHITTY, J.).—A.-G. v. MANCHESTER CORPN., [1893] 2 Ch. 87; 62 L. J. Ch. 459; 68 L. T. 608; 41 W. R. 459; 9 T. L. R. 315; 37 Sol. Jo. 325; 3 R. 427.

Annotations:—Consd. Pethick v. Plymouth Corpn. (1894), 70 L. T. 304; A.-G. v. Nottingham Corpn., [1904] 1 Ch. 673; East London Ry. v. Thames Conservators (1904), 68 J. P. 302. **Refd.** A.-G. v. Cory, Kennard v. Same (1919), 88 L. J. Ch. 410; Litchfield-Speer v. Queen Anne's Gate Syndicate (No. 2), [1919] 1 Ch. 407.

337. —.—No actual case of injury has arisen & the action is *quia timet*. In order to succeed in such an action pltf. must show a strong case of probability that the apprehended mischief will in fact arise (FARWELL, J.).—A.-G. v. NOTTINGHAM CORPN., [1904] 1 Ch. 673; 73 L. J. Ch. 512; 90 L. T. 308; 68 J. P. 125; 52 W. R. 281; 20 T. L. R. 257; 2 L. G. R. 698.

Annotations:—Refd. East London Ry. v. Thames Conservators (1904), 68 J. P. 302. **Mentd.** R. v. L. G. Board, *Ex p.* Arlidge, [1914] 1 K. B. 160.

338. —.—In *M'Murray v. Cadwell*, No. 335, *ante* I had to consider how the ct. ought to deal with a case of possible accident viewed from the light of an accident already occurred. I see no reason to depart from what is there laid down, & there is no occasion to add to or repeat it. Suffice it to say that here the risk of accident is not imminent & if an accident occurs there is no reason to suppose it will produce serious consequences. Under the circumstances it would be wrong to grant an injunction (KEKEWICH, J.).—A.-G. v. DORCHESTER CORPN. (1905), 93 L. T. 290; 69 J. P. 363; 21 T. L. R. 695; 3 L. G. R. 1237; *on appeal* (1906), 94 L. T. 682, C. A.

exercised with caution, not *ex p.*, but on notice, with the opportunity of opposing on affidavit.—CROWDER v. TINKLER (1816), 19 Ves. 617; 34 E. R. 645, L. C.

Annotations:—Distd. Cooke v. Forbes (1867), 37 L. J. Ch. 178. **Consd.** A.-G. v. Manchester Corpn., [1893] 2 Ch. 87. **Refd.** Haines v. Taylor (1846), 10 Beav. 75; Thorne v. Taw Vale Ry. & Dock Co. (1850), 13 Beav. 10; Lond. v. Murray (1851), 17 L. T. O. S. 248; Soltau v. De Held (1851), 2 Sim. N. S. 133; A.-G. v. Sheffield Gas Consumers Co. (1853), 3 De G. M. & G. 304; Hepburn v. Lordan (1865), 2 Hem. & M. 345; M'Murray v. Cadwell (1889), 6 T. L. R. 76. **Mentd.** R. v. Lister & Biggs (1857), 7 Cox, C. C. 342; Belvedere Fish Guano Co. v. Rainham Chemical Works, Feldman & Partridge, Ind, Coope v. Same, [1920] 2 K. B. 487.

340. —.—RIPON (EARL) v. HOBART, No. 332, *ante*.

341. —.—SALVIN v. NORTH BRANCEPETH COAL CO., No. 1138, *post*.

342. —.—The owners of a house had had for many years a supply of water by pipes passing through the adjoining land under circumstances which in the view of the ct. created an easement. The owner of part of the adjoining land proceeded to build a house over part of the line of pipes:—**Held:** the owners of the house had a right to go on the adjoining land & repair the pipes when necessary, & by building a house their means of access to the pipes would be materially interfered with & rendered more expensive; & an injunction was granted to restrain the building of the house. The fact that an action has been brought without a previous application to deft. does not prevent pltf. from getting their costs of the action.

It appears to me that this is a case in which I am bound to interfere by granting an injunction because there is not only a mere possibility that harm may come but the necessary effect of what is being now done is that when the pipes have to be repaired there will be a greater difficulty & greater expense in doing it than at the present time (NORTH, J.).—GOODHART v. HYETT (1883), 25 Ch. D. 182; 53 L. J. Ch. 219; 50 L. T. 95; 48 J. P. 293; 32 W. R. 165.

Annotations:—Refd. Metropolitan Water Board v. L. & N. E. Ry. (1924), 131 L. T. 123. **Mentd.** Schwann v. Cotton, [1916] 2 Ch. 120.

343. —.—FLETCHER v. BEALEY, No. 334, *ante*.

SUB-SECT. 5.—SUBSTANTIALITY OF APPREHENDED DAMAGE.

339. Court will interfere.]—(1) Jurisdiction by injunction on danger of irreparable injury to property. (2) Jurisdiction by injunction, where the effect will be to stop a great trading concern,

SUB-SECT. 6.—CONDUCT OF DEFENDANT.

344. Whether court will interfere—Defendant insisting on right—Waste.]—If a person has only threatened to open mines, a pltf. may certainly come into this ct., to restrain a deft. from doing it. It is not necessary to stay till waste is actually

PART VI. SECT. 1, SUB-SECT. 5.

339 i. Court will interfere.]—A railway co. being about to construct their line along a public street, a bill was filed by the owner of property in front of which it would pass, to restrain the construction of the road, on the ground, as alleged, that his property would be thereby greatly depreciated in value from divers causes, & rendered greatly less eligible from the inconvenience & danger occasioned by the cars running immediately in front thereof, & the present traffic be diverted from that part of the road:—**Held:** the injury as alleged did not amount to a private nuisance, & complainant was not entitled to an injunction; & as the injury was not irreparable, the ct. would not if otherwise in favour of pltf., have granted the application.—MAGEE v. LONDON & PORT STANLEY RY. CO. (1857), 6 Gr. 170.—CAN.

339 ii. —.—CANADIAN PACIFIC

RY. CO. v. TOWN OF CALGARY (1887), 1 Terr. L. R. 67.—CAN.

339 iii. —.—Where a person is commencing lawful operations for the purpose of enabling him to utilise his own property, the mere fact that such operations may be injurious to another, is not enough to induce the ct. to interfere by injunction. There must at least be proof, not only of imminent danger, but also that the damage, if it comes, will be irreparable.—PEATT v. RHODE (1892), 2 B. C. R. 159.—CAN.

339 iv. —.—An injunction will only be granted where pltf. can show that substantial or irreparable injury will be otherwise sustained.—COTTON v. VANCOUVER CITY (1906), 12 B. C. R. 497.—CAN.

339 v. —.—MCCOLL v. CANADIAN PACIFIC RY. CO., [1920] 3 W. W. R. 179; 53 D. L. R. 722; 30 Man. L. R. 534.—CAN.

339 vi. —.—In execution of a simple money decree against M., the decree-holder, R., attached certain property as belonging to his judgment-debtor. To this attachment B. objected & her objection was sustained. The decree-holder thereupon brought a suit, as provided by Code of Civil Procedure, s. 283, against the judgment-debtor & B., & in this suit obtained a decree from the ct. of first instance. B. appealed to the High Ct. & pending the appeal, applied for an injunction against R. under sect. 492:—**Held:** such an injunction could not be granted, inasmuch as it was impossible to say that the attached property was in danger of being "wrongfully" sold in execution of a decree within sect. 492.—*Re* CHANDO BIBI (1904), 1 L. R. 26 All. 311.—IND.

339 vii. —.—GANGABAI v. PURSHOTAM (1907), 1 L. R. 32 Bom. 146.—IND.

committed, where the intention appears, & the person insists on his right to do it. Though no proof appears of waste, yet if tenant for life insists on a right to do it, & has none, the reversioner may have an injunction.—*GIBSON v. SMITH* (1741), 2 Atk. 182; Barn. Ch. 491; 26 E. R. 514, L. C.

345. ———. ———.] — *COFFIN v. COFFIN*, No. 935, *post*.

346. ———. ———.] — *TIPPING v. ECKERSLEY*, No. 613, *post*.

347. ———. ———.] — In an action by a copyholder to restrain the working of coal under his land by A., who claimed to be entitled to do the acts complained of by virtue of a lease from B., the lord of the manor B. was by amendment added as a deft., on the allegation that he claimed the right by himself & his lessees to work the coal; that he justified the acts of A., & that he had received & claimed to be entitled to receive from A. rents & royalties in respect of such wrongful working. On summons by B. under R. S. C., Ord. 25, r. 4, that the amended statement of claim might be struck out as against him on the ground that it disclosed no reasonable cause of action against him, & that the action might be dismissed as against him:—*Held*: the lessor had been properly added as a deft.—*SHAFTO v. BOLCKOW, VAUGHAN & CO.* (1887), 34 Ch. D. 725; 56 L. J. Ch. 735; 56 L. T. 608; 35 W. R. 562.

Annotations:—*Appld. Leckhampton Quarries Co. v. Ballinger & Cheltenham R. D. Co.* (1904), 68 J. P. 464. *Consd. Dickens v. National Telephone Co., National Telephone Co. v. Hythe Corpn.* (1911), 75 J. P. 557. *Appld. Thornhill v. Weeks*, [1913] 1 Ch. 438. *Refd. Westhoughton U. D. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159.

348. ———. ———. To prevent repetition.] — An action was brought by inhabitants of houses abutting on an open & unbuilt on area of land situate in the centre of a town, adjoining the market place, & known as Market square, for an injunction to restrain the owner thereof from using, or causing or permitting the same to be used for the purpose of any sports, exhibitions, entertainments, or otherwise whereby a nuisance might be occasioned to the annoyance & injury of pltf's. It appeared that in June, 1889, deft.'s agent licensed S. to use Market square for holding a public show for several days, S. paying £6. The show consisted of a large circular roundabout worked by a steam engine, which engine also worked an organ; a large circular mechanical switchback worked by another steam engine which worked a second organ; a shooting gallery; & a boxing booth. Whilst the show was going on, pltf's complained to deft.'s agent, & a correspondence ensued, which resulted in deft.'s agent declining to give an undertaking, & expressing his intention of allowing persons to use Market square for public shows:—*Held*: as deft. contended that he had the right to do the thing complained of, & had refused to give an undertaking, the inference as that there would be a repetition of the nuisance; & therefore pltf's were justified in bringing the action, & were entitled to an injunction.—*PHILLIPS v. THOMAS* (1890), 62 L. T. 793; 6 T. L. R. 327.

349. ———. ———.] — Where a person claims a right to do a thing, though saying he has no present intention of doing it, he is a proper party to an action for a declaration & injunction.—*LECKHAMPTON QUARRIES CO., LTD. v. BALLINGER*

& *CHELTEHAM RURAL DISTRICT COUNCIL* (1904), 68 J. P. 464; 20 T. L. R. 559.

Annotation:—*Mentd. I. R. Comrs. v. Lonsdale's S. E. Trustees*, [1919] 2 K. B. 183.

350. ———. ———. Denial of threat.] — A telephone co. were using poles erected in 1887, under a licence from a corp'n. On Oct. 10, 1910, the corp'n. gave the co. notice to remove the poles. Arrangements having been made with the Postmaster-General for an underground telephone service after Jan. 1, 1912, the corp'n. desired that the poles should be taken down before Dec. 27, 1911.

If taken down at that date the effect would be that the Postmaster-General would not be liable to pay for the value of the poles. The corp'n. claimed a right to remove the poles, but contended that they had not threatened to remove them, & they refused to give any undertaking not to remove the poles:—*Held*: the corp'n. must be restrained by injunction from removing or interfering with the poles.—*DICKENS v. NATIONAL TELEPHONE CO., NATIONAL TELEPHONE CO. v. HYTHE CORPN.* (1911), 75 J. P. 557.

351. ———. ———.] — If a district council acting under Local Government Act, 1894 (c. 73), s. 26, assert that there is a public right of way over pltf.'s close & threaten & intend to exercise it by their servants or agents an action for a declaration & injunction will lie against them.—*THORNHILL v. WEEKS*, [1913] 1 Ch. 438; 82 L. J. Ch. 299; 108 L. T. 892; 77 J. P. 231; 57 Sol. Jo. 477; 11 L. G. R. 362.

352. ———. ———. Threat by defendant to infringe legal right.] — Injunction granted, on information & bill, upon the ground of public nuisance, to restrain the magistrates of a county from cutting the timbers supporting the roadway of a bridge, which timbers & roadway, at the place proposed to be cut, were within their jurisdiction, but of which the other extremity was within the jurisdiction of a different county.

They have . . . given a distinct notice, a notice quite sufficient for the purpose of maintaining an injunction, that they intend to adopt this course if they have a right to do so. Neither can there be any doubt that if their intention is carried into effect it will occasion a great public nuisance. Why then is the ct. with those two facts so stated on the record not to interfere to prevent the nuisance to the public (*LORD COTTENHAM, C.*). —*A.-G. v. FORBES* (1836), 2 My. & Cr. 123; 40 E. R. 587, L. C.

Annotations:—*Refd. Thorne v. Taw Vale Ry. & Dock Co.* (1850), 13 Beav. 10; *Soltau v. De Held* (1851), 2 Sim. N. S. 133.

353. ———. ———.] — Pltf. was in the enjoyment of ancient lights. There had been a building adjoining his, with a wall alleged to have been 12 feet high, & not interfering with his lights. Deft. was about to pull down the ruins of this wall, & rebuild it 30 feet high, which he alleged was the original height. Pltf.'s evidence as to the original height was more precise than deft.'s. Deft. said he never intended to build beyond the original height. Pltf. proved that he had threatened to build much beyond 12 feet. An injunction had been obtained, & deft. never moved to dissolve it. At the hearing a decree for a perpetual injunction was granted, without requiring pltf. to try his right at law.—*PORTS v. LEVY* (1854), 2 Drew. 272; 61 E. R. 723.

PART VI. SECT. 1, SUB-SECT. 6.

348 i. *Whether court will interfere—Defendant insisting on right.*—Except

in a case of irreparable damage, or of substantial damage, or of continuous damage, a ct. of equity will not interfere by injunction, unless the acts

complained of are done under a claim of right.—*MARTIN v. DOUGLAS* (1867), 16 W. R. 268.—*IR.*

Sect. 1.—Grounds for granting or refusing injunction: Sub-sect. 6. Sect. 2.]

354. ———.]—Defts. G. & I., who were entitled to the minerals under Greys had granted a lease to their co-defts. of the china clay under various lands, including greater part of Greys. The lessees had entered Greys for the purpose of getting china clay, but had not got any, & long before the bill was filed had ceased to occupy any part of that estate & were getting clay only from the 27 acres of which pltf's. claimed to be owners but to which they were decided not to be entitled. Defts. by their answers stated they had no intention of getting clay at present out of Greys, but they insisted that they were entitled to do so:—*Held*: defts. threatened to get the clay so as to give the ct. jurisdiction to interfere by injunction.—*HEXT v. GILL* (1872), 7 Ch. App. 699; 41 L. J. Ch. 761; 27 L. T. 291; 20 W. R. 957, L. JJ.

Annotations:—*Consd.* *Hedley v. Bates* (1880), 49 L. J. Ch. 170. *Apld.* *Shatto v. Bolekow, Vaughan* (1887), 34 Ch. D. 725; *Phillips v. Thomas* (1890), 62 L. T. 793; *Leckhampton Quarries Co. v. Ballinger & Cheltenham R. D. Co.* (1904), 68 J. P. 464. *Reid.* *Hall v. Byron* (1877), 4 Ch. D. 667; *Newington L. B. v. Cottingham L. B.* (1879), 12 Ch. D. 725; *Dickens v. National Telephone Co., National Telephone Co. v. Hythe Corp.* (1911), 75 J. P. 557; *Thornhill v. Weeks*, [1913] 1 Ch. 438; *Westhoughton U. D. Co. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159. *Mentd.* *Aspden v. Seddon* (1874), 10 Ch. App. 396, n.; *Eardley v. Granville* (1876), 24 W. R. 528; *A.-G. v. Tomline* (1877), 5 Ch. D. 750; *A.-G. for Isle of Man v. Mylehreost* (1879), 4 App. Cas. 294; *Gill v. Dickinson* (1880), 5 Q. B. D. 159; *Davis v. Treharne* (1881), 6 App. Cas. 460; *Loosemore v. Tiverton & North Devon Ry.* (1882), 22 Ch. D. 25; *Mid. Ry. v. Haunchwood Brick & Tile Co.* (1882), 20 Ch. D. 552; *Pountney v. Clayton* (1883), 11 Q. B. D. 820; *Tucker v. Linger* (1883), 8 App. Cas. 508; *Love v. Bell* (1884), 9 App. Cas. 286; *Robinson v. Milne* (1884), 53 L. J. Ch. 1070; *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562; *A.-G. v. Welsh Granite Co.* (1887), 35 W. R. 617; *Glasgow (Lord Provost & Mags.) v. Farie* (1888), 13 App. Cas. 657; *Consett Waterworks Co. v. Ritson* (1889), [1922] 2 Ch. 187, n.; *Jersey v. Neath Poor Law Union Grdns.* (1889), 22 Q. B. D. 555; *Westmoreland v. New Sharlston Colliery Co.* (1898), 79 L. T. 716; *Re Constable & Cranswick* (1899), 80 L. T. 164; *Johnstone v. Crompton*, [1899] 2 Ch. 190; *G. W. Ry. v. Blades*, [1901] 2 Ch. 624; *Greville v. Hemingway* (1902), 87 L. T. 443; *Re Todd, Birleston & N. E. Ry.*, [1903] 1 K. B. 603; *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co.-op. Co.*, [1906] A. C. 305; *G. W. Ry. v. Carpalla United China Clay Co. & Clifden* (1908), 99 L. T. 869; *Butterley Co. v. New Hucknall Colliery Co.*, [1909] 1 Ch. 37; *Skey v. Parsons* (1909), 101 L. T. 103; *N. B. Ry. v. Budhill Coal & Sandstone Co.*, [1910] A. C. 116; *I. R. Comrs. v. Joicey* (No. 2), [1913] 2 K. B. 580; *Thomson v. St. Catharines College Cambridge, etc.*, [1919] A. C. 468; *Welldon v. Butterley Co.*, [1920] 1 Ch. 130.

355. ———.]—An action was brought against the master of a ship to restrain him from using pumps which were an infringement of pltf.'s letters patent. He denied having used any pumps which were an infringement of the patent, & did not suggest that the owners ought to be parties. It was shown that the ship was fitted up exclusively with pumps which were an infringement of the letters patent, but had been so fitted up before deft., who was not a part owner, had taken command of her; he had nothing to do with putting them on board, & they had never been worked in British waters. An injunction having been granted to restrain the master from using the patented invention:—*Held*: the injunction was rightly granted, on the ground that deft., being in command of a ship exclusively fitted up with pumps which were an infringement of the letters patent, was intending to use the patented invention.—*Aspld.* *Aspld.* (1870), 12 Ch. D. 13;

Consd. *Upmann v. Forester* (1883), 24 Ch. D. 1. *Proctor v. Bailey* (1889), 42 Ch. D. 393, n. *Fish Guano Co. v. Rainham Chemical Works*, [1900] 1 K. B. 487. *Ind.* *Coope v. Same* (1920),

356. No. 39, ante.

357.

—.]—*COOPER v. WHITTINGHAM*, No. 39, ante. —.]—A covenant by a lessee not to assign without the lessor's consent runs with the land, & applies to a reassignment to the original lessee. An injunction will lie on a threat to commit a breach of it.—*MCEACHARN v. COLTON*, [1902] A. C. 104; 71 L. J. P. C. 20; 85 L. T. 594, P. C.

358. ———.]—*Denial of intention by defendant—After previous threats.*—*PACKINGTON v. PACKINGTON* (1745), 1 Dick. 101; 21 E. R. 206, L. C.

359. ———.]—Injunction to restrain the landlord from cutting ornamental trees in a lawn during the term, upon his conduct; amounting to a consent to the tenant's plan of improvement, laying out the lawn, etc. A deed not to be varied by parole evidence of the actual agreement. Sending a surveyor to mark out trees is a sufficient ground for an injunction.—*JACKSON v. CATOR* (1800), 5 Ves. 688; 31 E. R. 806, L. C.

Annotations:—*Consd.* *Civil Service Musical Instrument Assoon. v. Whiteman* (1899), 68 L. J. Ch. 484. *Reid.* *Swaine v. G. N. Ry.* (1864), 33 L. J. Ch. 399; *McManus v. Cooke* (1887), 35 Ch. D. 681. *Mentd.* *Willmott v. Barber* (1880), 15 Ch. D. 96.

360. ———.]—No one has a right to go over the land of another without his consent, but deft. has disclaimed any intention of so doing, & on the contrary has declared his resolution not to go over the lands of pltf's. They are therefore in no danger of any trespass on his part & may safely wait for the trial of the case . . . & if a wilful trespass is proved, no doubt an injunction will be granted (*HAWKINS, J.*).—*CALVERT v. GOSLING* (1889), 5 T. L. R. 185, D. C.

361. ———.]—In Aug. 1882, A. set up in B.'s factory four machines of his own make to be taken & paid for if they worked to B.'s satisfaction. They were used till Apr. 1883, when B., being dissatisfied with them, took them down, laid them in his yard, called on A. to take them away, & never used them again. A. did not take them away till Jan. 1885. In Mar. 1887, P., who had obtained a judgment against A. that A.'s machines were an infringement of a patent belonging to him, claimed royalties from B. B. replied that P. could satisfy himself by calling at B.'s mill that B. was using neither P.'s nor A.'s machines, & had no intention of so doing. Further correspondence took place, & B. denied all liability alleging that he had not bought the machines from A. who had set them up on trial & as they did not work well had to take them down, & that B. had not used & was not using any machine which infringed P.'s patent. In Jan. 1888, P. brought his action in the Chancery of the County Palatine against B. for an injunction & an account or damages. B. put in a defence denying infringement & stating that if he ever had used machines infringing the patent such user had been discontinued long before the action, as pltf. knew, & that B. never threatened or intended & did not threaten or intend to use any apparatus infringing the patent:—*Held*: though B. had infringed the patent, it was not to be inferred from the circumstances that he had any intention to infringe it again, & P. if he had made such inquiry as he ought would have discovered this; there was, therefore, no case for an injunction, & the ct. of the County Palatine having only the old Chancery jurisdiction, damages could not in that case be given.—*PROCTOR v. BAYLEY* (1889), 42 Ch. D. 390; 59 L. J. Ch. 12; 61 L. T. 752; 38 W. R. 100; 6 R. P. C. 538, C. A.

Annotations:—*Distd.* *Werner Motors v. Gamage*, [1904] 1 Ch. 264. *Reid.* *Barrett v. Day, Day v. Foster* (1890), 43 Ch. D. 435; *Burberry's v. Watkinson* (1906), 23 R. P. C. 141.

362. — Promise to give notice of intention to do act.]—Deft., in 1865, obtained leave to convert a piece of land containing twenty acres into a cemetery. He could not succeed in doing so, & the land remained unaltered. In 1876 an attempt was made to get up a co. for the purpose, but the attempt failed. In the following year pltf., who was owner of a dwelling-house within 100 yards of the nearest part of the land, wrote to deft. to the effect that unless deft. would give an undertaking not to use any part of the land for a cemetery, he should take legal proceedings. Deft. replied to the effect that he had no present intention of converting the land into a cemetery; that he would not give any undertaking not to do so if he found it desirable; but that if he should hereafter wish to use the property in that way, he would give pltf. two months' notice of his intention to do so; & he stated that he should not bury within 100 yards of pltf.'s house without consent. Pltf. thereupon commenced an action, & the judge granted an interlocutory injunction restraining deft. from using, "for burial or for a cemetery," the ground in question, "or any part thereof":—*Held*: (1) the injunction must be dissolved, for that there was no such threat or intention to use any part of the ground for a cemetery as to warrant the interference of the ct. by injunction, supposing such use to be unlawful; (2) an injunction in the above form could not, in any case, have been supported, for that under Burial Act, 1855 (c. 128), s. 9, a cemetery may come within 100 yards of a house, the only thing prohibited being actual burial within that limit.—*COWLEY (LORD) v. BYAS* (1877), 5 Ch. D. 944; 37 L. T. 238; 41 J. P. 804; 26 W. R. 1, C. A.

Annotations:—As to (2) *Consd.* *Godden v. Hythe Burial Board*, [1906] 2 Ch. 270. *Refd.* *Wright v. Wallasey L. B.* (1887), 18 Q. B. D. 783; *Clegg v. Metcalfe*, [1914] 1 Ch. 808.

363. Offer of undertaking before hearing.]—*LYON v. NEWCASTLE CORPN.* (1894), 11 R. P. C. 218.

364. — — —.] — In an action to restrain the infringement of a patent a deft., on being served with the writ, offered to undertake not to infringe, to give the other relief claimed by the writ & to pay pltf.'s costs. Notwithstanding this offer pltf. delivered a statement of claim & particulars of breaches. Deft. then delivered a defence; & pltf. moved for judgment in the terms of the statement of claim:—*Held*: pltf. ought to have accepted the undertaking offered; & on deft.'s giving the undertaking the ct. declined to grant an injunction giving pltf. costs down to the date of the offer & the costs of the day's appearance, & to deft., the other costs subsequent to the offer.—*JENKINS v. HOPE*, [1896] 1 Ch. 278; 65 L. J. Ch. 249; 73 L. T. 705; 44 W. R. 358.

365. — — —.] — *WINKLE & Co., LTD. v. GENT & SON* (1914), 31 R. P. C. 473.

Annotation:—*Refd.* *Davies v. Edinburgh Life Assce.*, [1916] 2 K. B. 852.

SECT. 2.—DAMAGES IN LIEU OF INJUNCTION.

Damages in lieu of injunction generally, see Part VII., *post*.

366. Whether court may award.] — *DREYFUS v. PERUVIAN GUANO Co.*, No. 394, *post*.

367. — — —.] — In an action for an injunction to restrain deft. from further building so as to interfere with pltf.'s ancient lights, & for a mandatory injunction to compel him to pull down like buildings already constructed, pltf. proved that if deft.'s building was completed it would seriously interfere with his light; but he failed to prove that the commercial value of his premises, or the facility of letting them, would be materially affected. The premises of pltf. & deft. were both leaseholds held under the same lessor, who had consented to the erection of deft.'s building:—*Held*: pltf., having proved his legal right to the light, & that the proposed building would infringe that right, & there being no special circumstances disentitling him to relief, he was entitled to an injunction as to the threatened building & to damages only as to the completed buildings. *Qu.*: whether the ct. has jurisdiction to give damages in respect of threatened injury, instead of an injunction.—*MARTIN v. PRICE*, [1894] 1 Ch. 276; 63 L. J. Ch. 209; 70 L. T. 202; 42 W. R. 262; 10 T. L. R. 172; 38 Sol. Jo. 127; 7 R. 90, C. A.

Annotations:—*Apld.* *Shelfer v. City of London Electric Lighting Co.*, *Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217. *Consd.* *Cowpor v. Laidler*, [1903] 2 Ch. 337; *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851. *Refd.* *Slack v. Leeds Industrial Co-op. Soc.*, [1924] 2 Ch. 475.

368. — — —.] — *LITCHFIELD-SPEER v. QUEEN ANNE'S GATE SYNDICATE (No. 2), LTD.*, No. 321, *ante*.

369. — — —.] — *Chancery Procedure Amendment Act, 1858* (c. 27), s. 2, confers on the Ct. of Ch. jurisdiction to award damages in lieu of an injunction in the case of a threatened injury.

Notwithstanding the repeal of *Chancery Procedure Amendment Act, 1857* (c. 27), by *Statute Law Revision & Civil Procedure Act, 1883* (c. 49), the combined effect of *Judicature Act, 1873* (c. 66), s. 16, & *Statute Law Revision Act, 1898* (c. 22), s. 1, is to maintain in force the jurisdiction conferred by *Chancery Procedure Amendment Act, 1857* (c. 27), s. 2.

Where therefore an action was brought in the Ch. Div. for an injunction to restrain an obstruction of ancient lights, & the ct. found that deft.'s buildings when completed would cause an actionable obstruction to pltf.'s lights, but that no such obstruction had yet taken place:—*Held*: the ct. had jurisdiction to award damages in lieu of an injunction.—*LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. SLACK*, [1924] A. C. 851; 93 L. J. Ch. 436; 131 L. T. 710; 40 T. L. R. 745; 68 Sol. Jo. 715, H. L.; *reversg.* *S. O. sub nom. SLACK v. LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD.*, [1923] 1 Ch. 431, C. A.; *subsequent proceedings, sub nom. SLACK v. LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD.*, [1924] 2 Ch. 475. C. A.

Part VII.—Damages in lieu of or in addition to Injunction.

SECT. 1.—JURISDICTION TO AWARD.

SUB-SECT. 1.—IN GENERAL.

See Chancery Amendment Act, 1858 (c. 27); Statute Law Revision & Civil Procedure Act, 1883 (c. 49), ss. 3, 5; Statute Law Revision Act, 1898 (c. 28), s. 1; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 18 (3).

370. Under Chancery Amendment Act, 1858 (c. 27)—Not affected by Judicature Acts.]—(1) Where damages are claimed in substitution for an injunction to restrain a wrongful act commenced before the issue of the writ & continued afterwards if the wrongful act has come to an end before the trial the ct. has jurisdiction under above Act, s. 3, to assess the whole of the damages accrued.

(2) Above Act remains in force notwithstanding the passing of the Judicature Acts.—**FRTZ v. HOBSON** (1880), 14 Ch. D. 542; 49 L. J. Ch. 321; 42 L. T. 225; 28 W. R. 459; 24 Sol. Jo. 366.

Annotations:—As to (1) **Reid.** *Beddall v. Maitland* (1881), 17 Ch. D. 174; *Serrao v. Noel* (1885), 15 Q. B. D. 549; *Chapman Morsons v. Auckland Grdns.* (1889), 23 Q. B. D. 294; *Dreyfus v. Peruvian Guano Co.* (1889), 43 Ch. D. 316. **Generally, Reid.** *Leeds v. Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851. **Mentd.** *Penrice v. Williams* (1883), 23 Ch. D. 353; *Barker v. Purvis* (1886), 56 L. T. 131; *Landrock v. Met. Dist. Ry.* (1886), 2 T. L. R. 532; *Serff v. Acton L. B.* (1886), 55 L. J. Ch. 569; *Milson v. Carter*, [1893] A. C. 638; *Martin v. L. C. C.* (1898), 79 L. T. 170; *Chaplin v. Westminster Corpn.*, [1901] 2 Ch. 329; *Chessum v. Gordon*, [1901] 1 K. B. 694; *Boyce v. Paddington B. C.*, [1903] 1 Ch. 109; *Lingke v. Christchurch Corpn.* (1912), 106 L. T. 376.

371. — Preserved notwithstanding subsequent repealing Acts.]—(1) A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors & with the purchasers of the other lots entitled to the benefit of the covenant not to build a shop on his land, or to use his house as a shop or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beershop with an "off" licence, to restrain him from breaking his covenant & for damages. Pltf. had known for three years before the action was commenced that deft. was using his house as a beershop, & had himself bought beer at the shop. There was evidence that some of the houses built on other lots had been for some time used as shops notwithstanding the covenant, & that some of the houses near pltf.'s house were occupied, not each by a single tenant, but by two families at weekly rents:—**Held:** the change in the character of the neighbourhood was not in itself a ground for refusing relief to pltf., as the change was not caused by his conduct, but pltf. had lost the right to enforce his covenant either by injunction or damages, through his acquiescence in the proceedings of deft.

(2) Above Act is applicable to cases where the damage sustained by pltf. is only nominal, as well as to cases where he is entitled to substantial damages.

(3) Although above Act is repealed by Statute

Law Revision & Civil Procedure Act, 1883 (c. 49), s. 3, under sect. 5 the jurisdiction conferred thereby is still in force.

(4) The ct. has power under above Act to refuse an injunction, although no case is established for granting damages in substitution for the injunction & in such a case may dismiss an action to enforce a covenant with costs.

(5) Since the Jud. Acts each division of the ct. has full power apart from above Act to give either injunction or damages (**BAGGALLAY, L.J.**).—**SAYERS v. COLLYER** (1884), 28 Ch. D. 103; 54 L. J. Ch. 1; 51 L. T. 723; 49 J. P. 244; 33 W. R. 91; 1 T. L. R. 45, C. A.

Annotations:—As to (1) **Distd.** *Northumberland v. Bowman* (1887), 56 L. T. 773. **Reid.** *Meredith v. Wilson* (1893), 69 L. T. 336; *Knight v. Simmonds*, [1896] 2 Ch. 294; *Osborne v. Bradley*, [1903] 2 Ch. 446; *Elliston v. Reacher* (1908), 77 L. J. Ch. 617; *Pulleyn v. France* (1912), 57 Sol. Jo. 173. As to (2) **Reid.** *Yates v. Kyffin-Taylor & Wark*, [1899] W. N. 145. As to (3) **Consd.** *Re R.*, [1906] 1 Ch. 730; *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851. **Reid.** *Dreyfus v. Peruvian Guano Co.* (1889), 42 Ch. D. 66; *Cowper v. Laidler*, [1903] 2 Ch. 337. As to (4) **Reid.** *Goddard v. Mid. Ry.* (1891), 8 T. L. R. 126; *Alexander v. Mansions Proprietary* (1900), 16 T. L. R. 431. **Generally, Reid.** *Sobey v. Sainsbury*, [1913] 2 Ch. 513. **Mentd.** *Alliance Economic Investment Co. v. Berton* (1923), 92 L. J. K. B. 750.

372. — — —.]—**LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. SLACK, No. 369, ante.**

373. — — —.]—If an injunction can be supported to restrain the progress of dilapidations not completed at the date of the filing of the bill, then above Act gives jurisdiction to assess damages in respect of such parts of the dilapidations as have been already effected at that date.

The intention [of above Act] was to give the ct. power to grant complete relief whenever it had a well-founded jurisdiction to entertain the case (**PAGE-WOOD, V.-C.**).—**HINDLEY v. EMERY** (1865), L. R. 1 Eq. 52; 35 L. J. Ch. 6; 13 L. T. 272; 11 Jur. N. S. 874; 14 W. R. 25.

Annotations:—**Reid.** *Hythe Corpn. v. East* (1866), 35 L. J. Ch. 257; *M'Rae v. L. B. & S. C. Ry.* (1868), 37 L. J. Ch. 267; *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851.

374. — — —.]—**SMITH v. SMITH, No. 233, ante.**

375. — — —.]—**Only where claim for injunction entertainable.]—****WICKS v. HUNT, No. 471, post.**

376. — — —.]—(1) Noise caused by machinery having been acquiesced in for more than five years, the ct. refused to grant an injunction, on the ground of increase evidenced only by the sense of hearing, it being proved on the other side that no new machinery or change in the manner of working had been introduced.

(2) Where an unlawful obstruction of an ancient light had existed for nearly six years, the ct. being of opinion that before the passing of above Act a bill for an injunction would have been dismissed, refused to direct an inquiry as to damages under that Act.—**GAUNT v. FYNNEY** (1872), 8 Ch. App. 8; 42 L. J. Ch. 122; 27 L. T. 569; 37 J. P. 100; 21 W. R. 129, C. A.

Annotations:—As to (1) **Follid.** *Rogers v. G. N. Ry.* (1889), 53 J. P. 484. **Generally, Reid.** *Fullwood v. Fullwood* (1878), 9 Ch. D. 176. **Mentd.** *Byass v. Bettam* (1885),

PART VII. SECT. 1, SUB-SECT. 1.

373 i. Under Chancery Amendment Act, 1858 (c. 27).]—The Supreme Ct. has the jurisdiction which Chancery Amendment Act, 1858 (c. 27), gave to the Ct. of Ch., to award damages in lieu of or in addition to an injunction.

Having always been a ct. both of law & of equity, it has always had jurisdiction to do so; but the effect of Supreme Court Acts, 1860 & 1862, was to give to it, if necessary, & to continue in it, the jurisdiction which the Ct. of Ch. had under Chancery Amendment Act, 1858 (c. 27), at the date of the passing

of the Act of 1860.—**RYDER v. HALL** (1905), 27 N. Z. L. R. 385.—N.Z.

k. Damages not specifically claimed.]—Damages which are not asked for will not be granted in a suit for an injunction except where they are either in substitution for or supplementary to the injunction which is

2 T. L. R. 88; *Remhardt v. Mentastl* (1889), 42 Ch. D. 685; *Christie v. Davey*, [1893] 1 Ch. 316; *Gosnell v. Aerated Bread Co.* (1894), 10 T. L. R. 661; *Sanders-Clark v. Grosvenor Mansions Co. & D'Allessandri* (1900), 82 L. T. 758; *Heath v. Brighton Corp.* (1908), 98 L. T. 718.

377. ———.]—It is necessary to consider the effect of the Act commonly called Lord Cairns' Act as to the jurisdiction of this ct. It appears to me that the second sect. of that Act gave a new power to the Ct. of Ch. . . . It only arises when the Ct. of Ch. has jurisdiction to grant an injunction. It can only apply to those cases in which the ct. could have granted an injunction, at all events at the time of the filing of the bill; & if the ct. could have granted an injunction it ought to have granted the injunction. Therefore it must apply to cases in which, before the passing of the Act, the ct. would have granted an injunction; & it gives a new power to the ct. purely discretionary to substitute damages in some one or more of the cases in which, before the passing of the Act, this ct. would have granted an injunction (*JESSEL, M.R.*).—*AYNSLEY v. GLOVER* (1874), L. R. 18 Eq. 544; 43 L. J. Ch. 777; 31 L. T. 219; 39 J. P. 36; 23 W. R. 147; *on appeal* (1875), 10 Ch. App. 283, L. JJ.

Annotations:—*Consd. Stanley of Alderley v. Shrewsbury* (1875), L. R. 19 Eq. 616; *Holland v. Worley* (1884), 28 Ch. D. 578; *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431; *Slack v. Leeds Industrial Co-op. Soc.*, [1924] 2 Ch. 475. *Refd. Greenwood v. Hornsey* (1886), 33 Ch. D. 471; *Martin v. Price*, [1894] 1 Ch. 276; *Cowper v. Laidler*, [1903] 2 Ch. 337. *Mentd. Moore v. Hall* (1878), 3 Q. B. D. 178; *Fowlers v. Walker* (1880), 49 L. J. Ch. 598; *Webster v. Whewall* (1880), 42 L. T. 868; *Dalton v. Angus* (1881), 6 App. Cas. 740; *A.-G. v. Queen Anne Garden & Mansions Co.* (1889), 60 L. T. 759; *Dicker v. Popham, Radford* (1890), 63 L. T. 379; *Smith v. Baxter*, [1900] 2 Ch. 138; *Warren v. Brown*, [1900] 2 Q. B. 722; *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229; *Colls v. Home & Colonial Stores*, [1904] A. C. 179; *Hyman v. Van Den Bergh*, [1908] 1 Ch. 167; *Wood v. Conway Corp.*, [1914] 2 Ch. 47.

378. ——— *Where injunction refused.*]—(1) In order to justify the ct. in not interfering at the hearing, there must be a much stronger case of acquiescence than is required upon an interlocutory application.

A. being about to erect a building near B.'s house, informed B. of his intention, & pointed out the proposed site of the building. B. having misunderstood A., & mistaken the proposed site for another to which he had no objection, made no further inquiries, & took no steps for nearly a month, by which time A. had almost finished the building; B. then discovered his mistake, & shortly afterwards filed a bill against A. for an injunction & damages, on the ground of obstruction to light & air:—*Held*: B.'s acquiescence was not sufficient to deprive him of the right to an injunction at the hearing of the cause; but the bill was dismissed on the ground that B. had sustained no substantial injury.

(2) If in a suit for an injunction & damages the injury to pltf. proves to be too trifling to sustain an injunction, the ct. has jurisdiction to award damages under the above Act.—*JOHNSON v. WYATT* (1863), 2 De G. J. & Sm. 18; 3 New Rep. 270; 33 L. J. Ch. 394; 9 L. T. 618; 28 J. P. 70; 9 Jur. N. S. 1333; 12 W. R. 234; 46 E. R. 281, L. JJ.

Annotations:—*As to* (1) *Refd. Lawrence v. Austin, Durell v. Pritchard* (1865), 6 New Rep. 308; *Hogg v. Scott* (1874), L. R. 18 Eq. 444. *As to* (2) *Consd. Swaine v. G. N. Ry.*

prayed.—*WILLIAMSON v. FRIEND* (1901), 1 S. R. N. S. W. 23, 133; 18 N. S. W. W. N. 32.—*AUS.*

1. Mandatory injunction sought.—Difficulty in restoring building.—A mtgee. filed his bill for foreclosure & for an injunction to restrain the

vendee of the mtgor. from removing a building erected on the property. The ct. thought that though the building had been actually removed, it was a proper case for a mandatory injunction; but it appearing that the building had been removed piece-

(1864), 4 De G. J. & Sm. 211. *Refd. Durell v. Pritchard* (1865), 1 Ch. App. 244; *Langmead v. Maple* (1865), 18 C. B. N. S. 255.

379. ———.]—*SWAINE v. GREAT NORTHERN RY. Co.* (1864), 4 De G. J. & Sm. 211; 3 New Rep. 399; 33 L. J. Ch. 399; 10 Jur. N. S. 191; 12 W. R. 391; 46 E. R. 899; *sub nom. SWAYNE v. GREAT NORTHERN RY. Co.*, 9 L. T. 745, L. JJ.

Annotations:—*Refd. Langmead v. Maple* (1865), 18 C. B. N. S. 255; *Serrao v. Noel* (1885), 15 Q. B. D. 549. *Mentd. Crump v. Lambert* (1867), 17 L. T. 133; *Dowling v. Pontypool Caerleon & Newport Ry.* (1874), L. R. 18 Eq. 714; *Gosnell v. Aerated Bread Co.* (1894), 10 T. L. R. 661; *A.-G. v. Preston Corp.* (1896), 13 T. L. R. 14.

380. *Damages not specifically claimed.*]—In a case for an injunction, which, from circumstances arising after the bill was filed, could not be granted, the ct., under above Act, awarded damages, though not specifically prayed for by the bill.—*CATTON v. WYLD* (1863), 32 Beav. 266; 55 E. R. 105.

Annotations:—*Consd. Davenport v. Rylands* (1865), L. R. 1 Eq. 302. *Apprvd. Betts v. Neilson, Betts v. De Vitre* (1868), 3 Ch. App. 429. *Refd. Serrao v. Noel* (1885), 15 Q. B. D. 549.

381. ———.]—(1) Injunction suit to restrain defts. from causing a nuisance by the working of their patent for making bricks & tiles under a covered area, to pltf. & her dwelling house. The bill prayed an injunction, but did not ask any inquiry as to damages. Pltf. at the hearing was willing to take damages instead of an injunction:—*Held*: a nuisance was proved, & pltf. was entitled to damages although she had not prayed for them by her bill.

(2) The damages would be assessed by the ct., & a memorandum of the decree giving damages, instead of an injunction, would be endorsed on pltf.'s title deed.—*CRAWFORD v. HORNSEA STEAM BRICK & TILE Co., LTD.* (1876), 45 L. J. Ch. 432; 34 L. T. 923; 24 W. R. 422, C. A.

382. ——— *Damages & account of profits—Patent.*]—*NEILSON v. BETTS*, No. 1190, *post*.

383. ———.]—*DE VITRE v. BETTS*, No. 1191, *post*.

384. ——— *Remedy by injunction barred—Action not maintainable at law.*]—*EASTWOOD v. LEVER*, No. 420, *post*.

385. ———.]—*CATTON v. WYLD*, No. 380, *ante*.

386. ———.]—Although relief by award of damages, under above Act, is in the nature of consequential relief, yet this ct. has jurisdiction to grant it, notwithstanding that it may not be in a position at the hearing to grant the injunction or specific performance on which the right to damages depends.

Simple questions, like the assessment of damages, are not such as this ct. will try by jury; but it will, under the power in sect. 6, refer them to a ct. of law.—*CORY v. THAMES IRONWORKS & SHIPBUILDING Co., LTD.* (1863), 2 New Rep. 16; 8 L. T. 237; 11 W. R. 589.

387. ——— *Establishment of right to specific performance.*]—(1) Vendors entered into an alleged agreement, consisting of letters, for the sale to purchasers of certain patent rights by which the vendors were to receive £15,000 payable by Mar. 1, 1886, for the patent rights works, plant, & book debts, & 25 per cent. of the profits made in dealing with the patents, the purchasers to form a co. to

meal, & that there might be difficulty in restoring it, an inquiry was directed to ascertain the value thereof, as sufficient for the justice of the case.—*MEYERS v. SMITH* (1869), 15 Gr. 616.—*CAN.*

m. ———.]—The ct. has power to

*Jurisdiction to award: Sub-sects. 1 2,
B. (a).]*

work the patents. No co. having been formed, & the purchasers refusing to carry out the agreement, the vendors brought an action claiming specific performance of the agreement, payment of the £15,000, & damages in addition to specific performance of the whole or any part of the said agreement, & in substitution for specific performance of any part of the agreement of which the ct. might decline to enforce specific performance.

The defence denied the agreement, & pleaded that the formation of a co., to work the patents was a condition precedent to the payment of the money. An order was made under R. S. C., Ord. 34, r. 2, directing the following questions of law to be set down for argument: (a) what was the construction of the letters constituting the alleged agreement; (b) whether pl'tfs. were entitled to any & what relief by way of specific performance, or damages, or both, in respect of such agreement:—*Held*: under Jud. Act, 1873 (c. 66), the ct. had complete jurisdiction both in law & in equity; so that, whether the ct. could in a particular case grant specific performance or not, it could give damages, for breach of the agreement.

(2) Under above Act pl'tfs. had first to make out that he was entitled to specific performance before he could get damages at all; now, he might come to the ct. & say, "If you think I am not entitled to specific performance of the whole or any part of the agreement, then give me damages":—*Held*: on the pleadings pl'tfs. were entitled to some relief, & defts. must pay the costs of the present hearing.—*ELMORE v. PIRRIE* (1887), 57 L. T. 333. *Annotation*:—*Generally*, *Reid*. Leeds Industrial Co-op. Soc. v. Slack, [1924] A. C. 851.

388. —.]—Where an action against a sanitary authority was *bond fide* & in substance brought for an injunction to prevent them from causing a nuisance in the future by continuing to discharge sewage into a stream, but the judge at the trial thought that under the circumstances an injunction was not then needed, because, though a nuisance was caused by such discharge of sewage in an exceptionally dry season, which at the time of the trial had passed away, it was not likely to recur except in such a season, & he accordingly refused an injunction, but gave £25 damages:—*Held*: he had power to give such damages in substitution for an injunction in accordance with the Chancery Practice under above Act, though no notice of such action had been given as required by Public Health Act, 1875 (c. 55), s. 264.—*CHAPMAN, MORSON & Co. v. AUCKLAND UNION GUARDIANS* (1889), 23 Q. B. D. 294; 58 L. J. Q. B. 504; 61 L. T. 446; 53 J. P. 820, C. A.

Annotations:—*Reid*. Pryce v. Hole (1890), 6 T. L. R. 195; Warwick & Birmingham Canal Navigation Co. v. Burman (1890), 63 L. T. 670; *Re R.*, [1906] 1 Ch. 730; Leeds Industrial Co-op. Soc. v. Slack, [1924] A. C. 851.

389. — Continuing nuisance.]—The distinction explained between an obstruction to ancient lights & an interference with the water rights of a riparian proprietor with reference to the question whether damages should be awarded in lieu of an injunction.

It is impossible to foresee what modes of enjoyment pl'tfs. . . . may resort to, or the extent of damages which would be a compensation for the

allow equitable compensation to be made in lieu of ordaining the removal of buildings.—*GRAHAM v. KIRKALDY MAGISTRATES* (1882), 9 R. (Ct. of Sess). 91 H. L.—*SCOT*.

n. Where wrongful act discontinued.]—Where a pl'tf. filed a bill for an injunction & payment of damages, & it appeared that the wrongful act complained of had, without his know-

ledge, been discontinued before the suit was commenced:—*Held*: the ct. had not jurisdiction to make a decree for the damages.—*BROCKINGTON v.* (1871), 18 Gr. 488.—*CAN*.

injury which the continued pollution might cause to such new modes of enjoyment. I shall not, of course, say that in no case of injury to riparian rights, damages should be awarded in lieu of an injunction, but I know of no case in which it has been done (*FRY, J.*).

If defts. . . . will undertake to indemnify pl'tfs. . . . in such manner as the ct. may direct, the injunction may be suspended for three months. There must be a reference as to the damage sustained by pl'tfs. (*FRY, J.*).—*PENNINGTON v. BRINSOP HALL COAL CO.* (1877), 5 Ch. D. 769; 46 L. J. Ch. 773; 37 L. T. 149; 25 W. R. 874.

Annotations:—*Reid*. Fritz v. Hobson (1880), 14 Ch. D. 542; Ormerod v. Todmorden Joint Stock Mill Co. (1883), 11 Q. B. D. 155; Owen v. Faversham Corp'n. (1908), 72 J. P. 404; Stollmeyer v. Petroleum Development Co., [1918] A. C. 498, n.

390. —.]—*SHELFER v. CITY OF LONDON ELECTRIC LIGHTING CO., MEUX'S BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO.*, No. 408, *post*.

391. —.]—*COWPER v. LAIDLER*, No. 410, *post*.

392. — Mandatory injunction sought.]—*SHELFER v. CITY OF LONDON ELECTRIC LIGHTING CO., MEUX'S BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO.*, No. 408, *post*.

393. —.]—*COWPER v. LAIDLER*, No. 410, *post*.

394. — Where no actual wrong committed.]—Above Act did not confer upon the Ct. of Ch. any jurisdiction to award damages in a case where no wrongful act had been committed by the person against whom an injunction was sought. Therefore where an action is brought for an injunction in respect of a threatened injury & no actual wrong has been committed by def't., the ct. has no jurisdiction to give damages in substitution for such injunction.

I entirely agree with what has been said by *BOWEN, L.J.*, on the subject of above Act. . . . Where there has been no wrong done it appears to me that above Act confers no power to give damages (*FRY, L.J.*).—*DREYFUS v. PERUVIAN GUANO CO.* (1889), 43 Ch. D. 316; 62 L. T. 518; 6 Asp. M. L. C. 492, C. A.; *on appeal, sub nom.* *PERUVIAN GUANO CO., LTD. v. DREYFUS BROTHERS & Co.*, [1892] A. C. 166, H. L.

Annotations:—*Consd.* Cowper v. Laidler, [1903] 2 Ch. 337. *Overd.* Leeds Industrial Co-op. Soc. v. Slack, [1924] A. C. 851. *Reid*. Martin v. Price, [1894] 1 Ch. 276; Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co., [1895] 1 Ch. 287. *Mentd.* Phillips v. Homfray (1890), 44 Ch. D. 694; *Dakshina Mohun Roy v. Saroda Mohun Roy* (1893), 9 T. L. R. 582; *Re A. B.* (No. 2), [1900] 2 Q. B. 429.

395. —.]—*COWPER v. LAIDLER*, No. 410, *post*.

396. —.]—*LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. SLACK*, No. 369, *ante*.

397. Under Judicature Acts.]—*SAYERS v. COLLYER*, No. 371, *ante*.

398. —.]—*ELMORE v. PIRRIE*, No. 387, *ante*.

SUB-SECT. 2.—EXERCISE OF JURISDICTION.

A. In General.

399. Exercise discretionary.]—*DURELL v. PRITCHARD*, No. 296, *ante*.

400. —.]—*AYNSLEY v. GLOVER*, No. 377, *ante*.

401. —.]—An action lies against a third

party, where a wrongful act discontinued before the suit was commenced:—*Held*: the ct. had not jurisdiction to make a decree for the damages.—*BROCKINGTON v.* (1871), 18 Gr. 488.—*CAN*.

person who maliciously induces another to break his contract of exclusive personal service with an employer, which thereby would naturally cause, & did in fact cause, an injury to such employer, although the relation of master & servant may not strictly exist between the employer & employed. Where in such an action the employed was also a deft., but as against him pltf. claimed only an injunction & not damages, it was held that damages might in the discretion of the ct. be given under Chancery Amendment Act, 1858 (c. 27), & the jury therefore should be directed by the judge, in the event of a verdict for pltf. to find such damages as should be awarded: (a) if the ct. should think it a proper case both for injunction & damages; (b) if the ct. should think it a proper case for damages only, & not also for an injunction.—*BOWEN v. HALL* (1881), 6 Q. B. D. 333; 50 L. J. Q. B. 305; 44 L. T. 75; 45 J. P. 373; 29 W. R. 367, C. A.

Annotations:—*Consd. Wright v. Hennessey* (1894), 11 T. L. R. 14; *Allen v. Flood*, [1898] A. C. 1. *Reid. National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335. *Mentd. Mineral Water Bottle Exchange & Trade Protection Soc. v. Booth* (1887), 36 W. R. 274; *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598; *De Francesco v. Barnum* (1890), 63 L. T. 514; *Woolley v. Broad*, [1892] 1 Q. B. 806; *Temper-ton v. Russell*, [1893] 1 Q. B. 715; *Exchange Telegraph Co. v. Gregory* (1895), 73 L. T. 120; *Lyons v. Wilkins* (1896), 74 L. T. 358; *Charnock v. Court* (1899), 68 L. J. Ch. 550; *Quinn v. Leathem*, [1901] A. C. 495; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239; *Long v. Smithson* (1918), 88 L. J. K. B. 223; *Weld-Blundell v. Stephens*, [1920] A. C. 956; *Ware & De Freville v. Motor Trade Assocn.*, [1921] 3 K. B. 40; *Sorrell v. Smith*, [1925] A. C. 700.

402. —.]—The ct. will not, in exercising the discretion given to it by Chancery Amendment Act, 1858 (c. 27), s. 2, compel pltf. to sell his property out & out to deft., by awarding pltf. damages in lieu of an injunction, when deft., by the buildings which he is erecting, is doing an act which will render the property of pltf. absolutely useless to him. When, however, the injury is less serious, & the ct. considers that pltf.'s property may still remain substantially useful to him if deft.'s buildings are permitted to continue, & that the injury is of such a nature as can be compensated by money, the ct. may exercise its discretion by awarding pltf. damages in lieu of an injunction; & for the purpose of exercising its discretion, the ct. will have regard to the nature & situation of the property.—*HOLLAND v. WORLEY* (1884), 26 Ch. D. 578; 54 L. J. Ch. 268; 50 L. T. 526; 49 J. P. 7; 32 W. R. 749.

Annotations:—*Distd. Greenwood v. Hornsey* (1886), 33 Ch. D. 471. *Expld. Dicker v. Popham, Radford* (1890), 63 L. T. 379. *Consd. Martin v. Price*, [1894] 1 Ch. 276. *Reid. National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.* (1894), 12 R. 112; *Cowper v. Laidler*, [1903] 2 Ch. 337; *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851.

403. —.]—*SHELFER v. CITY OF LONDON ELECTRIC LIGHTING CO., MEUX'S BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO.*, No. 408, *post*.

404. —.]—*WOOD v. CONWAY CORPN.*, No. 210, *ante*.

405. — *Judicial discretion.*]—*SMITH v. SMITH*, No. 233, *ante*.

406. — *According to circumstances of case.*]—The discretion given to the ct. by Chancery Amendment Act, 1858 (c. 27), to award damages in substitution for an injunction in the case of a substantial interference with pltf.'s ancient lights, is a discretion to be exercised according to the facts of each particular case. Where pltf. has, at the trial, established his statutory right as against a deft. who has erected a building causing a sub-

stantial interference with that right, the ct. will not compel him to accept damages or compensation instead of an injunction, especially where deft. has, during the progress of the action, given an undertaking to pull down, if so ordered at the trial.—*GREENWOOD v. HORNSEY* (1886), 33 Ch. D. 471; 55 L. J. Ch. 917; 55 L. T. 135; 35 W. R. 163.

Annotations:—*Consd. Dicker v. Popham, Radford* (1890), 63 L. T. 379; *Martin v. Price*, [1894] 1 Ch. 276. *Reid. Cowper v. Laidler*, [1903] 2 Ch. 337.

407. —.]—Defts., in constructing an embankment for a reservoir in connection with certain waterworks which they were carrying out under their statutory powers, inadvertently carried their underground workings below the surface of pltf.'s land, & so committed a trespass. The actual damage done amounted to much less than the probable cost of removing the works complained of:—*Held*: upon the authority of *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.*, No. 408, *post*, the ct. had a discretion to give damages in substitution for an injunction under circumstances which rendered that course desirable.—*RILEYS v. HALIFAX CORPN.* (1907), 97 L. T. 278; 71 J. P. 428; 23 T. L. R. 613; 5 L. G. R. 909.

Principles on which court will act.]—*See Subsect. 2, B., post.*

B. Principles upon Which Court acts.

(a) Damages in lieu of Injunction.

408. General rule — Continuing nuisance.]—

(1) Chancery Amendment Act, 1858 (c. 27), in conferring upon cts. of equity a jurisdiction to award damages instead of an injunction, has not altered the settled principles upon which those cts. interfered by way of injunction; & in cases of continuing actionable nuisance the jurisdiction so conferred ought only to be exercised under very exceptional circumstances.

It may be stated as a good working rule that if the injury to pltf.'s legal rights is small, & is one which is capable of being estimated in money, & is one which can be adequately compensated by a small money payment, & the case is one in which it would be oppressive to deft. to grant an injunction, damages in substitution for an injunction may be given (*A. L. SMITH, L.J.*).

(2) The sect. is in the widest possible terms, & I can find no limitation as to its applying only where the injunction sought is mandatory as distinguished from an injunction to prevent a continuing nuisance. . . . I cannot doubt that the Ct. of Ch. has the power in the one case as in the other to award damages in substitution for an injunction (*A. L. SMITH, L.J.*).—*SHELFER v. CITY OF LONDON ELECTRIC LIGHTING CO., MEUX'S BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO.*, [1895] 1 Ch. 287; 64 L. J. Ch. 216; 72 L. T. 34; 43 W. R. 238; 11 T. L. R. 137; 39 Sol. Jo. 132; 12 R. 112, C. A.; *subsequent proceedings*, [1895] 2 Ch. 388, C. A.

Annotations:—*As to* (1) *Consd. Jorden v. Sutton, Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217. *Appld. Rileys v. Halifax Corpn.* (1907), 97 L. T. 278. *Consd. Gilling v. Gray* (1910), 27 T. L. R. 39; *Petty v. Parsons* (1914), 84 L. J. Ch. 81; *Sharp v. Harrison*, [1922] 1 Ch. 502; *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851. *Appld. Slack v. Leeds Industrial Co-op. Soc.*, [1924] 2 Ch. 475. *Reid. Wise v. Metropolitan Electric Supply Co.* (1894), 10 T. L. R. 446; *Allport v. Securities Corpn.* (1895), 64 L. J. Ch. 491; *Westmoreland v. New Sharlston Colliery Co.* (1898), 79 L. T. 716; *Cowper v. Laidler*, [1903] 2 Ch. 337; *Colls v. Home & Colonial Stores*, [1904] A. C. 179; *Colwell v. St. Pancras B. C.*, [1904] 1 Ch. 707; *Higgins v. Betts*, [1905] 2 Ch. 210; *Kine v. Jolly*, [1905] 1 Ch. 480; *Midwood v. Manchester Corpn.*, [1905] 3 K. B. 597; *Saunby v. London (Ontario) Water Comrs.*, [1906] A. C. 110; *Balley v. Holborn & Finsbury* (1914), 110 L. T. 574. *As to* (2) *Reid. Kine v. Jolly*, [1905] 1 Ch. 480.

Sect. 1.—Jurisdiction to award: Sub-sect. 2, B. (a)

409. —.]—In an action claiming an injunction to restrain the proposed erection of buildings on one side of a narrow passage in the centre of the city of Leeds on the ground that the right of light enjoyed by pltf.'s premises on the other side of the passage would be seriously interfered with, ROMER, J., found that the proposed buildings, if erected, would interfere with pltf.'s lights, but that the injury would not be great, & that he could be adequately compensated by an award of damages. He felt bound, however, in view of the observations of the Lords Justices in *Dreyfus v. Peruvian Guano Co.*, No. 394, *ante*, to hold, contrary to his own opinion, that, where no injury had been actually caused, but was only contemplated at the date of the writ, there was no jurisdiction under Chancery Amendment Act, 1858 (c. 27), to grant damages in lieu of an injunction, & he therefore granted an injunction. Defts. appealed, & the Ct. of Appeal, without considering the merits, by a majority affirmed ROMER, J., on the question of jurisdiction. On a further appeal by defts., the House of Lords, by a majority, reversed the Ct. of Appeal, & pltf. having appealed from ROMER, J.'s decision so far as it was a finding that he would be adequately compensated in damages, the House remitted the case to the Ct. of Appeal to be heard on its merits:—*Held*: on the facts as found by ROMER, J., the case came within the "good working rule" laid down in *Shelfer v. City of London Electric Lighting Co.*, *Meux's Brewery Co. v. City of London Electric Lighting Co.*, No. 408, *ante*, namely, that if the injury to pltf.'s legal rights is small; if it can be estimated in money; if it is one which can be adequately compensated by a small money payment; & if the case is one in which it would be oppressive to deft. to grant an injunction, then damages in substitution for an injunction may be given; & that rule was still a guide to the ct. in exercising the discretion given by Chancery Amendment Act, 1858 (c. 27), & was unaffected by *Colls v. Home & Colonial Stores, Ltd.*, No. 1136, *post*. The Ct. of Appeal therefore discharged the injunction granted by ROMER, J., & directed an inquiry as to damages.—*SLACK v. LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD.*, [1924] 2 Ch. 475; 94 L. J. Ch. 46, C. A.; *previous proceedings, sub nom. LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. SLACK*, [1924] A. C. 851.

410. Only in special circumstances.—(1) Where an owner of premises seeks to restrain owners of adjoining premises by prohibitory injunction from interfering with his rights to light & establishes his legal right, he is entitled as of course to an injunction.

Assuming that the jurisdiction to substitute damages in lieu of granting a prohibitory injunction exists, the ct. will only exercise such jurisdiction under special circumstances, *e.g.* the trifling amount of the damage, & will refuse so to exercise it as in fact to enable the deft to purchase pltf.'s legal right against the latter's will.

(2) Where no wrongful act has been committed, but an injunction is sought to restrain its commission, the Ct. of Appeal has expressed a clear opinion in *Dreyfus v. Peruvian Guano Co.*, No. 394, *ante*, that Lord Cairn's Act [Chancery

Amendment Act, 1858 (c. 27)] confers no power to give damages in lieu of an injunction (BUCKLEY, J.).

(3) Where a mandatory injunction is asked the Act gives jurisdiction to substitute damages for an injunction (BUCKLEY, J.).

(4) Where the injunction asked for is one to restrain a continuing nuisance, . . . it would seem that there is jurisdiction to award damages instead of an injunction (BUCKLEY, J.).—*COWPER v. LAIDLER*, [1903] 2 Ch. 337; 72 L. J. Ch. 578; 89 L. T. 469; *sub nom. COOPER v. LAIDLER*, 51 W. R. 539; 47 Sol. Jo. 548.

Annotations:—*As to* (1) *Reid. Slack v. Leeds Industrial Co-op. Soc.*, [1924] 2 Ch. 475. *As to* (2) *Consd. Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851.

411. Quantum of damage sustained—Injury small.—*JOHNSON v. WYATT*, No. 378, *ante*.

412. — — — **Property still substantially useful.**—*HOLLAND v. WORLEY*, No. 402, *ante*.

413. — — —.]—*SAYERS v. COLLYER*, No. 371, *ante*.

414. — — — **Injury substantial.**]—*SAYERS v. COLLYER*, No. 371, *ante*.

415. Award equivalent to compulsory sale of property.—Where substantial damages, as distinguished from some £5 or £10, will be given at law for interference with light, the ct. will interpose by injunction. The ct. will not allow a man to inflict an injury upon his neighbour, & then purchase him out without any Act of Parliament having been obtained for that purpose.

Nor if a person complaining of interference with his light has offered to withdraw his opposition for a fixed sum, will the ct. gather from that fact alone that the damage is not irreparable, & send the case to a jury to assess the exact damage done. Were the ct. to do so, it would be conceding to persons desirous of erecting buildings the existence of an unknown Act of Parliament, with the provisions of the Lands Clauses Act, & enabling them to force the sale of pltf.'s right, not at his own valuation, but at the estimate of a jury.—*DENT v. AUCTION MART CO.*, *PILGRIM v. AUCTION MART CO.*, *MERCER'S CO. v. AUCTION MART CO.* (1866), L. R. 2 Eq. 238; 35 L. J. Ch. 555; 14 L. T. 827; 30 J. P. 661; 12 Jur. N. S. 447; 14 W. R. 709.

Annotations:—*Consd. Senior v. Pawson* (1866), L. R. 3 Eq. 330; *Beadell v. Perry* (1868), 19 L. T. 760; *Aynsley v. Glover* (1874), L. R. 18 Eq. 544; *Cowper v. Laidler*, [1903] 2 Ch. 337. *Reid. Luscombe v. Steer* (1867), 17 L. T. 229; *Potts v. Smith* (1868), 18 L. T. 629; *Kelk v. Pearson* (1870), 23 L. T. 458; *Dickinson v. Harbottle* (1873), 28 L. T. 186; *Pennington v. Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769; *Moore v. Hall* (1878), 3 Q. B. D. 178; *Warren v. Brown*, [1900] 2 Q. B. 722; *Colls v. Home & Colonial Stores*, [1904] A. C. 179. *Mentd. Beadell v. Perry* (1866), 15 W. R. 120; *Martin v. Headon* (1866), L. R. 2 Eq. 425; *Calcraft v. Thompson* (1867), 15 W. R. 387; *Lanfranchi v. Mackenzie* (1867), L. R. 4 Eq. 421; *Maguire v. Grattan* (1868), 16 W. R. 1189; *City of London Brewery Co. v. Tennant* (1873), 43 L. J. Ch. 457; *Bryant v. Lefever* (1879), 4 C. P. D. 172; *A.-G. v. Queen Anne Garden & Mansions Co.* (1889), 60 L. T. 759; *Bass v. Gregory* (1890), 25 Q. B. D. 481; *Dicker v. Popham*, *Radford* (1890), 63 L. T. 379.

416. — .]—*KREHL v. BURRELL*, No. 287, *ante*.

417. — .]—*HOLLAND v. WORLEY*, No. 402, *ante*.

418. — .]—*GREENWOOD v. HORNSEY*, No. 406, *ante*.

419. — .]—*COWPER v. LAIDLER*, No. 410, *ante*.

420. Acquiescence by plaintiff in infringement.—(1) Property was conveyed to certain trustees of a building society. A scheme was laid down for the buildings, with certain regulations applicable

PART VII. SECT. 1, SUB-SECT. 2.—
B. (a).

420 i. Acquiescence by plaintiff in infringement.—Appls. had erected a permanent dam for the purpose of generating power by means of a water

wheel. The effect of the dam was to raise the water in the stream several feet, & so to flood a few perches of resp.'s land higher up stream. Resp. had for a long period acquiesced in the dam, in the sense of protest, during

which time applts.' business, depending on the power supplied, was established. Some years later a new water wheel was erected, & subsequent to that resp. brought an action claiming damages for past injuries & an

to every lot of ground. Each allottee or purchaser from the society entered into restrictive covenants with the trustees, who were the conveying parties to him; & it was covenanted that the trustees should be deemed trustees of the covenants for the benefit of all claiming under conveyances already made by them. Pltfs. & deft. in the suit became allottees or purchasers. Soon after his purchase deft. built a large hotel, on some of the lots he had purchased, & he afterwards on certain other of his lots, & in front of lots which pltfs. had purchased, began erecting stables, with a large "midden," or receptacle for manure, of which the former were completed without formal protest from pltfs., who, however, ultimately filed a bill against deft., praying that they might have the benefit of the covenants entered into by deft., for an injunction against building in violation thereof, & that the buildings already so erected might be pulled down, & damages be accorded to pltfs. The judge made a decree, declaring that the only proper buildings were such as had been approved by the covenantees, directing the demolition of certain portions of the buildings raised, & awarding an injunction to restrain deft. from using the stables otherwise than as general outbuildings:—*Held*: under the circumstances, the injunction must be dissolved, & the order directing demolition discharged on the ground of acquiescence; & if pltfs. desired to proceed for the purpose of recovering damages, they must amend their bill by making it one on behalf of themselves & all the allottees & making the trustees defts.

(2) Pltf., though barred by acquiescence or otherwise from his remedy by injunction, may obtain damages under Chancery Amendment Act, 1858 (c. 27), & that even though no action would be maintainable at law by pltf.—*EASTWOOD v. LEVER* (1863), 4 De G. J. & Sm. 114; 3 New Rep. 232; 33 L. J. Ch. 355; 9 L. T. 615; 28 J. P. 212; 12 W. R. 195; 46 E. R. 859, L. JJ.

Annotations:—*Generally*, *Mentd.* Master v. Hansard (1876), 14 Ch. D. 718; *Wheelton v. Burrows* (1879), 12 Ch. D. 31; *Brown v. Inskip* (1884), Cab. & El. 231; *Rogers v. Hosegood* (1899), 81 L. T. 515.

421. —.]—The ct. will, in a case where the legal right is alone in question, coupled with facts which amount to a qualified consent & acquiescence, award damages instead of granting an injunction to restrain the proceedings by a railway co. with works which have done & might do further damage to a neighbouring landowner.

Where, therefore, a railway co. had trespassed on pltf.'s land by removing his boundary wall, & were proceeding to build another wall partly on his & partly on their own land, the ct. directed an inquiry in chambers to assess the amount of damage done, having previously refused an applica-

tion for the removal of the dam:—*Held*: damages should be given in lieu of an injunction, taking into consideration the acquiescence of resp., the hardship which an injunction would entail upon applts., & the fact that damages were a sufficient redress to the resp.—*ELLIS v. RASMUSSEN* (1910), 30 N. Z. L. R. 316.—N.Z.

o. Quantum of damage sustained—*Impossible to estimate.*—A landlord is not entitled to an injunction to prevent the carrying on of a livery & feed stable business in proximity to dwellings occupied by his tenants in a mainly residential locality so as to constitute a nuisance, without proof of injury to the reversion or that one or more of the tenants had left because of the annoyance from the stable, but such injunction may be granted at the suit of any tenant who proves such

nuisance. Pltfs. being tenants from month to month only:—*Held*: it would not be a proper case for awarding damages instead of granting an injunction, as it could not be known how long the tenants might remain, & besides, injuries of the kind in question cannot be fully compensated by damages, & it would be impossible to estimate such damages accurately in every case.—*MCKENZIE v. KAYLER* (1905), 15 Man. L. R. 660; 1 W. L. R. 290.—CAN.

p. Injury not yet committed.—The injury not having yet been committed:—*Held*: this was a case in which the ct. might reasonably & properly award damages, instead of an injunction, if it turned out that damages could be awarded.—*CANADIAN PACIFIC RY. CO. v. CANADIAN NORTH-ERN RY. CO.* (1912), 22 W. L. R. 289;

tion for an injunction to restrain the rebuilding of the wall.—*LOCKWOOD v. LONDON & NORTH WESTERN RY. CO.* (1868), 19 L. T. 68.

422. — *Acquiescence not sufficient to bar action.*—*SAYERS v. COLLYER*, No. 371, *ante*.

—.]—*See, generally*, Part VIII., Sect. 4, *post*.

423. *Where benefit results to property.*—A building containing ancient lights was pulled down & replaced by another in which the front was set back & a dormer window converted into a skylight:—*Held*: the right to access of light was not lost.

The right remains where any portion of the light which would have passed over the servient tenement through the old windows passes also through the new windows.

I must consider what the Master of the Rolls has called the materiality of the injury done to pltfs. . . . If there were not that material no question could arise between injunction & damages as alternatives (*FRY, J.*).

I am also of opinion that a portion of defts.' building actually enures to the benefit of pltfs. . . . although I am not at liberty to hold the injury compensated for by the benefit, yet in deciding the questions of damages or of injunction, I am at liberty to consider it as one element which has to influence my discretion in deciding which of the two alternatives, injunction or damages, I shall adopt (*FRY, J.*).—*NATIONAL PROVINCIAL PLATE GLASS INSURANCE CO. v. PRUDENTIAL ASSURANCE CO.* (1877), 6 Ch. D. 757; 46 L. J. Ch. 871; 37 L. T. 91; 26 W. R. 26.

Annotations:—*Reid.* *Dicker v. Popham*, Radford (1890), 63 L. T. 379; *Colls v. Home & Colonial Stores*, [1904] A. C. 179. *Mentd.* *Scott v. Pape* (1886), 31 Ch. D. 554.

424. *No case for injunction made out.*—Since the Jud. Act, 1873 (c. 66), as before it, a pltf. in an action to restrain an alleged obstruction to ancient lights cannot obtain an injunction unless he proves substantial damage. An inquiry as to damages will not be directed where pltf. has opened a case of substantial damage & has failed to prove it.—*KINO v. RUDKIN* (1877), 6 Ch. D. 160; 46 L. J. Ch. 807.

Annotation:—*Reid.* *Richards v. Revett* (1877), 37 L. T. 632.

Continuing nuisance.—*See* Nos. 389, 408, 410, *ante*.

Mandatory injunction sought.—*See* Nos. 408, 410, *ante*.

Where no wrong done.—*See* Nos. 369, 394, 410, *ante*.

Disturbance of easements.—*See* EASEMENTS, Vol. XIX., pp. 192–193, Nos. 1443–1468.

(b) *Damages in addition to Injunction.*

425. *Remedy in damages inadequate.*—The right of the lord of a manor to minerals is a right of property in the mineral substance only, subject

7 D. L. R. 120; 5 Alta. L. R. 407.—CAN.

q. Plaintiff otherwise entitled to equitable relief.—Damages in lieu of an injunction will be refused unless appet. can show he is otherwise entitled to equitable as distinguished from legal relief & a pltf. who has no equity entitling him to an interlocutory injunction when he obtains it will not be given damages in lieu thereof at the trial.—*BERTRAM v. BUILDERS ASSOCN. OF NORTH WINNIPEG* (1915), 31 W. L. R. 430; 8 W. W. R. 814.—CAN.

PART VII. SECT. 1, SUB-SECT. 2.—B. (b).

425 i. *Remedy in damages inadequate.*—*CARDWELL v. BRECKENBRIDGE* (1913), 24 O. W. R. 569; 4 O. W. N. 1295; 11 D. L. R. 461.—CAN.

Sect. 1.—Jurisdiction to award: Sub-sect. 2, B. (b). Sects. 2 & 3. Part VIII. Sect. 1.]

to which the copyholder has an estate in the soil throughout. Therefore, where the lord of a manor, entitled by custom to convey under pltf.'s copyhold minerals got within the manor, brought thereunder other minerals from mines without the manor:—*Held*: (1) the act was a trespass, for which an injunction lay; (2) as the title to the injunction was founded upon the inadequacy of the remedy in damages, the ct. could not award damages in addition to the injunction.—*EARDLEY v. GRANVILLE* (1876), 3 Ch. D. 826; 45 L. J. Ch. 669; 34 L. T. 609; 24 W. R. 528.

Annotations:—Generally, Mentd. Tucker v. Linger (1882), 21 Ch. D. 18; *Powell v. Vickerman* (1887), 3 T. L. R. 358; *Ruabon Brick & Terra Cotta Co. v. G. W. Ry.*, [1893] 1 Ch. 427; *G. W. Ry. v. Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157; *Webb v. Knight, Hedley v. Webb* (1901), 70 L. J. Ch. 668; *Batten Pooll v. Kennedy*, [1907] 1 Ch. 256; *Derry v. Sanders*, [1919] 1 K. B. 223; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468.

426. ——— Continuing nuisance.]—PENNINGTON v. BRINSOP HALL COAL CO., No. 389, ante.

427. ———.]—RAMUZ v. SOUTHEAST LOCAL BOARD (1892), 67 L. T. 169; 8 T. L. R. 700.

Liquidated damages in addition to injunction.]—See DEEDS, Vol. XVII., p. 403, Nos. 2118–2122.

SECT. 2.—WHAT DAMAGES RECOVERABLE.

428. Where damages in lieu awarded—Consideration of all circumstances.]—Damages in equity for loss occasioned by pulling up a railway will be computed upon a general view of the whole case & an estimate & allowance will be made of such a sum as may be considered a recompense for the loss sustained.—MOLD v. WHEATCROFT (1860), 30 L. J. Ch. 598.

429. ——— Damages accrued.]—CRAWFORD v. HORNSEA STEAM BRICK & TILE CO., LTD., No. 381, ante.

430. ——— To date of trial.]—A bill filed in 1868 prayed an injunction to restrain a local board of health from causing or permitting any sewage to pass into a certain brook, so as to be a nuisance. After various proceedings, in Feb. 1889, a supplemental writ was issued by leave of the ct., & a statement of claim was delivered asking for an injunction & also damages, including such as had been occasioned by the failure of the local board to comply with the interlocutory injunction. At the trial of the action, in July, 1890, the judge decided that defts. had practically abated the nuisance to such an extent that it would not be necessary to continue the injunction; but the judge was of opinion that certain moneys ought to be paid by defts. to pltf.s.:—*Held*: applying the principle that where there is jurisdiction to grant an injunction, damages may be given in lieu for injury, the injunction would not be continued; but there must be judgment against defts. for the moneys found to be due from them to pltf.s. at the trial.—WARWICK & BIRMINGHAM CANAL NAVIGATION CO. v. BURMAN (1890), 63 L. T. 670.

431. ———.]—MARTIN v. PRICE, No. 367, ante.

432. ——— Prospective damages—Memorandum endorsed on plaintiff's title deeds.]—CRAWFORD v. HORNSEA STEAM BRICK & TILE CO., LTD., No. 381, ante.

433. Where damages in addition awarded—Ancillary damages—Acknowledgment of wrong suffered.]—Where pltf. in an action for nuisance by noise & vibration claims an injunction which, or its equivalent undertaking, is granted by the ct., & also asks for general damages as ancillary to the real remedy sought, he is not entitled to substantial damages, but is entitled to recover something, not as compensation, but acknowledgment of the wrong he has suffered.

In the absence of misconduct a successful pltf. who has not failed wholly on one issue in the action will not, subject to the large discretion of the ct., be deprived of costs because some of his witnesses have been guilty of exaggeration in their evidence.—*LIPMAN v. PULMAN (GEORGE) & SONS, LTD.* (1904), 91 L. T. 182.

434. ———.]—Where pltf. proved a case of substantial injury to her business & to her health by the noise occasioned by the way in which deft.'s business was carried on, the ct. granted an injunction against the continuance of the nuisance, & also gave pltf. damages in respect of past injury.—GILLING v. GRAY (1910), 27 T. L. R. 39.

435. ———.]—The predecessor in title of pltf. P. sold & conveyed to defts. a piece of land forming part of a site used by them for a pumping station for a sewage farm, the site being so used in pursuance of a scheme sanctioned by the Local Government Board. The grantor knew that the land was required for sewage purposes. By the conveyance there was also granted to defts. the free right of passage & running of water from the piece of land through a drain or watercourse drawn on a plan to the conveyance, defts. covenanting to cleanse, repair, or renew the same so as not to cause a nuisance. Defts. allowed part of the sewage effluent from their sewage farm to flow on to land respectively belonging to & in the occupation of two pltf.s., & into the drain or watercourse referred to, with the result that some damage was done to pltf.s.' land & grass, & a nuisance caused by smells. Defts. justified this by express or implied grant from their vendor, & also under their statutory powers:—*Held*: on the construction of the deed of conveyance, there was neither an express nor implied grant of a right to discharge sewage effluent on to pltf.s.' land, & an injunction was granted restraining defts. from permitting any sewage effluent to be discharged into the drain or watercourse, but the operation of the injunction was suspended for six months. Pltf.s. were also awarded 40s. damages in respect of each of their claims as to underground flow of sewage & the nuisance.—PHILLIMORE v. WATFORD RURAL COUNCIL, [1913] 2 Ch. 434; 82 L. J. Ch. 514; 109 L. T. 616; 77 J. P. 453; 57 Sol. Jo. 741; 11 L. G. R. 980.

SECT. 3.—ASSESSMENT.

436. Cessation of wrongful act—Between commencement of proceedings & hearing—Infringement of patent.]—Where pltf. has succeeded in showing that at the filing of the bill he was entitled to an injunction to restrain an infringement of his patent, the ct. will not at the hearing refuse him an inquiry as to damages, under Chancery Amendment Act, 1858 (c. 27), although the patent has expired pending the litigation.—

PART VII. SECT. 2.

r. Where damages in lieu

v. GRAND TRUNK RY. CO. (1894), 22 A. R. 89.—CAN.

DAVENPORT v. RYLANDS (1865), L. R. 1 Eq. 302 ; 35 L. J. Ch. 204 ; 14 L. T. 53 ; 12 Jur. N. S. 71 ; 14 W. R. 243.

Annotations:—*Distd.* Betts v. Gallais (1870), L. R. 10 Eq. 392. *Foll.* Fritz v. Hobson (1880), 14 Ch. D. 542. *Reid.* Leeds Industrial Co-op. Soc. v. Slack, [1924] A. C. 851. *Mentd.* Penn v. Bibby, Penn v. Jack, Penn v. Fernie (1866), L. R. 3 Eq. 308 ; Fram Manufacturing Co. v. Morton (1922), 40 R. P. C. 33.

437. *Assessment by court.*—CRAWFORD v. HORNSEA STEAM BRICK & TILE CO., LTD., No. 381, *ante*.

438. — *Appeal against assessment*—No wrong principle acted upon.]—Pltf. who had obtained an injunction against a nuisance & an inquiry as to damages objected to the amount of damages awarded & to the way in which they had been assessed:—*Held*: it not having been shown that the ct. below had acted on any wrong principle in arriving at the amount of damages the appeal must be dismissed.—BALL v. RAY (1873), 30 L. T. 1 ; 22 W. R. 283, L. C. & L. JJ.

439. *Reference to chambers.*]—An author & publisher entered into an agreement in 1894 under which the author was to edit the whole of the plays of Shakespeare, to be called the Temple Shakespeare, & was to write an introduction, notes, & glossary for each play. The publisher was to pay the author a royalty, & the copyright was vested in the publisher. Clause 10 provided: "In the event of a cheaper or other form of

edition of any or either of the plays being thought advisable by the publisher, it shall form the subject of an agreement with the author on similar *pro rata* terms to those embodied herein."

The publication was very successful, & in 1899 a large Temple Shakespeare was produced, the notes & glossary being identical with those in the smaller edition, but illustrations were added ; a royalty was paid to the author upon this edition.

Discussion took place as to the production of a Shakespeare for schools, & the author stated that in Mar. 1901, a definite agreement was made as to the royalty to be paid him in respect of this edition, & denied that he ever failed or neglected or threatened to abandon its production.

The publisher produced a Temple Shakespeare for schools with notes, introduction, & glossary written by a person other than the author. The author applied for an injunction restraining the issue of this edition, or, in the alternative, for damages for breach of the agreement:—*Held*: there had been an agreement that the author should be paid a royalty on the school Shakespeare, & he had always been ready to perform the work, & the publisher had committed a breach of the agreement of 1894, supplemented by the verbal agreement of 1901 ; it was not a case for an injunction, but there must be a reference to chambers to assess the damages.—GOLLANCZ v. DENT (1908), 88 L. T. 358.

Part VIII.—Effect of Conduct of Parties.

SECT. 1.—IN GENERAL.

440. *Applicant must come with clean hands.*]—Where deft. in a suit, founded on charges of misconduct, for an account & a dissolution of the partnership & for an injunction to restrain him from receiving debts, drawing bills, etc., or further interfering in the partnership concern, denied or explained facts of appropriation to his own use of debts received by him from persons indebted to the concern, & alleged that he could not put in his answer to the bill because pltf. had possessed himself of the partnership books, & carried them away from the partnership premises, the ct. would not even grant the injunction, on the ground of pltf. having acted improperly.—LITTLEWOOD v. CALDWELL (1822), 11 Price, 97 ; 147 E. R. 413.

441. —.]—I am of opinion that the conduct of Mr. Williams [pltf.] & of Mr. Griffiths [pltf.'s solr.] in the transaction was such as to render it wholly unfit for this ct. to interfere in favour of pltf. (KNIGHT BRUCE, V.-C.).—WILLIAMS v. ROBERTS (1850), 8 Hare, 315 ; 68 E. R. 381.

442. —.]—Small instances of bad faith in a pltf., where deft. has an adequate remedy for such breaches of faith in his own hands, will not induce the ct. to dismiss a bill where the result would be to leave pltf. without any adequate remedy ; but the ct. will mark its sense of pltf.'s misconduct by disallowing all costs.—HOLMES v. EASTERN COUNTIES RY. CO. (1857), 3 K. & J. 675 ; 29

L. T. O. S. 311 ; 3 Jur. N. S. 737 ; 5 W. R. 870 ; 69 E. R. 1280.

Annotations:—*Mentd.* Catt v. Tourle (1869), 4 Ch. App. 654 ; Greenhill v. Isle of Wight (Newport Junction) Ry. (1871), 23 L. T. 885 ; County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

443. —.]—A person who comes for that relief [an injunction] must come with clean hands (WARRINGTON, J.).—JARVIS v. ISLINGTON BOROUGH COUNCIL & LANE (1909), 73 J. P. Jo. 323.

444. —.]—LITVINOFF v. KENT, No. 576, *post*.

—.]—*See, generally*, EQUITY, Vol. XX., pp. 248 *et seq.*

445. *Who seeks equity must do equity.*]—GREAT WESTERN RY. CO. v. OXFORD, WORCESTER & WOLVERHAMPTON RY. CO., No. 1554, *post*.

446. —.]—A party seeking relief by injunction must state in his bill the whole of the agreement in respect of which he seeks relief.

The ct. will not grant relief by injunction where there has been for a considerable time a violation of the agreement in respect of which relief is sought, both by pltf. & deft.

Whoever seeks equity should do equity (STUART, V.-C.).—SHEARD v. WEBB (1854), 23 L. T. O. S. 48 ; 2 W. R. 343.

—.]—*See, generally*, EQUITY, Vol. XX., pp. 243 *et*

447. *Plaintiff's derogation of own right*—Access of light.]—The ct. will grant an injunction

PART VIII. SECT. 1.

t. *Fraud of applicant.*]—The owner of an embarrassed estate executed a bond & warrant of attorney, to confess judgment thereon, to his sister, with the intention of having judgment for a large sum entered in her name & proceedings taken so as

to secure to himself a portion of the rents of his estate, & protect them from creditors, who were proceeding to get into possession. Afterwards a judgment was entered by the attorney of the obligor, who retained the bond in his possession. No further proceedings were taken on the judgment, since the creditors succeeded in

extending the portion of the property sought to be protected from their demands. The judgment was assigned. The assignee proceeded at law against the conusor. An injunction for want of an answer was obtained. On a motion, after answer, to continue the injunction:—*Held*: though the attempt had proved ineffectual, the

Sect. 1.—In general. Sects. 2 & 3: Sub-sect. 1.]

to restrain the erection of a proposed building which would materially affect the comfort & enjoyment in respect of light & air uninterruptedly enjoyed for twenty years by the inhabitants of an adjoining house, unless pltf., the owner of that house, has by his own act at any time during that period made an obstruction as great as that in respect of which he seeks relief.—*ARCEDECKNE v. KELK* (1858), 2 Giff. 683; 32 L. T. O. S. 331; 23 J. P. 147; 5 Jur. N. S. 114; 7 W. R. 194; 66 E. R. 286.

448. ———.]—(1) Where there is a material injury to that which is a clear legal right, as to which, from the nature of the case, damages would not be a complete compensation, this ct. will interfere by injunction.

(2) Deft.'s building obstructed in a material degree the access of light & air to old windows in pltf.'s premises:—*Held*: pltf. was not the less entitled to an injunction because he was himself engaged in erecting a structure which would interfere with the access of light & air to those windows from an opposite direction.

(3) The ct., in addition to requiring the usual undertaking from pltf. to be answerable in damages, prefaced its order for an injunction by a recital that pltf. intended to retain or restore the windows.—*STRAIGHT v. BURN* (1869), 5 Ch. App. 163; 39 L. J. Ch. 289; 22 L. T. 831; 34 J. P. 212; 18 W. R. 243, L. J.

Annotations:—*As to* (1) *Consd.* *Newson v. Pender* (1884), 27 Ch. D. 43. *Reid.* *Slack v. Leeds Industrial Co-op. Soc.*, [1924] 2 Ch. 475. *As to* (2) *Expld.* *Aynsley v. Glover* (1875), 10 Ch. App. 283. *Reid.* *Scott v. Pape* (1886), 31 Ch. D. 554; *Bailey v. Holborn & Frascati*, [1914] 1 Ch. 598. *As to* (3) *Expld.* *Eccl. Comrs. for England v. King* (1880), 14 Ch. D. 213. *Generally, Mentd.* *Sharp v. Wilson*, *Rotheray* (1905), 93 L. T. 155.

SECT. 2.—ASSERTION OF CLAIM.

449. Assertion without active support—Right not thereby kept alive.]—A continual claim without any active steps in support of it will not keep alive a right which would otherwise be barred by laches.—*LEHMANN v. MCARTHUR* (1868), 3 Ch. App. 496; 37 L. J. Ch. 625; 32 J. P. 660; 16 W. R. 877; *sub nom.* *LECHMANN v. MCARTHUR*, 18 L. T. 806, L. JJ.

Annotations:—*Mentd.* *Evans v. Davis* (1878), 10 Ch. D. 747; *Day v. Singleton*, [1899] 2 Ch. 320.

transaction was a fraudulent contrivance to delay creditors, such as to prevent the ct. from interfering; & any further injunction was refused.—*BATEMAN v. RAMSAY* (1837), Sau. & Sc. 459.—*IR.*

PART VIII. SECT. 2.

449 i. Assertion without active support—Right not thereby kept alive.]—A tenant, who had completed upon the demised premises a building, partly erected by a former tenant through whom he claimed, & which was erected & used by both for trade purposes, held over after the expiration of the lease to the first tenant, & was subsequently granted by his landlord a new lease, with the usual covenant to repair & a proviso that the lessee should have the privilege, at the expiration of the term, of removing any building erected on the demised lands, unless the same should be purchased by the lessor at a price to be fixed by the lessee. The tenant having given a chattel mtge. of a building, the building was about to be sold at public

auction, during the term, under a provision in the mtge. The landlord, hearing of it, went to the place advertised, where he was informed that the wife of the tenant was going to buy in the building at the auction. Satisfied with this he went away before the sale, making no objection to it & taking no steps to warn bidders of any claim that the building had become part of the freehold, & had passed to him as such; but, on the contrary, giving the bailiff conducting the sale a distress warrant, under which the landlord was to be paid a portion of the proceeds of the sale:—*Held*: as against a purchaser ignorant of the landlord's rights, the landlord was estopped from claiming the building as a part of the freehold, & from asserting any right to restrain the removal during the term.—*GRAY v. MACLENNAN* (1886), 3 Man. L. R. 337.—*CAN.*

PART VIII. SECT. 3, SUB-SECT. 1.

450 i. General rule—Promptitude essential to relief—Unless delay explained.]—Although pltf. had been

SECT. 3.—DELAY.**SUB-SECT. 1.—INTERLOCUTORY INJUNCTIONS.**

450. General rule—Promptitude essential to relief—Unless delay explained.]—Injunction to restrain the sailing of a ship, upon the application of a part-owner, refused; where the ship was intended to sail the next day, & it did not appear by the affidavit filed in support of the motion that there were any circumstances to account for pltf.'s delay in applying.—*CHRISTIE v. CRAIG* (1817), 2 Mer. 137; 35 E. R. 892, L. C.

451. ———.]—An action was commenced at law by a surveyor against a railway co., to recover a balance due to him for services performed. Payments had been made on account. Three months after the action was at issue, the co. filed their bill, praying discovery & an injunction, on the ground that, from the complicity & mutuality of the accounts, they ought to be taken under the direction of a ct. of equity. On motion by the co. for an injunction to restrain the action:—*Held*: this was not a case in which a ct. of equity will exercise the jurisdiction which it assumes in matters of account concurrently with the cts. of law; & no precise rule existed as to the particular cases in which it would exercise such jurisdiction.

The ct. will in all cases be influenced by any unexplained delay on the part of pltf. in equity.

It would, be a matter of reproach to this ct., if, in a case of concurrent jurisdiction, a party, having proceeded at law up to the period of trial, should be restrained by injunction from trying his action upon the application of his opponent, who, during that period, without any adequate excuse, permitted him so to proceed without any application to this ct. (*LORD COTTENHAM, C.*).—*SOUTH EASTERN RY. CO. v. MARTIN* (1848), 5 Ry. & Can. Cas. 478; 1 H. & Tw. 69; 18 L. J. Ch. 103; 12 L. T. O. S. 345; 13 Jur. 1; 47 E. R. 1330, L. C.

Annotations:—*Mentd.* *Dabbs v. Nugent* (1865), 13 L. T. 396; *Macintosh v. G. W. Ry.* (1865), 11 Jur. N. S. 681.

452. ———.]—Whenever a special injunction is moved for, it lies on pltf. seeking the aid of the ct. to show that there has been due diligence on his part to entitle him to that remedy. Delay unaccounted for will be a bar to pltf. obtaining the *festinum remedium* by way of injunction.—*KING EDWARD'S SCHOOL v. LONDON & NORTH WESTERN RY. CO.* (1849), 13 L. T. O. S. 203.

453. ———.]—Acquiescence by the party complainant, in the erection of works, alleged

guilty of great delay in applying to the ct. for an injunction to restrain the sale of lands under an execution at law, yet a sufficient case having been made out for an inquiry, the ct. granted the writ on an interlocutory motion; pltf. undertaking to proceed to an examination of witnesses within one month after answer filed & to the hearing of the cause forthwith thereafter, paying the costs at law incurred by reason of postponing the sale, & paying interest from the time the sale was to have taken place until the time of making the decree in the cause, in the event of the sale failing to realise enough to pay the full amount of the claim under the execution.—*CANADA PERMANENT BUILDING SOCIETY v. BANK OF UPPER CANADA* (1863), 10 Gr. 203.—*CAN.*

453 i. ———.]—In an action to rescind, on account of alleged misrepresentations, a contract for the purchase of a business by pltf. from defts., pltf. obtained an interim injunction restraining defts. from proceeding upon a mtge. which pltf.

to be in violation of an Act of Parliament, may, before the legal question has been tried, prevent the ct. from granting an injunction, which would indirectly have the effect of compelling the removal of the part of works already built; although, in the same case, the ct. may, pending the trial at law restrain the further proceedings with the works.—*A.-G. v. MANCHESTER & LEEDS RY. CO.* (1838), 1 Ry. & Can. Cas. 436.

Annotations.—*Reid. A.-G. v. Birmingham & Oxford Junction Ry., G. W. Ry. & Birmingham, Wolverhampton, Dudley Ry.* (1851), 16 Jur. 113; *Lancaster & Carlisle Ry. v. N. W. Ry.* (1856), 2 K. & J. 293; *Steele v. North Metropolitan Ry.* (1867), 2 Ch. App. 237; *Re London, Chatham & Dover Ry. Arrangement Act, Ex p. Hartridge & Allender* (1870), 5 Ch. App. 671.

454. ———.] — (1) The ct. will only grant an injunction where the legal right has been established; thus, where a railway co. charged an average rate of carriage upon packages containing smaller parcels, & upon the carriage of goods passing along deft.'s line & the line of another co., the ct. would not grant an injunction to restrain the railway co. from making such charges until their illegality had been established by trial at law.

(2) Where pl'tfs. had allowed six months to elapse from the time of filing their bill before moving for a special injunction that was held to be such a delay as amounted to an admission by pl'tfs. that there was no such urgency in their case as to call for the extraordinary interposition of the ct. by injunction.—*PICKFORD v. GRAND JUNCTION RY. CO.* (1845), 3 Ry. & Can. Cas. 538; 6 L. T. O. S. 213, L. C.

455. ———.] — *SHERSBY v. SOUTH EASTERN RY. CO.*, No. 217, *ante*.

456. ———.] — A party entitled to an injunction, had he applied for it in an early stage of the proceedings, may, by laying by, preclude himself from all right to such relief.—*WASON v. WARING* (1850), 15 L. T. O. S. 450, L. C.

457. ———.] — There is always greater danger in extending the common injunction to stay the trial than in letting the trial go on; for where the recovery of money is the object of the action, the delay may be fatal to pl'tf.'s at law ultimate recovery of his demand, should he prove successful. The ct., therefore, will require, on the part of pl'tf. in equity seeking to stay the trial, a great degree of promptness in bringing forward his equitable case.—*M'CLURE v. RIPLEY* (1849), 13 L. T. O. S. 85; *sub nom. M'CLURE v. RIPLEY*, 13 Jur. 353, L. C.

Annotation.—*Consd. S. E. Ry. v. Brogden* (1850), 3 Mac. & G. 8.

458. ———.] — *GREAT WESTERN RY. CO. v. OXFORD, WORCESTER & WOLVERHAMPTON RY. CO.*, No. 1554, *post*.

459. ———.] — *TURNER v. MIRFIELD*, No. 474, *post*.

460. ———.] — The ct. will not grant an interlocutory injunction if pl'tf., having sufficient notice of defts.' intention to commit the act sought to be restrained, is guilty of unreasonable

delay in applying to the ct.—*SALISBURY v. METROPOLITAN RY. CO.* (1870), 39 L. J. Ch. 429; 18 W. R. 484, L. J.

461. ———.] — In a suit to restrain the user of names in trade in a fraudulent manner, the right to an interlocutory injunction is lost by a delay in filing the bill of nine or ten months since the discovery of the user.—*ISAACSON v. THOMPSON* (1871), 41 L. J. Ch. 101; 20 W. R. 196.

462. ———.] — Pl'tf. in an action for infringement of his patent, applied on Dec. 2 for leave to serve notice of motion & for an interim order upon proof of two infringements on Nov. 13, & 23:—*Held*: the application for the interim order was too late.—*GREER v. BRISTOL TANNING CO.* (1885), 2 R. P. C. 268.

463. ———.] — *THOMPSON v. BATTY* (1887), 4 T. L. R. 36.

464. ———.] — Essence of application for interlocutory injunction was that it should be made with promptness (*COZENS HARDY, M.R.*).—*SHERWELL v. COMBINED INCANDESCENT MANTLES SYNDICATE, LTD.*, [1907] W. N. 211, C. A.

465. Plaintiff's knowledge of infringement of rights.] — *HODGSON v. POWIS (EARL)*, No. 129, *ante*.

466. ———.] — Large expenditure by defendant permitted.] — *GREAT WESTERN RY. CO. v. OXFORD, WORCESTER & WOLVERHAMPTON RY. CO.*, No. 1554, *post*.

467. ———.] — Development of defendant's trade.] — The owners of a patent commenced an action for infringement in Apr. 1893, & obtained judgment on June 12, 1894, with a certificate that the validity of the patent had come in question. On Nov. 15, 1894, they commenced the present action, & moved for an interlocutory injunction. For the purposes of the motion defts. admitted infringement, but they alleged that pl'tfs. knew as early as Jan. 1893, that defts. were infringing, & that in the interval a considerable trade on the part of defts. had grown up. Pl'tfs. did not contradict this by evidence, & their first complaint was made on Oct. 11, 1894. They alleged that they were put in a difficult position because there were numerous infringers. Defts. offered to pay into ct. a sum sufficient to meet the royalties until the trial, & to keep an account:—*Held*: under the circumstances of the case an injunction ought not to be granted.—*NORTH BRITISH RUBBER CO., LTD. v. GORMULLY & JEFFERY MANUFACTURING CO.* (1894), 12 R. P. C. 17.

468. ———.] — Pl'tfs. in May, 1899, commenced an action for infringement of patents & moved for an interim injunction. The ownership of the patents had been the subject of litigation in Germany, but in Oct. 1898, judgment was given against R. in favour of the right of pl'tfs. to an assignment from him of the patents, & an appeal from that judgment was disposed of in Jan. 1899. T., one of the defts., claimed the right to work the invention under a licence granted by R., & he had so worked since 1894, but, as alleged by pl'tfs., with notice of their title:—*Held*: assuming that

had given as security for the purchase price of the business sold:—*Held*: as pl'tfs. did not show a probability of success in their attempt to rescind the contract, & as they appeared in effect to have elected to affirm it after knowledge of the facts upon which they now relied, & as there had been delay on their part, it was not a case for the exercise of the extraordinary jurisdiction of the ct.; & a motion to continue the injunction was refused.—*BOOTH v. RATTRAY* (1911), 18 W. L. R. 55.—CAN.

468 ii. ———.] — Having regard

to the great delay of which all pl'tfs. were guilty, injunction was refused.—*CAIN v. PEARCE* (1912), 22 O. W. R. 174; 3 O. W. N. 1321; 5 D. L. R. 23.—CAN.

468 i. Plaintiff's knowledge of infringement of rights.] — Where pl'tf.'s title was disputed, & the injury of which he complained had been going on for three years, & was not any greater at the time pl'tf. moved for an interlocutory injunction than it had been for three years before, the ct. refused the motion.—*RICH v. BRANT-*

FORD (1867), 14 Gr. 83.—CAN.

468 ii. ———.] — A person had carried on the business of a soap & candle manufacturer for several years without any steps being taken to restrain him, after which a bill was filed for that purpose, on the ground of nuisance & inconvenience to the party complaining. The ct., under the circumstances, refused a motion for an interlocutory injunction, but reserved the question of costs to the hearing.—*RADENBURST v. COATE* (1856), 6 Gr. 139.—CAN.

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deft. T. had notice of pltf.'s title, yet in view of the delay on the part of pltf., who knew of deft.'s working, in asserting their rights, & on deft. T. undertaking to keep an account, no order ought to be made on the motion.—**ACT. FUR CARTON-NAGEN INDUSTRIE v. TEMLER** (1899), 16 R. P. C. 447.

Annotation:—*Consd. Bowdens Patents Syndicate v. Smith*, [1904] 2 Ch. 86.

469. Defendants' exercise of legal right in illegal way—Expenditure of public money.]—Comrs. under an Act for the better paving & lighting, etc., the borough of Plymouth were empowered to levy rates, & to apply them to certain specified purposes, & "in & for carrying the intents & purposes of the Act into full & complete execution in other respects":—**Held**: (1) this did not authorise the comrs. in expending the rates in payment of the expenses of an application to Parliament for increased powers; the purposes of the Act were public, & the A.-G. might proceed to restrain an illegal application of the rates; (2) the case was distinguishable from those in which there was a legal right to be tried, & an injunction would be granted, though there had been considerable delay in applying to the ct. But if an earlier application to the ct. might have been made, & the misapplication of the trust funds have been thereby prevented, the ct., at the hearing of the cause, although it directed the comrs. to replace the trust funds, could not compel them to pay the costs of the suit.—**A.-G. v. EASTLAKE** (1853), 11 Hare, 205; 2 Eq. Rep. 145; 22 L. T. O. S. 20; 18 J. P. 262; 17 Jur. 801; 1 W. R. 323; 68 E. R. 1249.

Annotations:—*Reid. A.-G. v. West Hartlepool Improvement Comrs.* (1870), L. R. 10 Eq. 152; *Elias v. Griffith* (1878), 8 Ch. D. 521. *Mentd. Beaumont v. Oliveira* (1869), 4 Ch. App. 309; *Re St. Bride's Church, Fleet St.* (1877), 35 Ch. D. 147, n.; *A.-G. v. Dartmouth Corp.* (1883), 48 L. T. 933; *Re St. Botolph without Bishopsgate Parish Estates* (1887), 35 Ch. D. 142; *Smith v. Kerr* (1902), 71 L. J. Ch. 369.

470. — Commission of nuisance.]—The L. local board, constituted under the Public Health Act, 1848 (c. 63), carried the whole drainage of the town of L. into the adjacent river, a small stream which, immediately below the town, flowed for three miles through pltf.'s lands on both sides. Pltf. was also seised of a mill upon the stream. The quantity of sewage matter thrown into the stream was greatly increased, the population of the town having increased nearly one-half, & the extent of sewers from 250 yards in 1848, to 10,500 yards in 1855; & besides other evidence of that, it appeared that sheep could no longer be washed there, that the fish were all dead, & that the exhalations were noisome. Pltf. had been in correspondence with the board on the subject of remedying the nuisance until Sept. 19, 1855, which was the date of the last communication in which they held out hopes of doing so. The bill & information was filed on Jan. 15, 1856:—**Held**: there was no such laches on the part of pltf. as to prevent him from having relief on an interlocutory application.—**A.-G. v. LUTON LOCAL BOARD OF**

HEALTH (1856), 27 L. T. O. S. 212; 20 J. P. 168; 2 Jur. N. S. 180.

Annotations:—*Reid. A.-G. v. Birmingham B. C.* (1858), 4 K. & J. 528; *A.-G. v. Kingston-upon-Thames* (1865), 11 Jur. N. S. 596; *A.-G. v. Halifax Corp.* (1869), 17 W. R. 1088.

471. Delay until injury serious.]—A road was altered in 1855 in a manner which pltf. considered likely to retard the escape of water in time of flood, & thus to aggravate the mischief done by floods to pltf.'s property, & especially to do him serious damage on the occurrence of great floods such as might be expected every twenty or thirty years. While the works were in progress, in Feb. 1855, pltf. threatened to take proceedings to stop them. After their completion slight floods occurred in 1855 & 1856 without doing serious mischief, & in 1857 a great flood occurred; shortly after which, in Dec. 1857, pltf. filed a bill to have the road restored to its condition before 1855, & to have compensation for the damage done by the flood of 1857:—**Held**: (1) the fact of no serious damage being done in the interval did not excuse pltf.'s delay, & he was not entitled to have the bill retained pending a trial; the bill accordingly dismissed with costs, without prejudice to any proceedings at law. (2) *Semle*: the Chancery Amendment Act, 1858 (c. 27), does not extend the jurisdiction of the ct. to cases where there is a plain common law remedy, & where the ct. would not have interfered before that statute.—**WICKS v. HUNT** (1859), John. 372; 70 E. R. 466.

472. Delay while injury prospective.]—The E. co. was registered in 1886 to purchase & work the S. telephone. In Feb. 1887, they wrote to the U. co., stating that they intended to manufacture & sell the S. telephone, & inviting the U. co. to inspect the S. telephone & challenging the U. co. to contest the right of the E. co. to manufacture & sell the same. The E. co. took no notice of this letter, but in Mar. 1888, the U. co. commenced an action against the E. co. for infringing their patents, & moved for an interlocutory injunction. The E. co. resisted the motion on the ground of the delay of the U. co. in taking proceedings. The U. co. alleged that they had been advised by their solrs. not to bring any action until they found that the E. co. had a substantial capital, & were selling the S. telephones:—**Held**: there had been no such delay on the part of pltf. as to disentitle them to an interlocutory injunction.—**UNITED TELEPHONE CO. v. EQUITABLE TELEPHONE ASSOCN.** (1888), 5 R. P. C. 233.

SUB-SECT. 2.—PERPETUAL INJUNCTIONS.

473. General rule—Delay no bar to relief.]—Mere acquiescence, if by acquiescence is to be understood only the abstaining from legal proceedings, is unimportant. Where one party invades the rights of another that other does not in general deprive himself of the right of seeking redress merely because he remains passive (**KINDERSLEY, V.-O.**).—**ROCHDALE CANAL CO. v.**

PART VIII. SECT. 3, SUB-SECT. 2.

rule—Delay no bar to
ed his bill to restrain
the defts. from closing
across a lane
ptf. claimed to be owner, &
defts. erecting a buildin
in

had no title to the lane, but
that the former owner of it had given

him to understand that the lane would
never be built on. At the hearing
ptf. was allowed to amend his bill,
by striking out the part claiming title
to the lane; & a perpetual injunction
was granted, restraining defts. from
closing the lane—the delay in filing
the bill having been satisfactorily
accounted for—with costs, less those
occasioned by ptf.'s claiming title to

473 ii. — — —.]—Delay, not hav-
ing been accompanied by acquiescence,
was insufficient to bar the ptf.'s right
to an injunction.—**RYDER v. HALL**
(1905), 27 N. Z. L. R. 385.—N.Z.

473 iii. — — —.]—Mere delay in
enforcing a legal right which does not
amount to an acquiescence barring
that right will not disentitle a ptf.
to an injunction in aid of his legal
right when established.—**ROCHE v.**

KING (1851), 2 Sim. N. S. 78; 20 L. J. Ch. 675; 15 Jur. 962; 61 E. R. 270.

Annotations.—*Conrad. L. C. & D. Ry. v. Bull* (1882), 47 L. T. 413. *Held. A.-G. v. Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304; *Beaufort v. Patrick* (1853), 17 Beav. 60; *Sheffield United Gas Co. v. Sheffield Gas Consumers Co., A.-G. v. Sheffield Gas Consumers Co.* (1853), 7 Ry. & Can. Cas. 650; *Archbold v. Scully* (1861), 9 H. L. Cas. 361; *Davies v. Marshall* (No. 1) (1861), 1 Drew. & Sm. 557; *A.-G. v. Kingston-on-Thames Corp.* (1865), 34 L. J. Ch. 481; *A.-G. v. Mid-Kent Ry. & S. E. Ry.* (1867), 3 Ch. App. 100; *Goodson v. Richardson* (1874), 30 L. T. 142; *Wilts. & Berks Canal Navigation Co. v. Swindon Waterworks Co.* (1874), 30 L. T. 443; *Eardley v. Granville* (1876), 3 Ch. D. 826; *Elias v. Griffith* (1878), 8 Ch. D. 521; *Cooper v. Crabtree* (1882), 20 Ch. D. 589; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Martin v. Price* (1893), 70 L. T. 202; *London General Omnibus Co. v. Lavell* (1900), 83 L. T. 453. *Mentd. Bottomley v. Squire* (1855), 24 L. J. Ch. 437.

474. ———.]—Deft. allowed a noxious & offensive refuse water to flow from his manufactory into an old pit on his own land but which percolated underground into the pltf.'s colliery. Deft. was restrained by perpetual injunction. On a bill to restrain a nuisance a delay of six months in filing the bill, though important on an interlocutory application held no bar to relief by injunction at the hearing of the cause.—*TURNER v. MIRFIELD* (1865), 34 Beav. 390; 55 E. R. 685.

475. ———.]—*HARTLEPOOL GAS & WATER CO. v. WEST HARTLEPOOL HARBOUR & RY. CO.*, No. 223, *ante*.

476. ———.]—The owners of certain glass works which were erected in 1845, erected in the year 1847 & subsequent years down to 1863 seven new furnaces, which largely increased the amount of smoke & vapour which was emitted from their works. Pltf. who was the owner of property adjoining the works which he & his predecessors in title had enjoyed long antecedent to the erection of the works, had at considerable expense prepared a portion of his estate for building purpose, but in consequence of the smoke & vapours from the glass works he had been unable to let the land for that purpose. Upon a bill filed in Mar. 1870, for an injunction to restrain the emission of smoke & vapours from the new works:—*Held*: pltf. was not barred by delay, but was entitled to an injunction as to the whole of the new works, although one of the chimneys was erected more than twenty years before the filing of the bill.—*SAVILLE v. KILNER* (1872), 26 L. T. 277.

477. ———.]—*SANDER v. MANLEY & ROGERS*, [1878] W. N. 181.

478. ———.]—Pltf. has a legal right to restrain the imitation of his labels, & has not lost it by acquiescence or delay. Nor would mere delay for a short time be sufficient to defeat his legal right (*ROMER, J.*).—*ROWLAND v. MITCHELL* (1896), 65 L. J. Ch. 857; 75 L. T. 65; 12 T. L. R. 510; 40 Sol. Jo. 636; *on appeal sub nom. ROWLAND v. MITCHELL, Re ROWLAND'S TRADE MARK*, [1897] 1 Ch. 71, C. A.

Annotation.—*Fold. Reddaway v. Stevenson* (1902), 20 R. P. C. 276.

479. ———.]—*F. R. & Co., Ltd.*, successors in business of *F. R.*, brought an action against *R. S. & Bro., Ltd.*, & *A. S.* in respect of the use of the words "camel-hair" in connection with belting. Pltfs. complained of the use of the name "Stevenson's Camel-hair Belting" & "Phoenix Brand Camel-hair Belting." Defts. admitted that "Camel-hair Belting" used alone denoted belting made by pltfs. Pltfs. had first

known of these acts of defts. in Apr. 1898, but, after inquiries into their position, had taken no steps against them:—*Held*: there had been no such acquiescence on the part of pltfs. as to debar them from suing for an injunction, but it debarred them from recovering damages for the past.—*REDDAWAY & CO., LTD. v. STEVENSON & BROTHER, LTD.* (1902), 20 R. P. C. 276.

480. ———.]—Unless legal remedy statute barred.]—*FULLWOOD v. FULLWOOD*, No. 207, *ante*.

481. ———.]—In 1867 pltfs. conveyed to a purchaser in fee simple certain hereditaments & appurtenances adjoining their railway, & by the deed of conveyance the purchaser covenanted "for himself, his heirs, exors., administrators, & assigns, that he would not erect or build any erection or buildings of any kind whatsoever within 10 feet of the roadway or viaduct of pltfs. without their permission in writing first had & obtained." In the following year the purchaser conveyed the hereditaments & appurtenances to a person since dead, testator took & accepted the conveyances without notice or knowledge of the covenant other than such constructive notice, if any, as he might be deemed to have had by reason of the deed of 1867 being a title deed of the premises. In 1869 testator rebuilt the hereditaments & erected on the premises a hotel, part of which stood within 10 feet of the roadway or viaduct of pltfs., & he demised the said hotel & premises for fifty years upon a certain rent to a woman, who assigned the lease to the second deft. F. A covenant was contained in the lease to the effect that the lessee should not make any alteration in the premises without the lessor's consent, in writing but neither the lessee nor defts. had any notice of the covenant in the conveyance of 1867 other than such constructive notice, if any, as before mentioned in the case of testator. In 1881 deft. F. increased the height of that part of the erection which was within 10 feet of pltf.'s roadway or viaduct, having previously in consideration for the payment of a sum of money obtained the written authority of deft. B. for doing so. Pltfs. had no knowledge of this erection by deft. B., or the alteration by deft. F., until they were both completed in 1881:—*Held*: upon a special case, pltfs. were entitled to an injunction to both defts., requiring them to pull down the erections, & deft. F. was not entitled to be indemnified by the deft. Bull.

I think when the legislature has put a limit of twelve or twenty years to the effect of a contract no man's rights should be barred at any other time (*FIELD, J.*).—*LONDON CHATHAM & DOVER RY. CO. v. BULL* (1882), 47 L. T. 413.

482. *Period of delay occupied in negotiation.*]—With regard to the question of acquiescence, whether there has been such a lying by on the part of pltf. as that this ct. will not interfere. Now the amount of what pltf. has been doing is not a tacit renunciation of his right to interfere; but he has been going on, protesting from time to time, with a view probably to an amicable adjustment (*per CUR.*).—*INNOCENT v. NORTH MIDLAND RY. CO.* (1839), 1 Ry. & Can. Cas. 242.

483. ———.]—*A.-G. v. COLNEY HATCH LUNATIC ASYLUM*, No. 4, *ante*.

484. *Plaintiff's knowledge of infringement of right.*]—A railway co. had deviated from their

EAGLE (1883), 2 N. Z. L. R. 294; *affd.* 3 N. Z. L. R. 165.—N.Z.

484 i. *Plaintiff's knowledge of infringement of right.*]—A pltf. brought his suit for proprietary possession of a

plot of land, & secondly, for a mandatory injunction to demolish certain buildings which deft. had erected on such plot. The suit, however, was not brought until upwards of two years

from the time when the buildings complained of were completed. It was found that pltf. was not entitled to proprietary possession of the land claimed by him, but that he had a right

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line & encroached upon grounds belonging to an individual contrary to an Act of Parliament; whereupon the co. in Sept. 1847, empannelled a jury who assessed the land which had been so taken at a sum which the owner refused to accept. Pltf. in Nov. following, entered into a contract for the purchase of the same property upon which the deviation had been made, for a sum greater than what had been assessed by the jury, the co. in the meantime continuing their works & embankments. Upon pltf. applying for an injunction to restrain the co. from proceeding in their buildings, etc., it having appeared that he was the attorney to the former owner of the land, & had advised him to refuse the offer made by the co., & who therefore knew distinctly that the co. intended to proceed, but had nevertheless neglected to file his bill until some months afterwards:—*Held*: he had, by his delay, shown such acquiescence in the alleged trespass as not to be entitled to the interference of the ct.—*HOPKINS v. GREAT NORTHERN RY. Co.* (1848, 11 L. T. O. S. 306.

485. —.]—In 1845 a bill & information to which pltf. was not a party, were filed by the charity trustees against a corpn., & in 1852 the latter was ordered to convey to the former the manor of P., etc., & the whole rents & profits were to be applied to the charitable purposes mentioned in the deed of Jan. 11, 1539, & the covenant contained in that deed was declared to be void. The present bill was not filed until the year 1853:—*Held*: while pltf. knew that a suit had been instituted, & was being proceeded with, which would materially interfere with his rights, he did not seek to disturb the arrangements before they were completed, & as the bill was not filed within a proper time, it must be dismissed, but, under the circumstances, without costs.—*HOPE v. GLOUCESTER CORPN. & CHARITY TRUSTEES* (1855), 24 L. T. O. S. 334; 1 Jur. N. S. 320; 3 W. R. 328; *on appeal*, 7 De G. M. & G. 647, L. JJ.

Annotation:—*Mentd.* A.-G. v. Greenhill (1863), 33 Beav. 193.

486. —.]—*MAYTHORN v. PALMER*, No. 222, *ante*.

487. — Notice attached to plan of proposed work—Construction of railway.]—A.-G. v. GREAT NORTHERN RY. Co., No. 1322, *post*.

488. — Act completed before complaint.]—Where an injunction was asked to restrain deft. from interfering with pltf.'s rights to real estate, pltf.'s title being doubtful & depending on questions more suitable for trial at law, while the injury, which was not very material in its character, had been in progress for three months to the knowledge of pltf. & had been full completed before the filing of the bill, the ct. refused to try the legal question of title, & dismissed the bill without prejudice to an action at law.—*WARD v. HIGGS* (1864), 4 New Rep. 459; 12 W. R. 1074.

489. Rights over mineral property.]—Bill by a co. for smelting & manufacturing iron against proprietors of coal mines adjoining their works, for specific performance of an agreement to sell

to the co., at a fixed price per ton, all of certain beds of coal, estimated to contain from 120,000 to 150,000 tons, to be raised & delivered by defts. at the rate of 500 tons per week, & the co. to drain the beds; & for an injunction to restrain defts. from selling any part to other persons. The bill averred that the coal was very conveniently situate with reference to the co.'s iron works, which adjoined thereto; & that the co. had the power, by means of their engines & pits, to drain the beds, & had occasion for a large quantity of coal of that particular description. Demurrer allowed, mainly on ground of laches, the co. having neglected to file their bill until eleven months after they discovered that defts. had ceased to deliver the coal, & were referred by defts. to their solrs. In contracts relating to commodities fluctuating from day to day in market price, the ct. expects persons to be unusually vigilant & active in asserting their right to specific performance, which it is inequitable to grant after such an interval, & when the parties may be no longer in the same position.—*POLLARD v. CLAYTON* (1855), 1 K. & J. 462; 25 L. T. O. S. 50; 1 Jur. N. S. 342; 3 W. R. 349; 69 E. R. 540.

Annotation:—*Refd.* Abinger v. Ashton (1873), L. R. 17 Eq. 358.

490. Injury only prospective.]—A.-G. v. BIRMINGHAM BOROUGH COUNCIL, No. 325, *ante*.

491. Injury dubious.]—*WARE v. REGENT'S CANAL Co.*, No. 969, *post*.

492. Defendant not injured by delay.]—*GALE v. ABBOTT*, No. 236, *ante*.

493. Delay by public—Suing through Attorney-General—Gradually growing nuisance.]—Though the public, through the A.-G., may be affected by delay, yet in cases of a gradually increasing nuisance, such as that in the present case, the ct. will have regard to the nature of the nuisance, & suppose that the relators have naturally been waiting to see whether the nuisance will continue to grow, or whether circumstances may not of themselves arise which will check or diminish it.—A.-G. v. BRADFORD CANAL PROPRIETORS (1866), L. R. 2 Eq. 71; 35 L. J. Ch. 619; 15 L. T. 9; 14 W. R. 579.

Annotation:—*Refd.* A.-G. v. Wimbledon House Estate Co., [1904] 2 Ch. 34.

494. —.]—A.-G. v. SHEFFIELD GAS CONSUMERS Co., No. 811, *post*.

495. —.]—A.-G. v. GRAND JUNCTION CANAL Co., No. 237, *ante*.

496. —.]—By an inclosure award in 1814 it was awarded that there should be a certain public carriage road & highway of the width of 35 feet in the parish of B., the land adjoining the road on the south side thereof being allotted to the predecessors in title of S., who were required under the award to fence the land bounding the road. In or about the year 1883 the predecessor in title of S. erected an iron fence separating his land to the south of the road from the roadway. At some time thereafter the land to the north of the road was fenced, & the width of the roadway before the year 1906 had become reduced to between 26 & 27 feet. In 1906 it was alleged that S.

of user over it, & that deft. was not entitled to build upon the land. The ct., however, on account of pltf.'s delay in bringing his suit, declined to grant the mandatory injunction asked for.—*MUHAMMAD v. GULAB RAI* (1898), 1 L. R. 20 All. 345.—*IND*.

490 i. Injury only prospective.]—S. was the locatee of two lots of land, one a free grant, the other a purchase, which he transferred to pltf. The

agent of pltf. swore that some pine timber had been taken off these lots in 1870–1 by some persons getting out square timber, & further, that deft. was the only person getting out square timber that season. After two years the ct. considered this evidence too indefinite as to the locality of cutting & as to quantity cut; & the act too old in date to warrant ct. in granting an injunction to restrain further

cutting.—*HUGHSON v. COOK* (1873), 20 Gr. 238.—*CAN*.

a. Delay in challenging election.]—At a meeting of the shareholders of a railway co., two sets of directors were proposed & voted for, & a scrutiny of the votes having taken place, the chairman decided that one of the sets had been elected, & they thereupon entered upon the discharge of their office as

removed the fence bounding the land on the south side of the road nearer to the fence on the north side, thus encroaching on the highway. In 1907 the rural district council called on S. to set back his fence so as to restore a width of 35 feet to the roadway, & on his refusal twice took down the fence, which S. on each occasion re-erected in the same position. In an action by the A.-G., & the rural district council for an injunction to restrain deft. S. from inclosing or encroaching upon the highway or from erecting any fence within 35 feet of the northern boundary of the road:—*Held*: (1) there had been no encroachment in 1906; (2) in respect of any alleged encroachment in 1883, the lapse of time was sufficient defence to the action by the relator pltfs.; (3) as to the action by the A.-G., no encroachment upon the highway by the fence complained of having been shown, an injunction must be refused, with costs against the relator pltfs.—*A.-G. & GODSTONE RURAL DISTRICT COUNCIL v. SMITH* (1912), 76 J. P. 253.

497. Plaintiff not in occupation of property.]—GORT (VISCOUNTESS) *v.* CLARK, No. 516, *post*.

498. Defendant exercising legal rights in illegal manner.]—It is said that pltf. . . . saw that the borough were laying out a great deal of money & must have known that the necessary & natural result would be [a gradual increase of the nuisance] & that knowing this & allowing the corpn. to complete these works he has now no right to complain. It appears to me that is a very strong application of the principle of acquiescence (JAMES, V.-C.).—*A.-G. v. HALIFAX CORPN.* (1869), as reported in, 17 W. R. 1088; *on appeal*, 5 Ch. App. 116, L. C. & L. J.

*Annotations:—*Refd. North Staffordshire Ry. *v.* Tunstall L. B. of Health (1870), 39 L. J. Ch. 131. *Mentd.* *A.-G. v. Halifax Corpn.* (1871), 24 L. T. 655.

499. —.]—By a local Act it was provided that the clauses of Towns Improvement Clauses Act, 1847 (c. 34), as to making & maintaining public sewers & the drainage of houses, should be incorporated with & form part of the Act, "except so far as they or any of them are inconsistent with the provisions of this Act, or are expressly varied or excepted by this Act"; & by sect. 6 of the Act the Corpn. of Leeds were authorised to construct one or more trunk or other sewer or sewers sufficiently capacious to receive the foul & drainage water & filth of the town, & to convey the same into the river:—*Held*: (1) the corpn. were not authorised by sect. 5 of the local Act to create a nuisance by draining into the river; (2) though the sewer had been completed, & in operation sixteen years before proceedings were taken, the ct. would interfere at the suit of the landowners.

When any person finds that the legislature has authorised work to be done he is not to assume it will create a nuisance . . . & until it is ascertained that the construction of the work will result in a nuisance I do not see how any person could have sued (LORD HATHERLEY, C.).—*A.-G. v. LEEDS CORPN.* (1870), 5 Ch. App. 583; 39 L. J. Ch. 711; 34 J. P. 708; 19 W. R. 19, L. C. & L. J.

*Annotations:—*As to (1) *Consd.* *Jordeson v. Sutton*, Southcoates, & Drypool Gas Co., [1899] 2 Ch. 217. *Refd.* *Holt v. Rochdale Corpn.* (1870), 18 W. R. 885; *A.-G. v. G. R. Ry.* (1872), 7 Ch. App. 478, n; *A.-G. v. Cockermouth L. B.* (1874), L. R. 18 Eq. 172; *Lea Conservancy Board v. Hertford Corpn.* (1884), Cab. & El. 299; *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287. *As to* (2) *Refd.* *A.-G. v. Birmingham B. C.* (1871), 24 L. T. 224; *Smith v. Smith* (1875), L. R. 20 Eq. 500.

directors; after the lapse of a month from the election, a suspension against their acting as directors was presented:—*Held*: the suspenders were

not entitled by this means, after having allowed so much time to elapse, to invert the possession which resps. had been allowed to have of the office

500. Grant of injunction prejudicial to defendant.]—A temporary church fronting to a road within the borough less than 40 feet wide having been pulled down with a view to erecting a permanent church, the corpn. gave notice to the clergyman in charge at the time, of a resolution passed by them that the road on which the church abutted must be not less than 40 feet wide; but there was no statement that the additional width was to be gained on the side on which the church abutted. & it appeared that the street might have been widened on the side opposite without removing any buildings. Afterwards, but not till the foundations of the new church had been put in, the corpn. prescribed a line of building which came within the limits of the church as designed:—*Held*: they were too late, & could not restrain the erection of the church in the manner in which it had been commenced.—*FOLKESTONE CORPN. v. WOODWARD* (1872), L. R. 15 Eq. 159; 42 L. J. Ch. 782; 27 L. T. 574; 37 J. P. 324; 21 W. R. 97.

*Annotation:—*Refd. *A.-G. v. Hatch*, [1893] 3 Ch. 36.

501. Delay unexplained.]—Injunction to restrain the obstruction of ancient lights refused, on the ground of pltf.'s delay, the bill being retained, with liberty to proceed at law.—*COOPER v. HUBBUCK* (1860), 30 Beav. 160; 31 L. J. Ch. 123; 25 J. P. 452; 7 Jur. N. S. 457; 9 W. R. 352; 54 E. R. 849; *subsequent proceedings* (1862), 12 C. B. N. S. 456.

*Annotations:—*Refd. *Jones v. Tapling* (1862), 12 C. B. N. S. 826; *Fulwood v. Fulwood* (1878), 38 L. T. 380. *Mentd.* *Hutchinson v. Copestake* (1861), 9 C. B. N. S. 863; *Weatherley v. Ross* (1863), 1 Hem. & M. 349; *Heath v. Bucknall* (1869), L. R. 8 Eq. 1.

502. —.]—Defts. were an association for the registry of iron ships, & classed the ships in a register of merit according to the reports of their own surveyors. A list from the register might be obtained by any one. Pltfs. were members of the association & the owners of a ship which in 1870 was ranked in the highest class in the register. Pltfs. in 1870 made an alteration in the ship, & submitted her to defts.' inspection, who not approving of the alteration, entered in the register, "class suspended 1871," & refused to restore the previous first-class entry unless some further alteration was made. The advisability of the alteration was a matter of opinion, as since the alteration the vessel was classed in the highest rank at "Lloyd's," London. Pltfs. continued to use the vessel, but it was proved that her value had been depreciated in consequence of the entry in defts.' register. On a bill being filed by pltfs. in Nov. 1873, to restrain defts. from disposing of any copies of their list containing the words "Class suspended 1871":—*Held*: on motion, pltfs. were not entitled to relief, first, because the entry was the *bond fide* opinion without malice of the society to whose judgment pltfs. had submitted the vessel; secondly, because of their laches in applying to the ct. for relief.—*CLOVER v. ROYDEN* (1873), L. R. 17 Eq. 190; 43 L. J. Ch. 665; 29 L. T. 639; 22 W. R. 254; 2 Asp. M. L. C. 167.

503. Injury to reversionary owner.]—To enable a termor to work mines it must be shown that the reversioner had commenced the working of the mines with a view to making a profit; & there is no difference in this respect between a mine & a quarry.

In 1802 the owner of land demised it to a mtgee. for five hundred years at a peppercorn rent. In

of directors.—*BLACKBURN v. FINLAY, BLACKBURN v. BUCHANAN* (1848), 10 Dunl. (Ct. of Sess.) 590; 20 Sc. Jur. 194, 199.—*SCOT.*

Sect. 8.—Delay: Sub-sect. 2. Sect. 4: Sub-sect. 1, A. & E

1811 the mtgor. granted a lease for twenty-one years to a third party of the mines & quarries under the land. Before that date a slate quarry had been opened & worked by the mtgor. on the property; & after that date, but at what time was uncertain, a second quarry was opened & was worked till the commencement of the suit. In 1820 the mtgee. foreclosed the equity of redemption in the term of five hundred years, & took possession of the property. In 1873 pltf., the reversioner on the term of five hundred years, filed a bill to restrain the termor from working the slate quarries during the term, & for an account of profits:—*Held*: if the quarries had been opened by the termor without the authority of the reversioner, pltf. would have been entitled to the relief prayed, notwithstanding the lapse of time; but the result of the evidence was that both the quarries had been opened by the authority of the reversioner, & that the termor was, therefore, entitled to continue to work them for the remainder of the term.—*ELIAS v. SNOWDON SLATE QUARRIES CO.* (1879), 4 App. Cas. 454; 48 L. J. Ch. 811; 41 L. T. 289; 43 J. P. 815; 28 W. R. 54, H. L.; *affg.* S. C. *sub nom.* *ELIAS v. GRIFFITH* (1878), 8 Ch. D. 521, C. A. *Annotations*:—*Reid.* Chaytor v. Trotter (1902), 87 L. T. 33. *Mentd.* Dashwood v. Magniac, [1891] 3 Ch. 306; *Re Maynard's S.E.*, [1899] 2 Ch. 347.

504. Prevention of continuing breach of restrictive covenant.]—A delay of fourteen months by a pltf. in taking steps to prevent the continuance of a breach of a restrictive covenant will not amount to such acquiescence as to disentitle him to an injunction.—*NORTHUMBERLAND (DUKE) v. BOWMAN* (1887), 56 L. T. 773; 3 T. L. R. 606.

Infringement of copyright.]—*See* COPYRIGHT, Vol. XIII., pp. 221–222, Nos. 598–602.

Patents.]—*See* PATENTS.

Trade Marks.]—*See* TRADE MARKS.

SECT. 4.—ACQUIESCENCE.

SUB-SECT. 1.—WHAT AMOUNTS TO ACQUIESCENCE.

A. In General.

505. General rule.]—Where a party stood looking on while an act not strictly legal was done, having the means, but without taking the proper steps, to prevent it, the remedy by injunction, which he would otherwise have, was gone (*LORD ELDON, C.*)—*SHAND v. HENDERSON* (1814), 2 Dow, 519; 3 E. R. 952, L. C.

506. —.]—If a party having a right stands by & sees another dealing with the property in a manner inconsistent with that right & makes no objection while the act is in progress he cannot afterwards complain. That is the proper sense of the word acquiescence (*LORD COTTENHAM, C.*)—*LEEDS (DUKE) v. AMHERST (EARL)* (1846), 2 Ph. 117; 16 L. J. Ch. 5; 10 Jur. 956; 41 E. R. 886, L. C.

Annotations:—*Apld.* Somersetshire Coal Canal Co. v. Harcourt (1858), 2 De G. & J. 596. *Consd.* Hogg v. Scott (1874), L. R. 18 Eq. 444. *Apld.* De Bussche v. Alt (1878), 8 Ch. D. 286; *Northumberland v. Bowman* (1887), 56 L. T. 773. *Mentd.* Morris v. Morris (1847), 8 L. T. O. S.

PART VIII. SECT. 4, SUB-SECT. 1. A.

of inter-
sustained by obstruction to the right

to the user of public navigable waters may be materially affected by party's presumed acquiescence, or silence with knowledge.—*McEWEN v. ANDERSON* (1886), 1 B. C. R. pt. 2, 308.—*CAN.*

510 II. —.]—In order to prove acquiescence by a firm in the piratical use of their trade mark, knowledge of

510; *Morris v. Morris* (1858), 28 L. J. Ch. 329; *Gent v. Harrison* (1859), John. 517; *Bright v. Legerton* (1861), 2 De G. F. & J. 606; *Bagot v. Bagot, L. Legge* (1863), 32 Beav. 509; *Dashwood v. Magniac*, [1891] 3 Ch. 306; *Phillips v. Homfray*, [1892] 1 Ch. 465.

507. —.]—The doctrine as to a person lying by so as to create an equity against him arises, if either he does something from which it can be reasonably inferred that he induced the other person to think he would raise no objection to what they were doing; or if he knows facts which are unknown to the other persons acting in violation of the right which those facts give, & does not inform him about it, but lies by & let them run into a trap. But here I can see nothing of the kind (*COTTON, L.J.*)—*RUSSELL v. WATTS* (1883), 25 Ch. D. 559; 50 L. T. 673; 32 W. R. 621, C. A.; *on appeal* (1885), 10 App. Cas. 590, H. L.

Annotations:—*Reid.* Birmingham, Dudley & District Banking Co. v. Ross (1888), 38 Ch. D. 295; *Neaverson v. Peterborough R. D. C.* (1902), 86 L. T. 738. *Mentd.* Bayley v. G. W. Ry. (1884), 26 Ch. D. 434; *Beddington v. Atlee* (1887), 35 Ch. D. 317; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Westhoughton U. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159.

508. Plaintiff must be cognisant of rights.]—*MARKER v. MARKER*, No. 563, *post*.

509. Belief that violation only temporary.]—*Semblc*: a party will not be precluded from relief by acquiescence in what he may be led to consider a mere temporary violation of his right, when no evidence is given of expense incurred by another party in consequence thereof.—*GORDON v. CHELTENHAM & GREAT WESTERN UNION RY. CO.* (1842), 5 Beav. 229; 2 Ry. & Can. Cas. 800; 49 E. R. 565.

Annotation:—*Mentd.* Hood v. N. E. Ry. (1870), 19 W. R. 266.

510. Plaintiff's knowledge of interference.]—Although the ct. will interfere by injunction, in proper cases, to restrain a co. from constructing a small portion only of their works, with a view of abandoning the remainder, yet, where such an intention had been known to the shareholders, or they had had an opportunity of knowing it many months before the filing of a bill to prevent such proceeding, & had made no application to the ct., such acquiescence on the part of the shareholders was held to have created a counter equity; & the ct. refused to grant an injunction for that purpose.—*GRAHAM v. BIRKENHEAD, LANCASHIRE & CHESHIRE JUNCTION RY. CO.* (1850), 12 Beav. 470, n; 2 Mac. & G. 146; 7 Ry. & Can. Cas. 938; 2 H. & Tw. 450; 20 L. J. Ch. 445; 15 L. T. O. S. 221; 14 Jur. 494; 47 E. R. 1760, L. C.

Annotations:—*Consd.* Kent v. Jackson (1851), 14 Beav. 367. *Apld.* Flocks v. South Western Ry. (1853), 1 Sm. & G. 142. *Consd.* Hare v. L. & N. W. Ry. (1861), 2 John. & H. 80. *Reid.* Winch v. Birkenhead, Lancashire & Cheshire Junction Ry. (1852), 16 Jur. 1035. *Mentd.* R. v. Harrop (1856), 20 J. P. 627; *Burt v. British Nation Life Assce. Asscn.* (1859), 33 L. T. O. S. 74; *Re Irrigation Co. of France* (1870), 39 L. J. Ch. 663.

511. — Defendant ignorant of adverse title.]—In an action by P., patentee of a stoking machine, for infringement against persons who had purchased stoking machines made by B., it was proved that before the purchase P., knowing that they were going to set up stoking machines, went to them & asked them to try his machine, saying that they would find it a better machine than B.'s, without giving any intimation that he considered B.'s machine to be an infringement of his patent,

such use must be proved.—*KINAHAN v. BOLTON* (1863), 15 L. Ch. R. 75.—*IR.*

b. Acceptance of rent.]—*Semblc*: the acceptance of rent by a lessor, subsequent to a breach of covenant, does not disentitle him to an injunction inst future breaches.—*MUNDAY v. WISE* (1878), 4 V. L. R. 101.—*AUS.*

though he admitted that he did at that time consider it to be so & intended to take legal proceedings when he was in funds:—*Held*: as the purchasers did not depose that when they bought B.'s machines they were ignorant of P.'s patent, nor was there any reason to believe that they were ignorant of it, or that P. supposed them to be so, P. had not on the ground of acquiescence or estoppel lost his right to sue them for an infringement in using R.'s machines, it not being the duty of a patentee to warn persons that what they are doing is an infringement, & P.'s conduct not amounting to a representation that it was not an infringement.

It is necessary that the person who alleges this lying-by should have been acting in ignorance of the title of the other man & that the other man should have known that ignorance & not mentioned his own title (COTTON, L.J.).—*PROCTOR v. BENNIS* (1887), 36 Ch. D. 740; 57 L. J. Ch. 11; 57 L. T. 662; 36 W. R. 456; 3 T. L. R. 820; 4 R. P. C. 333, C. A.

Annotations:—*Mentd.* Automatic Weighing Machine Co. v. Combined Weighing Machine Co. (1888), 6 R. P. C. 120; Gosnell v. Bishop (1888), 4 T. L. R. 397; Proctor v. Sutton Lodge Chemical Co. (1888), 5 R. P. C. 184; Automatic Weighing Machine Co. v. Knight (1889), 6 R. P. C. 297; Boyd v. Horrocks (1889), 6 R. P. C. 152; Crampton v. Patents Investment Co. (1889), 6 R. P. C. 287; Muirhead v. Commercial Cable Co. (1894), 12 R. P. C. 39; Nobel's Explosives Co. v. Anderson (1894), 11 R. P. C. 519; Ticket Punch & Register Co. v. Colley's Patents (1895), 11 T. L. R. 262; Incandescent Gas Light Co. v. De Mare Incandescent Gas Light System (1896), 13 R. P. C. 559; Incandescent Gas Light Co. v. Sunlight Incandescent Gas Lamp Co. (1896), 13 R. P. C. 333; Perry v. Soc. des Lunetiers (1896), 13 R. P. C. 664; Akt. Separator v. Dairy Outfit Co. (1898), 15 R. P. C. 327; Presto Gear Case & Components Co. v. Simplex Gear Case Co. (1898), 15 R. P. C. 635; Consolidated Car Heating Co. v. Came, [1903] A. C. 509; British United Shoe Machinery Co. v. Thompson (1905), 22 R. P. C. 175; Roth v. Cracknell (1921), 38 R. P. C. 120.

512. Infringement gradual & unobservable.]—

(1) Non-interference with a gradual & unobservable breach of covenant for a few months on the part of the covenantor & his under-lessee does not amount to such an acquiescence on the part of the covenantees as to disentitle them to an injunction.

(2) Where the covenantor underlets to a person who, to his knowledge, contemplates a breach of the covenant, & yet does not provide in the underlease against such breach of covenant, he is a proper party to a suit for an injunction to restrain the breach, & is liable to pay the costs of the suit.—*MITCHELL v. STEWARD* (1866), L. R. 1 Eq. 541; 35 L. J. Ch. 393; 14 L. T. 134; 30 J. P. 358; 14 W. R. 453.

Annotation:—*As to* (1) *Reid*. Knight v. Simmonds, [1896] 2 Ch. 294.

513. Plaintiff willing to accept compensation.]—

Pltf. was tenant from year to year of premises situated on an ancient tidal fleet or watercourse in the town of L., where he carried on business as a coal dealer, & for the purposes of his business had barges which at high tide floated alongside his premises. The fleet in the course of time had become offensive & injurious to the health of the town by reason of houses discharging their sewage into it, & the paving comrs. were consequently about to arch over a portion of it, thereby preventing the access of barges to pltf.'s premises. Pltf. thereupon claimed compensation for the injury which would be done to him, but no notice was taken of his application, & he afterwards filed a bill for an injunction, charging serious damage

to his trade, & that the fleet had been navigable from time immemorial:—*Held*: (1) upon the construction of various Acts of Parliament, the fleet was not vested in the comrs., & they had no right to arch it over; (2) pltf. was entitled to an inquiry as to damages in lieu of a mandatory injunction; (3) the fact of pltf. having in the first instance demanded compensation could not be regarded as an acquiescence, the assumption on both sides at the time being that the comrs. were entitled to do what they threatened.—*PENTNEY v. LYNN PAVING COMRS.* (1865), 12 L. T. 818; 13 W. R. 983.

514. —.]—*AINSWORTH v. BENTLEY*, No. 689, *post*.

515. —.]—*SENIOR v. PAWSON*, No. 529, *post*.

516. —.]—(1) Where on the site of old buildings the erection of new buildings of much greater height, materially obstructing the access of light & air to adjoining property, has been completed before complaints made or bill filed, the ct., although it has jurisdiction to grant a mandatory injunction, will not do so in a case where the owner of such property has himself treated the case as one for compensation by damages. But having that jurisdiction, it will direct an inquiry to assess damages, & will not leave pltf. to his remedy by action. (2) Although a month should elapse between the completion of the building & any objection thereto, the ct. will not consider that there was laches or acquiescence on the part of the owner of the adjoining property when he was not himself in possession or occupation of it.—*GORT (VISCOUNTESS) v. CLARK* (1868), 18 L. T. 343; 16 W. R. 569, L. JJ.

Annotations:—*As to* (1) *Consd.* Roskell v. Whitworth (1871), 19 W. R. 804. *Reid*. Sheller v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co., [1895] 1 Ch. 287.

517. —.]—As regards the use by defts. themselves, I am of opinion that no injunction should be granted. Pltfs. have accepted compensation . . . thus showing that in their opinion it is not impossible to fix the compensation for the future injury (CAVE, J.).—*ORMEROD v. TODMORDEN MILL Co.* (1883), 11 Q. B. D. 155; 52 L. J. Q. B. 445; 47 J. P. 532; 31 W. R. 759, C. A.

Annotations:—*Reid*. Kensit v. G. E. Ry. (1884), 27 Ch. D. 122. *Mentd.* A.-G. v. Conduit Colliery Co., [1895] 1 Q. B. 301; McCartney v. Londonderry & Lough Swilly Ry., [1904] A. C. 301.

518. —.]—*RAE v. YATES' CASTLE BREWERY Co.* (1903), 67 J. P. 427.

519. Infringements of copyright—Necessity for knowledge of infringement.]—To sustain an allegation of acquiescence in the infringement of a copyright, it must be shown that there was knowledge of the infringement.—*WELDON v. DICKS* (1878), 10 Ch. D. 247; 48 L. J. Ch. 201; 39 L. T. 467; 27 W. R. 689.

Annotations:—*Mentd.* Kelly v. Byles (1880), 13 Ch. D. 682; Dicks v. Yates (1881), 18 Ch. D. 76; Coote v. Judd (1883), 53 L. J. Ch. 36; Licensed Victuallers' Newspaper Co. v. Bingham (1888), 38 Ch. D. 139.

—.]—*See, further*, COPYRIGHT, Vol. XIII., pp. 222, 223, Nos. 613–615.

B. Defendant Permitted to Incur Expenditure.

520. No protest by plaintiff.]—Where a man suffers another to build on his ground, without setting up a right till afterwards, the ct. will oblige the owner to permit the person building to

PART VIII. SECT. 4, SUB-SECT. 1.—

B.

5201. No protest by plaintiff.]—Where the tenant of an agricultural holding constructs a building of a

character not suitable to such holding, with the knowledge of the landlord, such landlord is bound not only to object but to take legal steps to stop the progress of the work; &, in default

of doing so, the landlord is not entitled to a mandatory injunction for the demolition of the building.—*ULAGAPPAN AMBALAM v. OHIDAMBRAM CHETTY* (1906), 1 L. R. 29 Mad. 497.—IND.

Sect. 4.—Acquiescence: Sub-sect. 1, B.]

enjoy it quietly.—**EAST INDIA CO. v. VINCENT** (1740), 2 Atk. 83; 26 E. R. 451, L. C.

*Annotations:—*Expld. **Blakemore v. Glamorganshire Canal Navigation** (1832), 1 My. & K. 154. **Consd. Barnard v. Wallis** (1840), 2 Ry. & Can. Cas. 162. **Distd. Hervey v. Smith** (1855), 1 K. & J. 389. **Consd. Meynell v. Surtees** (1855), 25 L. J. Ch. 257; **McManus v. Cooke** (1887), 35 Ch. D. 681. **Refd. Lond v. Murray** (1851), 17 L. T. O. S. 248; **Harryman v. Collins** (1854), 18 Beav. 11; **Scott v. Scott** (1854), 23 L. T. O. S. 27; **Crampton v. Varna Ry.** (1872), 7 Ch. App. 562.

521. —.—The relief in respect of expenditure under an erroneous opinion of title or an expectation of a larger interest, or that the enjoyment would not be disturbed, with the knowledge & permission of the other party, requires a case of bad faith clearly made out.—**DANN v. SPURRIER** (1802), 7 Ves. 231; 32 E. R. 94, L. C.; *subsequent proceedings* (1803), 3 Bos. & P. 399, 442.

*Annotations:—***Consd. Rochdale Canal Co. v. King** (1851), 2 Sim. N. S. 78; *Re Newbery*, **White v. Wakley** (1858), 28 L. J. Ch. 77. **Appld. Cotching v. Bassett** (1862), 32 Beav. 101. **Refd. Beaufort v. Patrick** (1853), 17 Beav. 60; **Rochdale Canal Co. v. King** (1853), 16 Beav. 630; **Bigg v. Strong** (1857), 3 Sm. & G. 592; **White v. Wakley** (No. 1) (1858), 26 Beav. 17; **Mold v. Wheatcroft** (1859), 27 Beav. 510; **Davies v. Sear** (1869), L. R. 7 Eq. 427; **Russell v. Watts** (1885), 10 App. Cas. 590; **McManus v. Cooke** (1887), 35 Ch. D. 681; **London General Omnibus Co. v. Lavell** (1900), 83 L. T. 453. **Mentd. Davies v. Marshall** (1861), 4 L. T. 105; **Eardley v. Granville** (1876), 45 L. J. Ch. 669; **McAllister v. Rochester (Bp.) & Eccl. Comrs. for England** (1879), 42 L. T. 22.

522. —.—Injunction against draining, preparatory to opening a coal mine, with prejudice to a canal, before establishing the right at law, refused upon laches for two years, permitting expenditure.—**BIRMINGHAM CANAL CO. v. LLOYD** (1812), 18 Ves. 515; 34 E. R. 413, L. C.

*Annotations:—***Consd. Ripon v. Hobart** (1834), 3 My. & K. 169; **G. W. Ry. v. Oxford, Worcester, & Wolverhampton Ry.** (1853), 3 De G. M. & G. 341. **Mentd. Wheatley v. Westminster Brymbo Coal & Coke Co.** (1869), 22 L. T. 7.

523. —.—**PARROTT v. PALMER**, No. 1186, *post*.

524. —.—The owner of land, upon which a railway co. empowered by Parliament are about to enter, is not entitled to an interlocutory injunction to restrain them from so entering, if, by his silence & conduct, he has permitted the co. to carry on their works upon the supposition that they were entitled to enter on & take the land in question.

The party is not entitled to the injunction of this ct., for the purpose of preventing these works being carried on, which he by his sanction & conduct has, at least from Jan., until he made his demand in June, encouraged. If it was a question whether the conduct of a party had or had not deprived him of the right of asserting an equity against the existing co., it must be always considered upon which side the danger most preponderates. What the co. are doing, is, taking part of that land under the powers of their Act, which, even if done adversely, will not preclude pltf., if ultimately he establish his right upon the hearing of the cause, from compelling the co. to take the whole of the land under the contract. Even if the evidence was doubtful, & the ct. had no means of coming to any satisfactory conclusion upon it, the granting the injunction would certainly produce irreparable

injury to the co., for if it ultimately turn out that pltf. had not this right, to prevent the co. from following up this part of the line of railway is saying, that they must submit to any sacrifice, or suspend their works until they do that which is entirely out of their power. This would be exposing them to loss & injury, far beyond that which they could be compensated for. That is no answer, & these cos. should be aware that it is not, if there be a clear case against them (**LORD COTTENHAM, C.**).—**GREENHALGH v. MANCHESTER & BIRMINGHAM RY. CO.** (1838), 3 My. & Cr. 784; 1 Ry. & Can. Cas. 68; 8 L. J. Ch. 75; 3 Jur. 693; 40 E. R. 1128, L. C.

*Annotations:—*Expld. **Galbreath v. Armour** (1845), 4 Bell. Sc. App. 374. **Consd. Lindsey v. G. N. Ry.** (1853), 10 Hare, 664.

525. —.—A railway co. made excavations upon their own land, the purpose of which was the partial diversion of the stream of water of a navigable river, & the works so prosecuted necessarily occasioned the obstruction of a private road. Pltfs., who were the owners of a fulling-mill, which was supplied with water from the river, alleged that the proposed diversion of the stream was illegal under the powers of the Act. Pltfs., who had a right of way over the private road, also alleged that the co. were interfering with the road without the performance of the conditions imposed by the railway Act, as preliminary to interfering with the road:—**Held:** although the co. were working on their own land, pltfs. must be held to have had notice of the intended works of the co., & had by an acquiescence for eighteen months, during which the co. had expended a large sum of money on the works precluded themselves from asking for the interposition of this ct. by injunction.—**ILLINGWORTH v. MANCHESTER & LEEDS RY. CO.** (1840), 2 Ry. & Can. Cas. 187, L. C.

526. —.—A party may so encourage another in the erection of a nuisance, as to give the adverse party an equity to restrain him from recovering damages at law for such nuisance when completed.—**WILLIAMS v. JERSEY (EARL)** (1841), Cr. & Ph. 91; 10 L. J. Ch. 149; 5 Jur. 426; 41 E. R. 424, L. C.

*Annotations:—***Refd. Smith v. Kay** (1859), 7 H. L. Cas. 750; **Smith v. Hayes** (1867), 15 W. R. 871; **Osborne v. Bradley**, [1903] 2 Ch. 446.

527. —.—By a canal Act, millowners were empowered to use the canal water merely for "condensing" steam. In 1829 K., being about to erect a mill, applied to the co. for leave to take water for "generating" as well as "condensing." The co. did not appear to have refused the application, & the pipes were laid down in the presence of their engineers. The mill being built on the principle of using the canal waters for both purposes, & having been used in that way down to the present time, this ct., although the co.'s right had been established at law, held they were bound by their acquiescence, & refused a perpetual injunction to restrain K. from taking water for the purpose of "generating" steam. An injunction was however granted as to another mill, acquiescence & encouragement on the part of the co. not having been established. Of the two

520 II. —.—Defts., an urban sanitary authority, had constructed waterworks for the supply of their district, & in 1907 they entered into a contract with the Secretary for War for the supply of water to military barracks in an adjoining district of which pltfs. were the rural sanitary authority. No formal consent, under seal, to this had been given by pltfs., but they had full notice of

intention to supply the water to the barracks, & acquiesced in its being supplied, on the faith of which acquiescence defts. incurred expenditure. Pltfs. now brought an action claiming an injunction to restrain defts. from supplying water to persons within pltfs.' district without the consent of pltfs.:—**Held:** the effect of Public Health (Ireland) Acts, 1878 & 1896, was to give to each sanitary

authority a monopoly in the supply of water to its own district, & the violation of this monopoly by another sanitary authority was actionable without proof of special damage; but in the present case there was acquiescence by pltfs. amounting to consent, & the action was not sustainable.—**BIRK RURAL DISTRICT COUNCIL v. BIRK URBAN DISTRICT COUNCIL**, [1915] 1 L. R. 413.—**IR.**

objects of a bill, one succeeded & the other failed. The costs not being easily separable, a decree was made without costs on either side.—*ROCHDALE CANAL CO. v. KING* (1853), 16 Beav. 630; 22 L. J. Ch. 604; 22 L. T. O. S. 73; 17 Jur. 1001; 1 W. R. 278; 51 E. R. 924.

Annotations:—*Refd.* *Beaufort v. Patrick* (1853), 17 Beav. 60; *McManus v. Cooke* (1887), 35 Ch. D. 681. *Mentd.* *Bottomley v. Squire* (1855), 24 L. J. Ch. 437.

528. —.]—If a stranger begins to build on land supposing it to be his own, & the real owner, perceiving his mistake, abstains from setting him right, & leaves him to persevere in his error, a ct. of equity will not afterwards allow the real owner to assert his title to the land. But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it.

Semble: if a principal knows that a stranger is dealing with his agent under the belief that all statements made by the agent were warranted by the principal, & so knowing, allows the stranger to expend money in that belief, a ct. of equity would not afterwards allow the principal to set up want of authority in the agent. But this knowledge must be brought home to the principal.—*RAMSDEN v. DYSON* (1866), L. R. 1 H. L. 129; 12 Jur. N. S. 506; 14 W. R. 926, H. L.; *reusq.* *S. C. sub nom. THORNTON v. RAMSDEN* (1864), 4 Giff. 519.

Annotations:—*Consd.* *Bankart v. Tennant* (1870), L. R. 10 Eq. 141; *Plimmer v. Wellington Corpn.* (1884), 9 App. Cas. 699; *Proctor v. Bennis* (1887), 36 Ch. D. 740; *Ramsden v. I. R. Comrs.* (1912), 82 L. J. K. B. 1290; *A.-G. to Prince of Wales v. Collom*, [1916] 2 K. B. 193. *Expld.* *Jones (Holloway) v. Woodhouse*, [1923] 2 K. B. 117. *Refd.* *Bastin v. Bidwell* (1881), 44 L. T. 742; *Weller v. Stone* (1885), 54 L. J. Ch. 497; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Re Clarke, Ex p. Newton & Kearly* (1889), 60 L. T. 335; *Wimbledon & Putney Commons Conservators v. Nicol* (1894), 10 T. L. R. 247; *Civil Service Musical Instrument Assocn. v. Whiteman* (1899), 68 L. J. Ch. 484; *Marriott v. Reid* (1900), 82 L. T. 369; *Ahmad Yar Khan v. Secretary of State for India in Council* (1901), 17 T. L. R. 500; *Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co. & Donkin* (1921), 90 L. J. Ch. 420; *Michaud v. Montreal City* (1923), 92 L. J. P. C. 161. *Mentd.* *Re Williams & Parry's Contract* (1895), 72 L. T. 869; *Lala Beni Ram v. Kundan Lal* (1899), 15 T. L. R. 258; *Cloutte v. Storey* (1910), 80 L. J. Ch. 193; *Wheeler v. Stratton* (1911), 105 L. T. 786.

529. —.]—In a case where the circumstances justified the ct. in granting a mandatory injunction at the hearing to compel defts. to pull down newly erected buildings to the height of the former ones, on the ground of obstruction to pltf.'s light & air; but where pltf., having heard of the intended structure in Apr., did not complain till Nov. following, during which time defts. had laid out large sums; & where pltf. had also, since bill filed, made an offer to take a money compensation for the injury to her rights; the ct., instead of an injunction directed an inquiry as to the amount of damages sustained by pltf.—*SENIOR v. PAWSON* (1866), L. R. 3 Eq. 330; 15 W. R. 220.

Annotations:—*Refd.* *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431. *Mentd.* *Sharp v. Wilson, Rotheray* (1905), 93 L. T. 155.

530. —.]—On the sale of land to a purchaser, who has notice that the adjoining land is to be laid out in building in a manner which will make a right of way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication as a way of necessity. A. purchased from B. the lease of a house, part of an estate agreed to be let to B. upon building leases. There was an open archway under part of the house, which was described as a "gateway" in the ground plan of the house drawn on the lease, & which, when the buildings on the

estate were completed in accordance with the plan of the building agreement, formed the only means of access to a mews behind the house. At the time of the purchase, the buildings not being then completed, there were other means of access to the mews. The assignment contained no reservation of a right of way, but the archway was used as an entrance to the mews until the buildings were completed:—*Held*: A. having stood by & allowed B. to build so as to leave no other access to the mews, could not afterwards dispute the right of way, & injunction granted accordingly.—*DAVIES v. SEAR* (1869), L. R. 7 Eq. 427; 38 L. J. Ch. 545; 20 L. T. 56; 17 W. R. 390.

Annotations:—*Expld.* *Allen v. Seckham* (1879), 11 Ch. D. 790. *Consd.* *Wheeldon v. Burrows* (1879), 12 Ch. D. 31.

531. —.]—If, after an agreement for a lease involving a stipulated outlay on the demised premises by the lessee, before the lease is granted the landlord stands by & encourages the lessee to expend additional moneys in artistically paving a passage excepted from the demise, but over which the lessee is given a right of way to the demised premises, the lessee, to the landlord's knowledge, being under the belief that the pavement will remain, the landlord cannot afterwards, as legal owner, insist on its removal or alteration. Nor can the landlord insist on the removal of an advertisement board affixed by the lessee to the outside wall of the landlord's premises under similar circumstances.—*CIVIL SERVICE MUSICAL INSTRUMENT ASSOCN., LTD. v. WHITEMAN* (1899), 68 L. J. Ch. 484; 80 L. T. 685; 63 J. P. 441; 43 Sol. Jo. 507.

532. —.]—Deft. was the owner by purchase of garden land adjoining two cottages at W. E. in the manor of U., & was also in possession of a house & garden at W. Z., the site of which she had purchased in 1902. This house was subsequently enlarged from one of six rooms into one of eleven rooms, with an additional wing. These alterations & some improvements to the garden cost £500 & were known to the mineral agent of the Duchy, who remained passive. The Duchy claimed that the two cottages & land at W. E. & the house & land at W. Z. had been originally erected, entered upon, & used in connection with the mines at W. E. & W. Z. respectively, & were now vested in the Duchy. From 1846 onwards licences & leases had been granted by the Duchy for the working of the two mines, but neither had been in fact worked for years.

Upon an information by the A.-G. to H.R.H. the Prince of Wales claiming declarations of title to the lands & buildings, & an injunction to restrain deft. from asserting any title to the same:—*Held*: following the principle laid down in *Ramsden v. Dyson*, No. 528, *ante*, in regard to the Duchy's claim to the house at W. Z. deft. had established a good equitable defence based on estoppel, the expenditure on the house having been made to the knowledge of the agent to the Duchy & on property which deft. reasonably believed to be her own; & such equitable defence was good against the Crown, therefore in the result deft. had established her title, & the information must be dismissed.—*A.-G. to PRINCE OF WALES v. COLLOM*, [1916] 2 K. B. 193; 85 L. J. K. B. 1484; 114 L. T. 1121; 32 T. L. R. 448.

533. *Expenditure with knowledge of plaintiff's claim.*—The equitable rule, as to the effect of a person's lying by & allowing another to expend money on his property, does not apply where the money is expended with knowledge of the real state of the title.—*RENNIE v. YOUNG* (1858), 2

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De G. & J. 136; 27 L. J. Ch. 753; 44 E. R. 939, L. J.J.

534. ———.]—RAMSDEN v. DYSON, No. 528, *ante*.

535. ———.]—Protest by plaintiff.]—A.-G. v. SHEFFIELD GAS CONSUMERS CO., No. 811, *post*.

536. ———.]—IMPERIAL GAS LIGHT & COKE CO. (DIRECTORS, ETC.) v. BROADBENT, No. 205, *ante*.

537. ———.]—ISENBERG v. EAST INDIA HOUSE ESTATE CO., LTD. (1863), 3 De G. J. & Sm. 263; 3 New Rep. 345; 33 L. J. Ch. 392; 9 L. T. 625; 28 J. P. 228; 10 Jur. N. S. 221; 12 W. R. 450; 46 E. R. 637, L. C.

*Annotations:—*Expld. R. v. Darlington L. B. of Health (1865), 6 B. & S. 562. *Consd.* Stretton v. Great Western & Brentford Ry. (1870), 5 Ch. App. 751. *Folld.* Stanley of Alderley v. Shrewsbury (1875), L. R. 19 Eq. 616. *Refd.* Betts v. De Vitre (No. 2) (1864), 11 L. T. 533; Martyn v. Lawrence (1864), 10 L. T. 188; Curriers' Co. v. Corbett (1865), 29 J. P. 469; Senior v. Pawson (1866), L. R. 3 Eq. 330; Pettay v. Parsons (1914), 84 L. J. Ch. 81; Slack v. Leeds Industrial Co-op. Soc., [1923] 1 Ch. 431. *Mentd.* Clowes v. Staffordshire Potteries Water-works Co. (1872), 27 L. T. 521.

538. ———.]—PRICE v. BALA & FESTINIOG RY. CO., No. 684, *post*.

C. Acquiescence in Previous Infringements.

539. Whether plaintiff debarred from relief.]—Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan refused, the covenantee having acquiesced in a partial deviation from the plan, & not having made immediate application to the ct. A landlord who relaxes in favour of some of his tenants a covenant entered into for the benefit of all is not entitled to an injunction to restrain the other tenants from infringing that covenant.—ROPER v. WILLIAMS (1822), Turn. & R. 18; 37 E. R. 999, L. C.

*Annotations:—*Distd. Patching v. Dubbins (1853), Kay, 1. *Consd.* Child v. Douglas (1854), Kay, 560; Scarisbrick v. Tunbridge (1854), 3 Eq. Rep. 240. *Apld.* Peck v. Matthews (1867), L. R. 3 Eq. 516. *Distd.* Kilbey v. Haviland (1871), 24 L. T. 353; German v. Chapman (1877), 7 Ch. D. 271. *Consd.* Tubbs v. Essex (1909), 26 T. L. R. 145. *Refd.* Johnstone v. Hall (1856), 4 W. R. 417; Mitchell v. Steward (1866), L. R. 1 Eq. 541; Plymouth Corp'n. v. Martin (1884), 1 T. L. R. 5; Meredith v. Wilson (1893), 69 L. T. 336; Knight v. Simmonds, [1896] 2 Ch. 294; Sobey v. Sainsbury, [1913] 2 Ch. 513. *Mentd.* Sidney v. Clarkson (1865), 14 W. R. 157.

540. ———.]—LLOYD v. LONDON, CHATHAM & DOVER RY. CO., No. 683, *post*.

541. ———.]—On the sale of an estate in building plots, purchasers were required to enter into a covenant with the vendors & with each other that plans of all buildings to be erected on the estate should be submitted for approval to the vendors or to a committee & that no building should be erected the plan of which had not been approved; & it was provided that within seven days after the submission of such plan, the approval or disapproval should be signified in writing to

the party submitting the plan; & that such approval should not be withheld unless for the sake of preserving uniformity of building or other good causes or considerations. On June 23, 1869, deft., who had purchased one plot, began, without submitting a plan, to erect buildings the plan of which would not have been approved had it been submitted. Remonstrances were made & notices served on deft. during July & Aug., & on Sept. 3 vendors filed a bill on behalf of themselves & all other persons entitled to benefit of covenants, except deft., praying for mandatory injunction & damages:—*Held*: (1) the erection of a temporary hovel on another part of the estate, which had not been interfered with by pl'tfs. was not a waiver of the covenant; (2) the vendors were not bound to obtain the consent of all the parties entitled to the benefit of the covenant, in order to file such a bill. (3) A mandatory injunction was refused, & deft. was ordered to pay damages & costs.

The ct., when it is necessary, will grant a mandatory injunction, but only in cases which make it absolutely necessary for the purpose of justice between the parties (BACON, V.-C.).—KILBEY v. HAVILAND (1871), 24 L. T. 353; 19 W. R. 698.

*Annotation:—*As to (3) *Refd.* Sharp v. Harrison, [1922] 1 Ch. 502.

542. ———.]—Where all the purchasers of an estate were bound by restrictive covenants not to use their houses otherwise than as private residences, & the vendor had given permission to one of the purchasers to open a school in his house, this was held not to be a waiver of the covenant as to another purchaser whose house was at some distance.—GERMAN v. CHAPMAN (1877), 7 Ch. D. 271; 47 L. J. Ch. 250; 37 L. T. 685; 42 J. P. 358; 26 W. R. 149, C. A.

*Annotations:—*Consd. Meredith v. Wilson (1893), 69 L. T. 336. *Folld.* Hooper v. Bromet (1903), 89 L. T. 37. *Consd.* Sobey v. Sainsbury, [1913] 2 Ch. 513. *Refd.* Jackson v. Winniffrith (1882), 47 L. T. 243; Knight v. Simmonds, [1896] 2 Ch. 294. *Mentd.* Serraino v. Campbell, [1891] 1 Q. B. 283; McNair v. Baker (1903), 90 L. T. 24.

543. ———.]—Breaches extending over long period.]—A. & B. on making partition, which was confirmed by Act of Parliament, had mutually covenanted to use their respective lots in a particular manner. B. had afterwards, but with the consent of A., deviated from the terms of the covenant in the use of his lot; & this deviation continued for many years under B., & those claiming under him. On the application of a party claiming under B. the ct. refused to enforce the covenant against a party claiming under A., to restrain him from using his lot in any way he pleased, on the ground that the conduct of the parties was an implied dispensation with the terms of the covenant.—HAWKINS v. SCARBOROUGH (1838), 2 L. J. Ch. 126.

544. ———.]—On a sale of part of the C. estate, the purchasers entered into a covenant with the vendors "their & each of their heirs &

PART VIII. SECT. 4, SUB-SECT. 1.—C.

5391. Whether plaintiff debarred from relief.]—A landowner through whose lands water pipes were laid at a greater vertical deviation than was authorised by the statute empowering the construction of the works:—*Held*: not entitled in a process of suspension & interdict to object to a new pipe being laid alongside the other, the statute empowering the comrs. to alter, enlarge, or increase, the number of pipes, & no objection having been made, or being now taken to the level at which the old pipes were laid.—*v. GLASGOW WATER-WORKS*

COMRS. (1869), 7 Macph. (Ot. of Sess.) 353.—SCOT.

5431. ———.]—Breaches extending over long period.]—Pl'tf. V. was owner since 1838 of land on which he was erecting buildings & excavating cellars. He complained that M., owner of adjoining land & premises, allowed sewerage to flow into the excavated cellars, & prayed that M. might be restrained from continuing nuisance. Sewerage from adjoining land used as soda water works ran through a drain across land of V., but which M. claimed by right of prescription to use for such purpose:—*Held*: as V. & his predecessors had so long acquiesced in

user of drain as sewer he was not entitled to interposition of a ct. of equity to prevent it.—VICKERY v. MARR (1865), 4 N. S. W. S. C. R. (Eq.) 66.—AUS.

54311. ———.]—Tenant restrained from cutting turf for sale (his lease giving a right of estovers only) notwithstanding an uninterrupted practice for eighty years.—COURTOWN (LORD) v. WARD (1802), 1 Sch. & Lef. 8.—IR.

543111. ———.]—The ct. will not interdict operations which have been acquiesced in for years.—HOYLE, ETC. v. SHAW'S WATER CO. (1854), 17 Dunl. (Ot. of Sess.) 83; 27 Sc. Jur. 11.—SCOT.

assigns, & also separately with the owners & owner, lessors & lessees for the time being, or other the persons or person for the time being entitled to the receipt of the rents & profits of any part of "the C. estate, against keeping a beer shop on any part of the premises sold. In an action brought by subsequent purchasers of the C. estate to restrain a breach of this covenant:—*Held*: on the evidence adduced, they had lost their right to bring an action by long-continued acquiescence in breaches of the covenant both by deft. & other similar covenantors & consequently were not entitled either to an injunction or to any damages.—*KELSEY v. DODD* (1881), 52 L. J. Ch. 34.

Annotations:—*Reid*. *Jackson v. Winniffrith* (1882), 47 L. T. 248; *Day v. Waldron* (1919), 88 L. J. K. B. 937. *Mentd.* *Forster v. Elvet Colliery Co.*, *Quin v. Same*, *Seed v. Same*, *Morgan v. Same*, [1908] 1 K. B. 629.

545. ———.]—*SAYERS v. COLLYER*, No. 371, *ante*.

546. — Previous infringement slight—Subsequent extension of injury.]—Though A. may be disentitled by acquiescence to an injunction to stop B.'s manufactory, which is noxious to the neighbourhood, yet it does not consequently follow that B. is entitled to an injunction to prevent A.'s recovering damages at law. Equity may leave both parties to their legal rights.

Acquiescence in the erection of noxious works, while they produce little injury, does not warrant the subsequent extension of them to an extent productive of great damage.

Injunction to prevent, on the ground of acquiescence, a party injured by copper works from enforcing a judgment recovered by him for damages at law refused with costs.—*BANKART v. HOUGHTON* (1860), 27 Beav. 425; 28 L. J. Ch. 473; 32 L. T. O. S. 382; 23 J. P. 260; 5 Jur. N. S. 282; 7 W. R. 197; 54 E. R. 167.

Annotation:—*Reid*. *Davies v. Marshall* (1861), 31 L. J. C. P. 61.

547. ———.]—Where each of the original owners of houses in a row had entered into covenants with the original owner of all the land on which they stood as to what should be done in the garden attached to each house, an injunction was granted at the suit of the owner of one of the houses, restraining a breach of the covenants by the owner of another house, notwithstanding that small breaches of the covenants by other owners had not been interfered with, & that he himself had committed a small breach.—*WESTERN v. MACDERMOTT* (1866), 2 Ch. App. 72; 36 L. J. Ch. 76; 15 L. T. 641; 31 J. P. 73; 15 W. R. 265, L. C.

Annotations:—*Consd.* *Meredith v. Wilson* (1893), 69 L. T. 336. *Apld.* *Hooper v. Bromet* (1903), 89 L. T. 37. *Reid*. *Chitty v. Bray* (1883), 48 L. T. 860; *Brown v. Inskip* (1884), Cab. & El. 231. *Mentd.* *Re Drew* (1866), 35 Beav. 443; *Poulett v. Hood* (1866), 35 Beav. 234; *Tulk v. Metropolitan Board of Works* (1868), L. R. 3 Q. B. 682; *Keates v. Lyon* (1869), 4 Ch. App. 218; *Leech v. Schweder* (1874), 9 Ch. App. 465, n.; *Manners v. Johnson* (1875), 1 Ch. D. 673; *Master v. Hansard* (1876), 46 L. J. Ch. 505; *Fairclough v. Marshall* (1878), 4 Ex. D. 37; *Renals v. Cowlishaw* (1879), 11 Ch. D. 866; *Austerberry v. Oldham Corpn.* (1885), 29 Ch. D. 750; *Martin v. Spicer* (1886), 55 L. T. 820; *Nottingham Patent Brick & Tile Co. v. Butler* (1886), 54 L. T. 444; *Sheppard v. Gilmore* (1887), 57 L. J. Ch. 6; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Formby v. Barker*, [1903] 2 Ch. 539.

548. ———.]—*GAUNT v. FYNNEY*, No. 376, *ante*.

549. ———.]—*RICHARDS v. REVITT*, No. 671, *post*.

550. ———.]—O. sold a plot of land to B., & took from B. a covenant, among others, that houses erected thereon should be used as private residences only. The covenants were contained in a printed form of agreement which O. used in

the sale of many plots; it contained a power for the vendor to waive or vary the covenants with regard to unsold lots. There had been no sale or attempted sale by auction. No plan was produced to B. showing what plots were affected by the restrictions. O. afterwards himself built, or allowed to be built, a number of shops on the adjoining plots, & acquiesced in some slight breaches of covenant in respect of B.'s land. Deft., who purchased from B., & had notice of the covenant, began to alter two houses erected on the plot into shops. O. brought an action to restrain him:—*Held*: no building scheme had been proved to exist, & in the absence of such a scheme & of proof that the covenant was entered into merely for the protection of O.'s property, the change in the character of the neighbourhood, though caused by his own acts, did not, nor did his acquiescence in minor breaches, disentitle him to an injunction.—*OSBORNE v. BRADLEY*, [1903] 2 Ch. 446; 73 L. J. Ch. 49; 89 L. T. 11.

Annotations:—*Consd.* *Sharp v. Harrison*, [1922] 1 Ch. 502. *Reid*. *Sobey v. Sainsbury*, [1913] 2 Ch. 513. *Mentd.* *Hooper v. Bromet* (1904), 90 L. T. 234; *Elliston v. Reacher*, [1908] 2 Ch. 665; *Reid v. Bickerstaff*, [1909] 2 Ch. 305; *Kelly v. Barrett*, [1924] 2 Ch. 379.

551. — Previous infringements few in number.]—Where all the purchasers of lots of an estate are bound by restrictive covenants not to allow any trade or business to be carried on upon their lots, equitable relief in enforcing the covenants will be refused if the party suing has debarred himself from such relief by delay or acquiescence, or if the property has been so laid out & used that the object of the covenants, namely, the preserving the property as a residential property, can no longer be attained; but it will not be refused merely because in a few instances the covenants have not been enforced.—*KNIGHT v. SIMMONDS*, [1896] 2 Ch. 294; 65 L. J. Ch. 583; 74 L. T. 563; 44 W. R. 580; 12 T. L. R. 401; 40 Sol. Jo. 531, C. A.

Annotations:—*Apld.* *Sobey v. Sainsbury*, [1913] 2 Ch. 513. *Reid*. *Ramuz v. Leigh-on-Sea Conservative & Unionist Club* (1915), 31 T. L. R. 174. *Mentd.* *Rowell v. Satchell*, [1903] 2 Ch. 212.

552. — Infringement by persons other than defendant.]—Where a vendor, having taken from each of several purchasers of plots of building land, formerly the same estate, a covenant to build only in a specified manner, has permitted, without interference, material breaches of the covenant to be committed by some of the purchasers, he cannot obtain an injunction to compel another purchaser to observe the same covenant; & there is no difference in the case where the covenant is not only a covenant by each purchaser with the vendor, but also a covenant by each purchaser with all the others; nor in the case where the breaches have been committed before deft. became a purchaser, & executed the deed of covenant.—*PEEK v. MATTHEWS* (1867), L. R. 3 Eq. 515; 16 L. T. 199; 15 W. R. 689.

Annotations:—*Distd.* *German v. Chapman* (1877), 7 Ch. D. 271. *Apld.* *Sobey v. Sainsbury*, [1913] 2 Ch. 513. *Reid*. *Knight v. Simmonds*, [1896] 2 Ch. 294.

553. ———.]—*KELSEY v. DODD*, No. 544, *ante*.

554. ———.]—On the sale of an estate in plots for building purposes, a deed of covenant was executed by all the purchasers, whereby they covenanted with the trustees, each purchaser covenanting with regard to the plot purchased by him, to observe certain stipulations as to the number of houses to be built on the plots, the building lines & other similar matters. Pltf. was owner of certain of these plots on which a house had been erected & grounds laid out. Deft. had

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contracted for the purchase of some adjoining plots on which he was commencing to build more houses than were allowed by the deed of covenant, & in a position at variance with the building line therein laid down. The houses so built would overlook pltf.'s grounds somewhat more than if built within the building line. Pltf. claimed an injunction & deft. pleaded that in several other instances, the original vendors, who were trustees under the deed of covenant for all the purchasers, had allowed considerable breaches of the covenants to be committed without interference, that they were therefore disentitled to enforce the covenants against deft., & pltf., as claiming under them, could not be in any better position. It also appeared that pltf.'s own house was built 2 feet in advance of the building line:—*Held*: as the breaches of covenant allowed by the trustees were committed in relation to other portions of the property, not affecting pltf.'s enjoyment of his plots, they could not be set up against him, & the deviation with regard to his own house was too trifling to affect his right.—*JACKSON v. WINNIFRITH* (1882), 47 L. T. 243.

555. ———.]—In 1888, S., the owner of a considerable estate called the B. M. Estate, lying on the south side only of C. Road, conveyed to a building society three acres of the land bounded by C. Road on the north (below called the second S. Estate). The land was coloured pink on the plan on the conveyance, which divided it by lines into eighteen equal sized plots having the odd numbers on the C. Road frontage & the even numbers on the south. The plan also showed another piece of land coloured green, which belonged to S. but was not conveyed. The deed contained a covenant by the society against the erection or user of buildings on the second S. Estate other than as private dwelling houses, professional premises, or lodging houses. S. by the same deed entered into a similar restrictive covenant as regarded the land coloured green. Other parts of the B. M. Estate lying to the west & south-west of the second S. Estate (below called the first S. Estate) had been previously purchased by the society, which later on purchased other land forming part of the B. M. Estate, including the land coloured green (collectively called the third S. Estate). In 1889 the society conveyed a plot on the second S. Estate (No. 11 facing north) & another plot (No. 12 facing south) to G., who in 1912 conveyed them both to deft. The unsold portions of the B. M. Estate were in 1911 conveyed by the successor in title of S. to pltf. In & for some time after 1888 C. Road was a quiet country road with a few houses on either side, & for some distance west of the second S. Estate & along the whole frontage of that estate & of the land coloured green the district was purely residential. From 1888 onwards this character had been seriously altered. On the north side of C. Road there was an almost continuous line of shops opposite the second S. Estate & C. Road

itself had become the main shopping district of the place. Many shops had also been built on adjoining parts of the B. M. Estate which had formerly been subject to restrictive covenants, & the covenants in respect of several plots on the second S. Estate had not been enforced, with the result that private houses on them had been turned into shops. Pltf. himself had erected shops on parts of his neighbouring land. In 1912 deft., being desirous of building shops on his plots, applied to pltf. for leave to do so. This was refused except on the terms of deft., paying pltf. £100. On these terms being declined pltf. sued for an injunction to restrain deft. from erecting the shops:—*Held*: the acts & omissions of pltf. & his predecessors in title, & particularly the non-enforcement of the covenant as to the building on parts of the second S. Estate, prevented the ct. from enforcing the covenant.—*SOBEY v. SAINSBURY*, [1913] 2 Ch. 513; 83 L. J. Ch. 103; 109 L. T. 393; 57 Sol. Jo. 836.

**SUB-SECT. 2.—DEGREE OF ACQUIESCENCE
REQUISITE TO BAR RELIEF.**

556. **Interlocutory injunction—Lesser degree requisite—Than for perpetual injunction.]—**Delay in taking legal proceedings, & other acts, not amounting to acquiescence in the infringement of a right.

To deprive pltf. of a legal right at the hearing of the cause, a case of acquiescence must be shown much stronger than such as would be sufficient defence to an interlocutory application by him, & must amount not only to positive licence, but to an implication of an actual grant.—*PATCHING v. DUBBINS* (1853), Kay, 1; 22 L. T. O. S. 116; 17 Jur. 1113; 2 W. R. 2; 69 E. R. 1; *on appeal*, 2 Eq. Rep. 71, L. JJ.

Annotations:—*Mentd.* Schlumberger v. Lister (1860), 6 Jur. N. S. 1336; McLean v. McKay (1873), L. R. 5 P. C. 327.

557. ———.]—*JOHNSON v. WYATT*, No. 378, *ante*.

558. ——— **Acquiescence for six years.]—***CHILD v. DOUGLAS*, No. 149, *ante*.

559. **Perpetual injunction—Acquiescence for long period.]—**Perpetual injunction granted, after long acquiescence on the part of bkpt. to restrain bkpt. from continuing an action, & from any other proceedings to invalidate the commission.—*Re BRITAIN, Ex p. WHITE* (1835), 4 L. J. Bcy. 50.

560. ——— **Five years.]—***WOOD v. SUTCLIFFE*, No. 13, *ante*.

561. ——— **Eighteen years.]—**Pltf. & defts. held under the same superior lease. One of the covenants of the lease was that nothing should be hung, placed or exposed for sale or otherwise outside the premises. Pltf. brought an action for damages & injunction for breach thereof, complaining that defts. greatly interfered with the comfort of the people coming to his shop. The jury found that defts. had been guilty of a breach of the covenant in question, & also that there was such an unreasonable use of the highway as to

PART VIII. SECT. 4, SUB-SECT. 2.

c. **Fraudulent to insist on legal right.]—**Pltf., a married woman, was the owner in fee of a lot of land through which flowed a stream, too small, however, in the natural state for steam-driving purposes. The land had previously been owned by pltf.'s husband, who, both while such owner & afterwards, had assisted as a labourer in constructing a driving dam above

pltf.'s lot. Defts.' logs were driven by means of the driving dam which was owned by them, & such user flooded pltf.'s intervals & injured the banks of the stream:—*Held*: pltf. was not estopped from taking proceedings to restrain further injury to the property & from claiming damages for the injury done; the acquiescence or leave & license by which a person can be deprived of his legal rights, must be of such a nature & given under such

circumstances as will make it fraudulent in him to set up these rights against another prejudiced by his acts.—*WRIGHT v. MITTEN* (1896), 34 N. B. R. 14.—*CAN.*

d. ———.]—Where a trespasser, by taking proper steps to that effect would have the right to expropriate the lands in dispute, an injunction should be withheld in order to enable the necessary proceedings to be taken &

amount to a public nuisance, & pltf. had in consequence sustained damage, but to what amount they were unable to say. During the eighteen years which the nuisance had existed, pltf. had only once complained to defts. about it. Pltf. upon the findings of the jury asked for an injunction:—*Held*: there was such acquiescence on the part of pltf. in the nuisance that an injunction could not be granted.—*ROGERS v. GREAT NORTHERN RY. CO.* (1889), 53 J. P. 484; 5 T. L. R. 264.

— **Greater degree requisite—Than for interlocutory injunction.**—*See* Nos. 378, 556, *ante*.

562. Ex parte injunction—Small degree of acquiescence.—*MEXBOROUGH (EARL) v. BOWER*, No. 678, *post*.

SUB-SECT. 3.—WHAT PERSONS BOUND BY ACQUIESCENCE.

563. Co-plaintiffs—Acquiescence by one—Some co-plaintiffs infants.—Acquiescence by one of several co-pltfs. in the act complained of precludes the interference of the ct. upon an interlocutory application as much as upon decree; & the rule is the same although some of co-pltfs. are infants.

Parties cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute them.—*MARKER v. MARKER* (1851), 9 Hare, 1; 20 L. J. Ch. 246; 17 L. T. O. S. 176; 15 Jur. 663; 68 E. R. 389.

Annotations:—*Mentd.* *Micklethwait v. Micklethwait* (1857), 26 L. J. Ch. 721; *Ashby v. Hincks* (1888), 58 L. T. 557; *Stafford v. Sutherland* (1892), 36 Sol. Jo. 381.

564. Purchaser from shareholder.—(1) An incorporated railway co., having powers within a fixed time to complete a branch line, commenced, but afterwards, by a vote of the proprietary, suspended for a time, the works. Before their powers expired, the works, on a resolution of the shareholders, were resumed, & actively prosecuted. After a lapse of nearly a year, the powers having then expired, & the branch railway still being unfinished, two shareholders, on behalf of themselves & the other shareholders, filed a bill to restrain the further prosecution of the works. On a motion for an injunction:—*Held*: pltfs., having been aware of the intention to construct the line, & not having applied with diligence, the ct. would not grant the injunction.

(2) A shareholder, who had acquiesced in the recommencement of the works, afterwards sold his shares to a purchaser, who objected to the further prosecution of the works:—*Held*: the purchaser was bound by the acquiescence of his vendor.—*FHOOKS v. SOUTH WESTERN RY. CO.* (1853), 1 Sm. & G. 142; 21 L. T. O. S. 55; 17 Jur. 365; 1 W. R. 175; 65 E. R. 62.

Annotations:—*Generally, Mentd.* *Burt v. British Nation Life Assoc. Assocn.* (1859), 33 L. T. O. S. 74; *London Trust Co. v. Mackenzie* (1893), 62 L. J. Ch. 870.

565. Plaintiff suing in representative capacity—Acquiescence by party represented.—An institution was incorporated by charter & deed of settlement authorising the holding of land in perpetuity, with power to borrow £25,000 on mtge., & to contract, purchase, sell, assure, & generally do all acts which the council should consider necessary, as if the same were done with the assent of the whole body. Money was borrowed under the

power, & in the mtge. deeds were inserted powers of sale. The concern was unsuccessful, & a mtgee. proceeded to sell, & a bill was filed by the managing director after a lapse of three years from the date of the mtges. for a declaration that the said mtges. were void by reason of the power of sale being *ultra vires*, & to restrain the sale. The injunction was granted; & a motion was made by the mtgee. to dissolve the injunction: a similar motion was made by the council, who were defts., on the ground of acquiescence; & that a power of sale is now universal in mtge. deeds:—*Held*: a power to mortgage does not include a power to give authority to sell; but upon the ground of acquiescence in the case of the mtgee., & of complete power to sell in the case of the council, the injunction must be dissolved on both motions with costs. *Semble*: acquiescence on the part of any member of a body on behalf of whom pltf. sues will disentitle him to relief.—*CLARKE v. ROYAL PANOPTICON* (1857), 4 Drew. 26; 27 L. J. Ch. 207; 28 L. T. O. S. 335; 3 Jur. N. S. 178; 5 W. R. 332; 62 E. R. 10.

Annotations:—*Mentd.* *Re Chawner's Trusts* (1869), 38 L. J. Ch. 726; *Stevens v. Theatres*, [1903] 1 Ch. 857.

566. Company.—Where an incorporated co. stands by & permits expensive works to be executed at the spot where its premises are situated, & its operations carried on, the effect for all purposes of knowledge & acquiescence will be the same as in the case of an individual.—*LAIRD v. BIRKENHEAD RY. CO.* (1859), John. 500; 29 L. J. Ch. 218; 1 L. T. 159; 6 Jur. N. S. 140; 8 W. R. 58; 70 E. R. 519.

Annotations:—*Reid.* *Bourke v. Alexandra Hotel Co.* (1877), 25 W. R. 393; *Civil Service Musical Instrument Assocn. v. Whiteman* (1899), 68 L. J. Ch. 484; *Hoare v. Lewisham Corpn.* (1901), 85 L. T. 281. *Mentd.* *Marriott v. Reid* (1900), 82 L. T. 369; *Michaud v. Montreal (City)* (1923), 92 L. J. P. C. 161.

567. Representative of deceased person—Infringement of trade mark.—*Semble*: where a trader acquiesces in a particular infringement of his trade mark for a considerable period during his life, his representatives will be unable to restrain it after his death.—*HOVENDEN v. LLOYD* (1870), 18 W. R. 1132.

SECT. 5.—BREACH OF CONTRACT OR COVENANT BY PLAINTIFF.

568. Whether plaintiff disentitled to relief.—Pltf., the manager of a London theatre, engaged deft., a provincial actor desirous of appearing on the London stage, for two years. Though there was nothing expressed on the subject the ct. inferred an engagement on the part of pltf. to employ deft. for a reasonable time & on the part of deft. not to perform elsewhere. Pltf. having, under these circumstances, delayed deft.'s appearance for five months, deft. broke his engagement & went to another theatre:—*Held*: he had a right so to do, & pltf. was not entitled to an interlocutory injunction to prevent his performing there.—*FECHESTER v. MONTGOMERY* (1863), 33 Beav. 22; 55 E. R. 274.

Annotations:—*Consd.* *Montague v. Flockton* (1873), L. R. 16 Eq. 189. *Distd.* *Grimston v. Cunningham*, [1894] 1 Q. B. 125. *Reid.* *Turner v. Sawdon*, [1901] 2 K. B. 653; *Turpin v. Victoria Palace*, [1918] 2 K. B. 539.

compensation made; but where there has been acquiescence equivalent to a fraud upon deft. the injunction ought not to be granted, even where the legal right of pltf. has been proved.—*SANDON WATER WORKS & LIGHT CO. v. BYRON N. WHITE CO.* (1904), 35

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e. —.]—The ct. will not, in case of alleged acquiescence, act on light grounds against the legal rights of the parties; there must be either fraud, or such acquiescence, as, in the view of the ct., would make it a fraud

afterwards to insist upon the legal right.—*GERRARD v. O'REILLY* (1843), 3 Dr. & War. 414.—IR.

i. *Mandatory injunction.*—*WOODHOUSE v. NEWBY NAVIGATION CO.*, [1898] 1 I. R. 161.—IR.

Sect. 5.—Breach of contract or covenant by plaintiff.]

569. Deft. sold to the pltf's. his news agency business for £2,500, payable by instalments. The first two instalments of £500 each were payable at all events, but the payment of the other two of £750 each was contingent on the profits of the business, & in the event of the profits of the business exceeding a certain amount, deft. was to receive further benefits. Pltf's. at the same time engaged deft. to superintend their business, including along with the business sold certain other branches, for five years, at a salary; he undertaking to obey their directions. Within the first year pltf's. agreed with a company to discontinue the news agency business, giving the co. the option of continuing such parts of it as the co. might elect to continue. Pltf's. then directed deft. to discontinue the transmission of news, & deft. refusing to obey, they filed their bill for an injunction to restrain him from transmitting news, which injunction was granted:—*Held*: as the purchase money was to be ascertained by reference to the profits, there was an implied covenant by pltf's. that the business should be carried on, & as pltf's. had broken his implied covenant, they were not entitled to restrain deft. from breaking any other part of the agreement.—*TELEGRAPH DESPATCH & INTELLIGENCE CO. v. McLEAN* (1873), 8 Ch. App. 658, L. JJ.

Annotations:—*Refd.* *Brown v. Brown*, *Brown v. Brown* (1876), 35 L. T. 54; *Measures v. Measures*, [1910] 2 Ch. 248. *Mentd.* *Hope v. Gibbs* (1877), 47 L. J. Ch. 82; *Re Railway & Electric Appliances Co.* (1888), 38 Ch. D. 597; *Ogdens v. Nelson*, *Ogdens v. Telford*, [1903] 2 K. B. 287.

570. —.]—Pltf. & defts. being purchasers of different plots of land from a common vendor, pltf. sought to obtain a mandatory injunction against deft. in respect of a breach of a covenant in the conveyance which pltf. himself had also committed. Injunction refused.—*GODDARD v. MIDLAND RY. CO.* (1891), 8 T. L. R. 126.

571. —.]—Certain lots forming part of a building estate, were subject to a restrictive covenant that no building on any lot should be erected or used as a shop, workshop, warehouse, or factory, nor should any trade or manufacture be carried on on any lot. Since 1886 W. carried on the business of a laundryman on one of the lots. In July, 1893, he commenced to build on a lot of which he was the owner, a building adapted solely for the purposes of his business. An owner of other of the lots, thereupon commenced an action to restrain the erection of the building. The evidence showed that all the buildings erected on the lots were private residences, but that in several of them trades, *e.g.* dressmaking, boot repairing, & washing, had for some time openly been carried on. It also appeared that pltf. had kept cows on some of his lots, & had sold their milk at a shed erected on the lots for their use, that he had discontinued this business in 1886, & that subsequently he had temporarily let a part of these lots to a mason, & permitted him to erect & use a shed thereon for the purposes of his business:—*Held*: deft. had committed a breach of the covenant; the breach was greater & more serious than any previously committed; having regard to that fact, pltf. was entitled to relief, & accordingly an injunction ought to be granted.—*MEREDITH v. WILSON* (1893), 69 L. T. 336.

572. —.]—Deft., an actor, agreed with pltf., a theatrical manager, to act & to understudy as a member of pltf.'s co. on tour in America for twenty-five weeks, or longer if required, but not more than forty weeks, subject to certain rules, by one of which no member of the co. was allowed

to act at any other theatre without permission. Shortly after the beginning of the tour pltf. produced a play in America, in which deft. was not given a part to act, but was called on to understudy. A week later deft. wrote asking pltf. to cancel the engagement, & this being refused deft. returned to England, & entered into an engagement & acted at a theatre in London. Deft. alleged in his affidavit that pltf. had verbally promised that deft. should perform in certain parts, but had not kept such promise.

On an application for an injunction to restrain deft. from acting at any theatre other than where pltf.'s company played:—*Held*: the negative stipulation against acting elsewhere could be enforced by injunction, the alleged verbal promise could not, in the absence of any circumstances showing want of good faith on pltf.'s part, be considered in construing the contract, the allotting of parts to deft. was no part of the consideration, pltf. had not failed to carry out his part of the contract, & an injunction ought to be granted.

It is certainly time that the ct. will decline to interfere by injunction where pltf. fails to do that which he has promised to do as part of the contract (*WILLS, J.*).—*GRIMSTON v. CUNINGHAM*, [1894] 1 Q. B. 125; 10 T. L. R. 81; 38 Sol. Jo. 143, D. C.

573. —.]—*DOWSETT v. PRAMUZ* (1905), *Emden's B. C.*, 4th ed. App. 659.

574. —.]—Employers agreed with their manager that he should hold office subject to termination at twelve months' notice by either party & with a restriction on his right to trade after its termination. The employers having wrongfully dismissed him without notice:—*Held*: he was entitled to treat the dismissal as a repudiation of the contract & to sue them for damages for breach of contract, & was no longer bound by the restriction on trade.—*GENERAL BILLPOSTING CO., LTD. v. ATKINSON*, [1909] A. C. 118; 78 L. J. Ch. 77; 99 L. T. 943; 25 T. L. R. 178, H. L.

Annotations:—*Appld.* *Measures v. Measures*, [1910] 2 Ch. 248. *Consd.* *Dennis v. Tunnard & Moore* (1911), 56 Sol. Jo. 162. *Distd.* *Konski v. Peet*, [1915] 1 Ch. 530. *Mentd.* *Newsum v. Bradley*, [1918] 1 K. B. 271; *Re Rubel Bronze & Metal Co. & Vos*, [1918] 1 K. B. 315; *British Concrete Co. v. Schell*, [1921] 2 Ch. 563; *Martin v. Stout*, [1925] A. C. 359.

575. —.]—In July, 1903, deft. agreed to hold office as a director of pltf. co. for a period of seven years at a salary of £1,000 *per annum*; & that he would not at any time thereafter while he should hold the office of director, or within seven years after ceasing to hold such office, directly or indirectly carry on or be engaged or interested in certain specified businesses that would in any way compete with or be detrimental to the business carried on by the co. In 1909 a receiver & manager of the co.'s undertaking was appointed in a debenture holder's action; & shortly afterwards an order was made for the compulsory winding up of the co. Thereupon deft. commenced to carry on a business on his own account of the same nature as that which had been carried on by the co. The co. claimed an injunction to restrain the breach of the agreement:—*Held*: pltf. co., who were seeking equitable relief by way of injunction could not obtain such relief unless they proved that they were ready to perform their part of the bargain; they could not in future give deft. the consideration which he was originally to receive; & the contract had therefore been broken by an act brought about by pltf.'s own default, *i.e.* the omission to pay debts incurred by them.—*MEASURES BROTHERS, LTD. v.*

MEASURES, [1910] 2 Ch. 248; 79 L. J. Ch. 707; 102 L. T. 794; 26 T. L. R. 488; 54 Sol. Jo. 521; 18 Mans. 40, C. A.

Annotations.—*Reid*, *Alpertan Rubber Co. v. Manning* (1917), 86 L. J. Ch. 377; *Reigate v. Union Manufacturing Co. (Ramsbottom)* & *Elton Cop Dyeing Co.*, [1918] 1 K. B. 592.

576. —.]—Pltf., who described himself as the Plenipotentiary Minister of the Russian People's Govt. in London, became the tenant of deft. under an agreement containing a covenant that pltf. would not do anything which might become a nuisance to the adjoining tenants & would not use the premises for propagandist purposes. The agreement gave deft. a right of re-entry only for non-payment of rent. Pltf. committed a breach of his covenant & also sent to British trade unions a circular inciting to revolution. Deft. thereupon re-entered & locked pltf. out. In an action for an injunction to restrain deft. from interfering with pltf.'s occupation of the premises:—*Held*: in the circumstances pltf. was not entitled to equitable relief, & the action must be dismissed.

No relief unless pltf. comes with clean hands (NEVILLE, J.).—*LITVINOFF v. KENT* (1918), 34 T. L. R. 298.

577. — Justifiable breach.]—S., proprietor of a weekly newspaper, by a letter to F., an author, agreed that F. should write two tales, extending over one year, at £10 per week for each number, to contain about the same quantity as was sent under a former similar engagement, & to receive the first number on Apr. 22, 1855, & to continue to receive one number weekly during one year, conditionally that F. should not write for any other newspaper published at less than 6d. F. accepted, received £20 deposit, & wrote regularly for some weeks; then went to Paris, sent an abrupt conclusion of the then current tale in a small quantity of manuscript, refused to proceed with his engagement with S., & entered into another engagement with C. S. thereupon stopped his payments to F., & employed another author to conclude the half finished tale:—*Held*: under the circumstances S. had behaved reasonably, & not so as to deprive himself of his remedy by injunction.

Under the circumstances . . . I cannot see that pltf. was not perfectly justified in securing the services of some other writer. That is no such breach of agreement on the part of pltf. as to enable deft. to say that he does not come here with clean hands (PAGE WOOD, V.-C.).—*STIFF v. CASSELL* (1856), 2 Jur. N. S. 348.

578. — Trifling breach.]—*WESTERN v. MACDERMOTT*, No. 547, *ante*.

579. —.]—A husband is not debarred from enforcing a deed of separation & from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part.—*BESANT v. WOOD* (1879), 12 Ch. D. 605; 40 L. T. 445; 23 Sol. Jo. 443.

Annotations.—*Consd.* *Hart v. Hart* (1881), 18 Ch. D. 670; *Clark v. Clark* (1885), 10 P. D. 188. *Reid*, *Gandy v. Gandy* (1882), 7 P. D. 168; *Cahill v. Cahill* (1883), 8 App. Cas. 420; *Russell v. Russell*, [1895] P. 315; *Kunski v. Kunski* (1898), 68 L. J. P. 18; *Kennedy v. Kennedy*, [1907] P. 49. *Mentd.* *Rose v. Rose* (1883), 8 P. D. 98; *Aldridge v. Aldridge* (1888), 13 P. D. 210; *McGregor v. McGregor* (1888), 21 Q. B. D. 424; *Wennhak v. Morgan* (1888), 57 L. J. Q. B. 241; *Gooch v. Gooch*, [1893] P. 99; *Sweet v. Sweet*, [1895] 1 Q. B. 12; *Bishop v. Bishop*, *Judkins v. Judkins*, [1897] P. 138; *Re Weston*, *Davies v. Tagart*, [1909] 2 Ch. 164; *Horwood v. Millar's Timber & Trading Co.*, [1916] 2 K. B. 44; *Eccle. Comrs. for England v. I. R. Comrs.*, [1918] 2 K. B. 602.

580. —.]—Pltfs., the trustees of a chapel, were the owners in fee of a piece of land, &

deft. was the owner in fee of an adjoining piece of land, which together formed part of an estate that had been laid out for building under a general scheme. The conveyances of the pieces of land respectively contained a covenant that certain stipulations would be observed & performed, one of which stipulations was that "nothing is to be erected within 15 feet of the high road or within 10 feet from any other road, except fences, & those not more than 6 feet high; & no house or part of a house is to be erected at a greater distance than 50 feet from the front building line." Before pltfs.' chapel was erected, a house was built on defts.' land, the front of which was 15 feet from the high road. Afterwards deft. began building a shop on his land in advance of the front of his house. Pltfs. objected on the ground of the covenant, but deft. built his shop & brought forward the walls 7 feet in advance of his house so as to be only 8 feet from the high road. The view of pltfs.' chapel was obstructed by deft.'s shop. Pltfs. claimed an injunction to restrain deft., & damages. It appeared, however, that pltfs.' chapel was in advance of the lines mentioned in the above stipulation in some trifling respects, & that they had violated the stipulation that no house, or part of a house, was to be erected at a greater distance than 50 feet from the front building line, by carrying their chapel to a greater distance than 50 feet from the high road, & by erecting an iron building at the rear of their chapel, so as to occupy the entire space between the chapel & the extent in depth of their ground. Deft. contended that, under the circumstances, pltfs. were not entitled to the relief claimed by them:—*Held*: the two covenants were essentially different, the one to observe the line of frontage being of a more important, & the other, as to building in the rear, being of a less important, character, & could be treated as a separate covenant; pltfs. were not prevented in equity from enforcing the covenant as to the frontage line, which they themselves had substantially observed; & the injunction claimed must be granted, & deft.'s building removed.—*CHITTY v. BRAY* (1883), 48 L. T. 860; 47 J. P. 695.

Annotation.—*Apld.* *Meredith v. Wilson* (1893), 69 L. T. 336.

581. —.]—Certain lands were subject to a building scheme, the provisions of which were contained in a deed of 1854. The purchaser of a plot was informed by the vendor in good faith that the original deed was lost or destroyed, & what purported to be a true copy was produced. This copy subsequently proved to be defective. An action was brought by an adjoining owner to restrain deft. from erecting or allowing to remain upon his land certain buildings which contravened the provision as to a building line. The property in respect of which he was entitled to sue had certain erections upon it contravening another building stipulation, which provided that no erection should be built within 4 feet of a boundary fence:—*Held*: (1) deft. was affected with notice of the building stipulations, for that there was nothing in this case to take it out of the general rule that notice of a deed is notice of its contents; (2) pltf. had only committed a trivial breach of a trivial covenant, & such a breach did not disentitle pltf. from having the building stipulations strictly enforced.—*HOOPER v. BROMET* (1903), 89 L. T. 37; *on appeal* (1904), 90 L. T. 234, C. A.

582. Systematic breach by both parties—Over long period of time.]—*SHEARD v. WEBB*, No. 446, *ante*.

Part IX.—Against whom Injunction may be Granted.

SECT. 1.—IN GENERAL.

583. Co-defendant.]—Under special circumstances, an injunction granted, on the application of a deft., against a co-deft.—*EDGEUMBE v. CARPENTER* (1839), 1 Beav. 171; 8 L. J. Ch. 17; 48 E. R. 904.

Annotation:—Distd. *Russell v. L. C. & D. Ry.* (1863), 9 Jur. N. S. 1007.

584. — Before decree.]—Defts., the railway co., before a decree was obtained moved for an injunction to restrain co-defts., pltf.'s trustees, from prosecuting an action at law on the ground that the relief sought by it was identical with the relief prayed by the bill filed against the railway co. & pltf.'s trustees. The motion also asked that all proceedings in the suit might be stayed; but it was on both points refused with costs.—*RUSSELL v. LONDON CHATHAM & DOVER RY. CO.* (1863), 4 Giff. 403; 2 New Rep. 507; 9 L. T. 14; 9 Jur. N. S. 1007; 11 W. R. 983; 66 E. R. 763.

585. Person out of jurisdiction—By Court of Appeal—Chancery Court of Lancaster.]—An injunction was granted by the Lords Justices, as the Ct. of Appeal from the Chancery Ct. of Lancaster, against a person out of the jurisdiction of that Chancery Ct.—*DOWNES v. JACKSON* (1866), 14 W. R. 907, L. JJ.

SECT. 2.—SERVANTS AND AGENTS.

See, generally, AGENCY, Vol. I., pp. 620 et seq.

586. Injunction against principal—Not extended to servants—In subsequent action.]—Deft. having brought an action against pltf., the original bill was filed, & an injunction obtained. Deft. afterwards commenced actions against the servants of pltf., for acting according to his orders in the same matter which had been the subject of the former suit & of the original bill. Pltf., by supplemental bill, stated those facts & moved an affidavit to extend the injunction to these actions. The motion was refused.—*GADD v. WORRALL* (1795), 2 Anst. 555; 145 E. R. 965.

Annotation:—Distd. *Bolt v. Stanway* (1795), 2 Anst. 556.

587. Acting under order of principal defendant.]—There is no agency as between wrong doers, each of them is personally liable. Hence, where there was a dispute between pltf. & one of defts. about a weir situate on pltf.'s land, & the other deft. was charged with intending to enter forcibly on the land & destroy the weir:—*Held*: the last-mentioned deft. could not sustain a demurrer to a bill for injunction on the ground that he had no interest in the subject-matter of the dispute, & was a mere agent acting on the orders of the principal deft.—*HEUGH v. ABERGAVENNY (EARL) & DELVES* (1874), 23 W. R. 40.

588. Acting as Custom House agent.]—A patent was granted in England for an invention rendering nitro-glycerine less dangerous. Foreigners im-

ported into England an article compounded of nitro-glycerine & other substances which they had manufactured abroad according to the patent process. Resps., acting as Custom House agents for the importers, passed the article through the Custom House, & obtained permission, as required by the Explosives Act, 1875 (c. 17), for landing & storing it in magazines belonging to the importers:—*Held*: resps. being only Custom House agents for the importers, & not themselves the importers, & having neither possession of nor control over the goods, their acts did not amount to an exercise or user of the patent, & no action could be maintained against them for an infringement of the patent.—*NOBEL'S EXPLOSIVE CO., LTD. v. JONES, SCOTT & CO.* (1882), 8 App. Cas. 1; 52 L. J. Ch. 339; 48 L. T. 490; 31 W. R. 388, H. L.

Annotations:—Expld. *United Telephone Co. v. London & Globe Telephone & Maintenance Co.* (1884), 26 Ch. D. 766. *Refd.* *Badische Anilin und Soda Fabrik v. Basle Chemical Works Bindschedler*, [1898] A. C. 200.

589. Principal resident out of jurisdiction.]—*COHEN v. POLAND*, [1887] W. N. 159.

Agents of foreign government.]—*See* Sect. 10, *post*.

Whether included in order.]—*See* Part XI., Sect. 5, sub-sect. 2, *post*.

Breach by servant or agent.]—*See* Part XII., Sect. 2, sub-sect. 3, *post*.

SECT. 3.—PERSONS NOT PARTY TO ACTION.

590. Injunction obtained in previous action—Not extended to subsequent action.]—*GADD v. WORRALL*, No. 586, *ante*.

591. Purchaser who has not completed—Committing waste.]—An injunction may be obtained upon motion, to restrain a purchaser under a decree, not a party to the cause who has not paid his purchase-money, from committing waste on the property purchased.—*CASAMAJOR v. STRODE* (1823), 1 Sim. & St. 381; 57 E. R. 152.

Annotations:—Mentd. *Croome v. Lediard* (1834), 2 My. & K. 251; *Re Brettell, Ex p. Goren* (1838), 7 L. J. Ch. 187.

592. Tenant of farm removing hay, etc.—Action by receiver.]—Order made in a summary way, to restrain a person, not a party to the suit, to whom the receiver had let a farm, part of the estates in the cause, from removing hay, straw, etc., therefrom.—*WALTON v. JOHNSON* (1848), 15 Sim. 352; 12 Jur. 299; 60 E. R. 654.

593. Party having parted with interest—Before action brought.]—In 1845 S. conveyed to a purchaser a piece of land for building purposes, & the purchaser covenanted not to allow the trade of a retailer of beer or licensed victualler to be exercised upon the premises. A house was built upon the land, & in Mar. 1852, it was opened by T. for the sale of beer. In May, 1852, S. gave notice to T. not to carry on the trade of a retailer of beer on

PART IX. SECT. 1.

g. Persons acting under authority of Royal Commissions of inquiry.]—Royal Commissions of inquiry are lawful; & the cts. have no power to restrain persons acting under the authority of such commissions, provided that they do not invade private rights, or interfere with the course of justice.—*CLOUGH v. LEAHY* (1904),

2 C. L. R. 139.—AUS.

h. Commissioners appointed by Act of Parliament.]—Where comrs., appointed by an Act of Parliament, exceed the authority given them by the Act, & thereby infringe on, or violate private rights, the ct. has jurisdiction to restrain them by injunction.—*FOSTER v. HORNSBY* (1851), 2 L. Ch. R. 426; 5 Ir. Jur. 279.—IR.

PART IX. SECT. 2.

k. Necessity for joinder of principal.]—An application for injunction should not be entertained against the agent of an insurance co. to restrain him from applying for the issuance of a licence to the co., without the latter being made a party to the proceedings.—*MATTHEW v. GUARDIAN ASSURANCE CO.* (1918), 58 S. C. R. 47; 45 D. L. R. 32.—CAN.

the premises. In Sept. 1852, & again in Sept. 1853, T. applied for a public-house licence, & these applications were successfully opposed by S. In Dec. 1853, T. transferred her business to H. In Aug. 1854, a bill was filed by S. against T. & H. to restrain them from carrying on the trade of a retailer of beer & licensed victualler:—*Held*: S. was not entitled to an injunction against T., who had parted with her interest before the bill was filed; nor against H., so far as the business of a retailer of beer was concerned, by reason of the delay in filing the bill; but an injunction was granted against B. to restrain him from carrying on the trade of a licensed victualler.—*SCARISBRICK v. TUNBRIDGE* (1854), 3 Eq. Rep. 240.

594. ———.]—The underlessee of a person who has covenanted not to carry on a particular trade on the demised property will be restrained from carrying it on, although such covenant was not contained in the original lease, but only in an assignment thereof, & although the underlessee had no actual notice of it when he took his underlease, &, *semble*, even though he had no constructive notice. So also as to an assignee of the underlessee. To a suit to enforce such a covenant, the original covenantor is not a proper party, if he has parted with all his interest in the property & is not any way in fault.—*CLEMENTS v. WELLES* (1865), L. R. 1 Eq. 200; 35 Beav. 513; 35 L. J. Ch. 265; 13 L. T. 548; 30 J. P. 100; 11 Jur. N. S. 991; 14 W. R. 187; 55 E. R. 995.

Annotation:—*Reid. Teape v. Douse* (1905), 92 L. T. 319.

595. ———.]—After a verdict for pltf., in an action against a shareholder in a copper mine for a nuisance & injury to crops & cattle by the noxious vapours arising from arsenic works connected with the mine:—*Held*: the ct. would not grant an injunction under C. L. P. Act, 1854 (c. 125), s. 82, to restrain deft. from continuing the nuisance in reference to which pltf. had recovered damage, where deft. had subsequently to the verdict & before pltf.'s application for the injunction, *bond fide* disposed of his shares in the mine, & had no further interest in, or control over, the works in question.—*MATTHEWS v. KING* (1865), 3 H. & C. 910; 13 L. T. 120; 159 E. R. 793; *sub nom. MATHEWS v. KING*, 29 J. P. 632.

596. ———.]—An agreement by E. to grant a lease to D. provided that "in case of non-performance" of any of the agreements on the part of the tenant, it should be lawful for the landlord to re-enter. The agreement also provided that the lease to be granted should contain certain specified covenants, & all such other covenants & conditions as were contained in the lease under which E. held the property, with such additions as might be necessary & proper in an underlease. The lease to E. contained a proviso for re-entry by his lessor in case the lessee should not "observe, perform, & keep" the covenants. The lease to E. contained a covenant by the lessee not "to affix or permit any outward mark or show of business to be affixed" on the demised premises. D. granted a lease to B. of two of the rooms comprised in the agreement, & the right to use the entrance in common with the other occupiers of the house. B. carried on the business of a tailor under the [name] of H. B. & Co. She put up in the window of one of the rooms a wire blind, which had inscribed on the side of it towards the street, "H. B. & Co. late S., B., & Co.," & also a white roller blind with the inscription on it, "H. B. & Co." She also placed on the iron railings outside the entrance a brass plate with the inscription, "H. B. & Co. late S., B., & Co. tailors." E. commenced an action against D. & B. in respect of the

breach. No lease had at this time been executed in pursuance of the agreement. The writ was indorsed with a claim for an injunction to restrain defts. from committing a breach of the agreement; damages for the breach; & to recover possession of the premises comprised in the agreement. By his statement of claim pltf. said that the lease had not been granted to D. "but pltf. has always been & is ready & willing to grant the same":—*Held*: the claim to an injunction, being founded on the continuance of the agreement, was inconsistent with the claim to recover possession, & pltf. must be taken to have waived the latter claim by stating that he was ready & willing to grant the lease; but an injunction must be granted to restrain B. from breaking the covenant, & the injunction must extend to D. because he had not parted with the possession of the entrance, & had sanctioned the putting up of the blinds.

He [D.] could only be relieved from the burden of the injunction if he had shown . . . that he had parted with his whole interest in that part of the premises which is affected by the injunction (*FRY, J.*).—*EVANS v. DAVIS* (1878), 10 Ch. D. 747; 48 L. J. Ch. 223; 39 L. T. 391; 27 W. R. 285.

Annotations:—*Apld. Moore v. Ulcoats Mining Co.*, [1908] 1 Ch. 575. *Consd. Wheeler v. Hitchings* (1919), 121 L. T. 636. *Refd. Sayers v. Collyer* (1883), 52 L. J. Ch. 770. *Mentd. Harman v. Ainslie*, [1904] 1 K. B. 698.

597. Party having no interest in cause of action. —*HAMP v. ROBINSON* (1865), 3 De G. J. & Sm. 97; 46 E. R. 574, L. JJ.

598. Parties to agreement—Action for breach. —(1) In a suit for an injunction to prevent a violation of an agreement, the persons alleged to have made the agreement must be parties.

(2) A party who insists on his legal rights in a case in which the ct. considers he should not morally do, will not be allowed his costs.—*LANDED ESTATES CO., LTD. v. WEEDING* (1869), 21 L. T. 384; 18 W. R. 35.

599. Party added on appeal. —Defts. in a patent action claimed an indemnity against third parties, & obtained an order that the third parties should be at liberty to appear at the trial, & should be bound by the decision of the ct. upon any question as to the indemnity, but not otherwise. At the trial, the judge decided in favour of pltf. on one patent, & against them on another, & directed a set-off of costs, but he made no order against the third parties. Pltf. appealed, & served notice of appeal on defts. & the third parties, & the third parties appeared on the appeal with defts. The appeal was allowed. After judgment pltf. applied for an injunction against the third parties, & for leave to amend by making them defts., & for costs against them:—*Held*: the ct. had no jurisdiction to grant an injunction against the third parties as if they were defts.—*EDISON & SWAN UNITED ELECTRIC LIGHT CO. v. HOLLAND* (1889), 41 Ch. D. 28; 58 L. J. Ch. 524; 61 L. T. 32; 37 W. R. 699; 5 T. L. R. 294; 6 R. P. C. 243, C. A.

Annotations:—*Mentd. Hoop v. Hartley* (1889), 61 L. T. 538; *Lane-Fox v. Kensington & Knightsbridge Electric Lighting Co.*, [1892] 3 Ch. 424; *Jandus Arc Lamp & Electric Co. v. Arc Lamps* (1905), 21 T. L. R. 308; *Layland v. Boldy* (1913), 30 R. P. C. 547; *Osram Lamp Works v. Pope's Electric Lamp Co.* (1917), 34 R. P. C. 369; *Gold Ore Treatment Co. of Western Australia (in Liquidation) v. Golden Horseshoe Estates Co.* (1919), 36 R. P. C. 95; *Wallace v. Tullis Russell* (1921), 39 R. P. C. 3; *British Thomson-Houston v. Charlesworth, Peebles* (1924), 41 R. P. C. 241.

600. Joint licencees—Action against one. —*CURZON v. RICHARDS* (1902), 46 Sol. Jo. 615.

601. Sub-lessee—Breach of covenant in lease. —Where the lessor does not add the sub-lessee as a party to his action for an injunction against his

Sect. 3.—Persons not party to action. Sects. 4–12.
Part X. Sects. 1 & 2: Sub-sect. 1.]

lessee for breach of the covenants contained in the lease, although he may be entitled to an injunction against such lessee, the scope of the injunction must be confined to the lessee, his servants & agents, & must not extend to the sub-lessee.—**METROPOLITAN DISTRICT RY. CO., LTD. v. EARL'S COURT, LTD.** (1911), 55 Sol. Jo. 807.

602. "Aiding & abetting" defendant—Breach of injunction.]—The ct. has jurisdiction to grant an injunction to restrain persons who are not parties to an action from aiding & abetting deft. in the action in committing a breach of an injunction which has been obtained from the ct. against such deft. by pltf. Deft. in this case was under order of the ct. not to sell certain meadow grass. He nevertheless instructed some auctioneers to sell it. Deft. could not readily be found, so pltf. obtained an *ex p.* injunction against the auctioneers:—*Held*: there was jurisdiction to continue that injunction without adding the auctioneers as parties to the action.—**HUBBARD v. WOODFIELD** (1913), 57 Sol. Jo. 729.

Scope of order.]—See Part XI., Sect. 5, sub-sect. 2, *post*.

SECT. 4.—ABSENT PARTIES TO ACTION.

603. Local authority—Resignation of members.]—**HARDINGE v. SOUTHBOROUGH LOCAL BOARD**, No. 777, *post*.

Consequential effect of injunction.]—See Part IV., Sect. 2, *ante*.

Scope of order.]—See Part XI., Sect. 5, sub-sect. 2, *post*.

SECT. 5.—GOVERNMENT DEPARTMENTS.

604. Lords of the Treasury.]—Injunction granted to restrain the Lords of the Treasury from paying the compensation awarded under 11 Geo. 4 & 1 Will. 4, c. 58, for the office of side clerk in the Exchequer, which had been abolished.—**ELLIS v. GREY (EARL)** (1833), 6 Sim. 214; 58 E. R. 574; *sub nom.* **ELLIS v. WALMSLEY**, 2 L. J. Ch. 181.
Annotations:—*Reid*. **Turner v. Blamire** (1853), 1 Drew. 402; **Thomas v. R.** (1874), 38 J. P. Jo. 759.

SECT. 6.—MEMBERS OF PARLIAMENT.

605. Injunction may be granted.]—An injunction may be granted against a Member of Parliament but attachment is not to issue.—**ANON.** (1666), 3 Rep. Ch. 21; 21 E. R. 716.

PART IX. SECT. 4.

l. Addition of.]—On a motion for injunction an objection was taken, that certain necessary parties were not before the ct.; but counsel appearing for the absent parties, & consenting to their being made parties, to be bound by the proceedings, & treated as if actually defts. on record:—*Held*: this cured the defect.—**A.-G. v. GREY COUNTY** (1859), 7 Gr. 592.—**CAN.**

PART IX. SECT. 5.

m. Minister of the Crown.]—A Minister of the Crown is no exception to the principle that all persons except the Sovereign are subject to the jurisdiction of the Supreme Ct. & would be

bound by an injunction.—**EVANS v. O'CONNOR** (1891), 12 N. S. W. L. R. (Eq.) 54.—**AUS.**

n. —.]—A bill was filed against the A.-G. & A., the superintendent of certain slides belonging to the Crown, who was also collector of the rates thereat, alleging that he had seized certain saw logs of pltf.'s, & was about to sell them on the false pretence that the tolls thereon had not been paid. The bill prayed for an injunction, to restrain the sale. A. demurred to the bill, on the ground that being the agent of the Crown he was exempt from personal liability. The demurrer was overruled.—**BAKER v. RANNEY** (1866), 12 Gr. 226.

SECT. 7.—INFANTS.

See **INFANTS**, p. 326, *ante*.

SECT. 8.—INCORPORATE BODIES.

See Part X., Sect. 4, sub-sect. 1, *post*.

SECT. 9.—UNINCORPORATE BODIES.

See Part X., Sect. 4, sub-sect. 2, *post*.

SECT. 10.—FOREIGN SOVEREIGNS, GOVERNMENTS AND THEIR AGENTS.

606. Foreign ambassador—Where no submission to jurisdiction.]—The ct. will grant an *interim* injunction to restrain a stakeholder from paying over a fund *in medio* to the principal possessing the legal interest in it, although that principal is absent, & not amenable to its jurisdiction.

Certain securities were deposited by pltf's. in the Bank of England in the name of the ambassador of a foreign state, in order to secure the performance of a contract between pltf's. & the foreign govt. The ambassador threatened to withdraw the deposit on the ground of an alleged breach of contract by pltf's., which they denied under the circumstances to be such breach:—*Held*: it was not competent for pltf's. to move against the ambassador; but an *interim* injunction might be granted against the bank to restrain them from parting with the fund, & under this order, the bank would be protected against any proceedings by the ambassador.—**GLADSTONE v. MUSURUS BEY** (1862), 1 Hem. & M. 495; 1 New Rep. 178; 32 L. J. Ch. 155; 7 L. T. 477; 9 Jur. N. S. 71; 11 W. R. 180; 71 E. R. 216.

Annotations:—*Consd.* **Smith v. Wegielln** (1869), L. R. 8 Eq. 198. *Reid.* **Larivière v. Morgan** (1872), 7 Ch. App. 554, n.; **The Charkieh** (1873), L. R. 4 A. & E. 59; **Twycross v. Dreyfus** (1877), 5 Ch. D. 605; **The Parlement Belge** (1880), 5 P. D. 197; **Musurus Bey v. Gadban** (1894), 71 L. T. 51; **The Tervaete**, [1922] P. 259.

607. Foreign sovereign—Contract with British subject.]—A bill filed against the Ottoman Bank, its directors, & the Sultan, alleged that the Sultan's Govt. had granted to pltf's. the exclusive right of issuing bank notes in Turkey, & subsequently, in derogation of that grant, made a similar concession to defts., the Ottoman Bank, & prayed a declaration of pltf's.' exclusive right, & an injunction against the Ottoman Bank & its directors:—*Held*: on the demurrer of the bank & directors, inasmuch as the ct. had no jurisdiction on the contract as against the Sultan, it had none against the bank & its directors, & demurrer allowed accordingly.—**GLADSTONE v. OTTOMAN BANK** (1863), 1 Hem. & M. 505; 1 New Rep. 512; 32

o. —.]—*Held*: the discretion of the ct. should be exercised in refusing an injunction on the grounds of public policy, as deft. was A.-G.—**BARNARD v. WALKER** (1880), 1 B. C. R. pt. 1, 121.—**CAN.**

p. Nominal defendant.]—An injunction cannot be granted against a nominal deft. in an action against the Govt., under the claims against Government Act.—**EVANS v. O'CONNOR** (1891), 12 N. S. W. L. R. (Eq.) 54.—**AUS.**

q. Registrar of titles.]—An injunction may be granted against any dealing by the Registrar of Titles with land that has escheated to the Crown.—**A.-G. v. HOGGAN** (1877), 3

L. J. Ch. 228; 8 L. T. 162; 9 Jur. N. S. 246; 11 W. R. 460; 71 E. R. 221.

Annotations:—*Reid*. Smith v. Weguelin (1869), L. R. 8 Eq. 198; Larivière v. Morgan (1872), 7 Ch. App. 554, n.

608. — To restrain removal of property in England.—The ct. has no jurisdiction to prevent a foreign sovereign from removing his property in this country. A foreign sovereign who, for the purpose of obtaining his property, submits to be made a deft. in an action, does not thereby lose his rights.

A foreign sovereign bought in Germany shells made there, but said to be infringements of an English patent. They were brought to this country in order to be put on board a ship of war belonging to the foreign sovereign, & the patentee obtained an injunction against the agents of the foreign sovereign & the persons in whose custody the shells were, restraining them from removing the shells. The foreign sovereign then applied to be & was made a deft. to the suit. An order was then made that notwithstanding the injunction he should be at liberty to remove the shells.—*VAVASSEUR v. KRUPP* (1878), 9 Ch. D. 351; 39 L. T. 437; 27 W. R. 176; 22 Sol. Jo. 702, C. A.

Annotations:—*Reid*. The Parlement Belge (1880), 5 P. D. 197; British Westinghouse Electric & Manufacturing Co. v. Electrical Co. (1911), 55 Sol. Jo. 689. *Mentd.* Moser v. Marsden, [1892] 1 Ch. 487; *Re* Millers' Patent (1894), 63 L. J. Ch. 324; *Aksionairnoye Obschestvo Luther v. Sagor*, [1921] 3 K. B. 532; *The Tervaele*, [1922] P. 259; *Duff Development Co. v. Kelantan Government*, [1923] 1 Ch. 385; *The Jupiter* (1924), 93 L. J. P. 156.

609. Agent of foreign government.—*FOREIGN BONDHOLDERS CORPN. v. PASTOR*, No. 883, *post*.

SECT. 11.—ALIENS.

Liability of aliens generally, *see* ALIENS, Vol. II., pp. 128 *et seq.*

610. Foreigners resident in England—Infringement of patent.—Injunction granted against subjects of the kingdom of Holland, to restrain them from using on board their ships within the dominions of England, without the licence of pl'ts., an invention, to the benefit of which pl'ts. were exclusively entitled under the Queen's patent.

Foreigners in this country, as well as British subjects are liable to actions for the injury done by their infringing upon the sole & exclusive right granted by the Crown to patentees of inventions in conformity with the law & constitution of this country; & the powers of the Ct. of Equity, which are founded on the insufficiency of the legal

remedy, must be enforced against them as well as against British subjects.—*CALDWELL v. VANVLISSENGEN*, *CALDWELL v. VERBECK*, *CALDWELL v. ROLFE* (1851), 9 Hare, 415; 21 L. J. Ch. 97; 18 L. T. O. S. 192; 16 Jur. 115; 68 E. R. 571.

Annotations:—*Consd.* Betts v. Neilson (1865), 3 De G. J. & Sm. 82; Betts v. Neilson, Betts v. De Vitre (1868), 3 Ch. App. 429. *Reid*. Betts v. Willmott (1871), 6 Ch. App. 239; Adair v. Young (1879), 12 Ch. D. 13; Nobel's Explosives Co. v. Jones, Scott (1881), 17 Ch. D. 721; Jackson v. Needle (1884), Griffin's Patent Cases, 132. *Mentd.* United Telephone Co. v. Sharples (1885), 29 Ch. D. 164; North Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439.

611. Foreigners resident abroad — Transaction abroad.—A foreign manufacturer, who manufactures abroad & sends by post at their request to a firm in England, articles which infringe an English patent, does not himself infringe the patent, & is not liable to an injunction restraining infringement in an action by the owner of the English patent.

The ct. has no jurisdiction to restrain a foreigner abroad as regards transactions carried on by him in his own country.—*BADISCHE ANILIN UND SODA FABRIK v. BASLE CHEMICAL WORKS, BINDSCHIEDLER*, [1898] A. C. 200; 67 L. J. Ch. 141; 77 L. T. 573; 46 W. R. 255; 14 T. L. R. 82, H. L.

Annotations:—*Reid*. Saccharin Corp'n. v. Reitmeyer, [1900] 2 Ch. 659; British Motor Syndicate v. Taylor, [1901] 1 Ch. 122; *Badische Anilin Und Soda Fabrik v. Chemische Fabrik Vormal's Sandoz* (1903), 88 L. T. 490; *Badische Anilin Und Soda Fabrik v. Hickson*, [1906] A. C. 419. *Mentd.* Wimble v. Rosenberg, [1913] 3 K. B. 743; Underwood v. Burgh Castle Brick & Cement Syndicate, [1922] 1 K. B. 343.

612. Foreign creditors — Suing abroad.—A., a trader in London, being in difficulties, sent round a letter to his creditors, asking for indulgence; thereupon certain creditors in New York commenced actions in the New York Cts. in respect of bills accepted, made payable, & dishonoured in London to attach the debts due to A. from various New York firms. A. immediately filed a petition for liquidation, a receiver was appointed, & application made for an injunction to restrain the actions in the New York Cts.:—*Held*: the ct. would not grant an injunction against the foreign creditors suing abroad.—*Re* CHAPMAN (1872), L. R. 15 Eq. 75; 42 L. J. Bcy. 38; 27 L. T. 628; 21 W. R. 104.

Restraint of foreign proceedings.—*See* CONFLICT OF LAWS, Vol. X., pp. 480 *et seq.*

SECT. 12.—TRADE UNIONS.

See TRADE & TRADE UNIONS.

Part X. Matters in respect of which Injunction may be Granted.

SECT. 1.—ADMINISTRATION OF ESTATES.

Injunction to restrain executor from acting—Grounds for interference.—*See* EXECUTORS, Vol. XXIII., pp. 44 *et seq.*

—Without making provision for contingent liabilities.—*See* EXECUTORS, Vol. XXIII., p. 368, No. 4380.

—Before probate.—*See* EXECUTORS, Vol. XXIII., p. 62, Nos. 423, 425.

SECT. 2.—CONTRACT.

SUB-SECT. 1.—PROOF OF DAMAGE.

613. Where breach of contract.—Where the construction of a contract is clear, & the breach clear, it is not a question of damage; but the mere circumstance of the breach of covenant affords sufficient ground for the ct. to interfere by injunction. *Semble*: the ct. may so interfere, whether the breach has or has not been actually

Sect. 2.—Contract: Sub-sects. 1, 2 & 3, A.]

committed, provided deft. claims & insists on a right to do the act which would constitute such breach.

Defts. demised to pltf. a plot of land, one-half of an adjoining brook, a cotton mill, reservoir & steam engine of 100 horse power on the plot of land, & the use of a weir below the mill, for the purpose of holding up the water of the brook from the weir to the level of the bed of the brook at a bridge above the mill, " & the free use & enjoyment of so much of the stream of water which usually flowed down the brook adjoining the plot of land as should be necessary for effectually supplying with water & working the said steam engine, or any other steam engine of like power & capacity "; & covenanted not to construct any other weir or dam between the weir & bridge, & for quiet enjoyment of the demised premises according to the tenor of the demise. Shortly afterwards defts. erected, a little below the bridge but above pltf.'s mill, a new cotton mill & steam engine, with a reservoir, which drew off water from the brook between pltf.'s reservoir & the bridge, & they discharged the heated water which they had used for their new mill into the brook, whereby on one occasion they raised the temperature of the water, which pltf. had to use for condensing his engine from 57° to 68°. All the engineering witnesses agreed that every additional degree of heat above 41 renders water less fit for condensing purposes. It was also deposed that on another occasion, in consequence of the increased temperature, pltf.'s engine worked " nearly half a stroke per minute less " than the usual rate of twenty-eight strokes per minute.

Upon motion for a decree the ct. granted a perpetual injunction, restraining defts. from discharging heated water, so as to increase the temperature of the water which pltf. used for condensing; being of opinion that the evidence exclusive of that as to the actual diminution in the working of the engine, showed a material interference with the quality of the water to which pltf. was entitled under the demise; & that the question whether such interference was such as to give him a right to damages was one which he was not obliged to try. But so much of the motion as sought to restrain defts. from diverting the water for their new mill was directed to stand over, upon terms of pltf. bringing an action, pltf. having failed to show that he had ever yet been deprived by defts. of the quantity of water necessary for effectually supplying & working his engine, although it appeared from the evidence that he had great reason to fear that he would be so deprived.—*TIPPING v. ECKERSLEY* (1855), 2 K. & J. 264; 69 E. R. 779.

*Innotations:—*Consd. *Leech v. Schweder* (1874), 9 Ch. App. 465, n. *Distd. Pattison v. Gilford* (1874), L. R. 18 Eq. 259. *Fold. Manners v. Johnson* (1875), 1 Ch. D. 673. *Consd. Devonport Corpn. v. Plymouth, Devonport & District Tram Co.* (1884), 52 L. T. 161; *Sharp v. Harrison*, [1922] 1 Ch. 502. *Reid. Westhoughton U. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159. *Mentd. Evans v. Davis* (1878), 27 W. R. 285; *Shatto v. Bolekow, Vaughan* (1887), 34 Ch. D. 725; *Leckhampton Quarries Co. v. Ballinger & Cheltenham R. D. Co.* (1904), 68 J. P. 484; *Dickens v. National Telephone Co., National Telephone Co. v. Hythe Corpn.* (1911), 75 J. P. 557; *Thornhill v. Weeks*, [1913] 1 Ch. 438.

614. —.] *LLOYD v. LONDON, CHATHAM & DOVER RY. Co.*, No. 683, *post*.

615. —.]—A pltf. suing for an injunction to restrain a breach of a covenant is not bound to show any special damage sustained thereby.—*FIELDEN v. SLATER* (1869), L. R. 7 Eq. 523; 17

W. R. 485; *sub nom. FIELDEN v. SLATER*, 38 L. J. Ch. 379; 20 L. T. 112.

*Annotations:—**Distd. Stuart v. Diplock* (1889), 43 Ch. D. 343. *Consd. Holloway v. Hill*, [1902] 2 Ch. 612. *Reid. Thornowell v. Johnson* (1881), 50 L. J. Ch. 641. *Mentd. L. & N. W. Ry. v. Garnett* (1869), 39 L. J. Ch. 25; *Jones v. Bone* (1870), L. R. 9 Eq. 674; *Allen v. Allen & Bell* (1894), 63 L. J. P. 120.

—.]—The purchaser of a piece of land entered into a covenant with the vendor not to do, or suffer to be done, on the land or any part thereof, anything which should be a nuisance to the owners of the adjoining property:—*Held*: the word "nuisance" must be restricted to its technical meaning, & the establishment of a national school, though it might be an annoyance, & cause a depreciation of the adjoining property, was not a legal nuisance which would be restrained by the injunction of this ct. as a breach of the covenant.

Although the Ct. of Ch. interferes, when it thinks it right, by way of injunction, to prevent the violation of a covenant, yet, if the violation is so slight, formal & unsubstantial that pltf. can have no ground in conscience to complain of it the ct. will not grant an injunction (*BACON, V.-C.*).

The ct. in refusing to grant an injunction did so without costs, being satisfied that defts. might have obtained some other site for the schools, where they would have been a less annoyance to the neighbours.—*HARRISON v. GOOD* (1871), L. R. 11 Eq. 338; 40 L. J. Ch. 294; 24 L. T. 263; 35 J. P. 612; 19 W. R. 346.

*Annotations:—**Appld. Sharp v. Harrison*, [1922] 1 Ch. 502. *Mentd. Nottingham Patent Brick & Tile Co. v. Butler* (1886), 16 Q. B. D. 778; *Re Davis & Cavey* (1888), 40 Ch. D. 601; *Tod-Heatly v. Benham* (1888), 40 Ch. D. 80; *Christie v. Davey*, [1893] 1 Ch. 316.

617. —.]—It is no defence to an application for an injunction to restrain a breach of covenant to say that the covenantee sustains no damage from the breach, for if the covenantor derives any benefit therefrom the covenantee may reasonably demand a share of it as the price of his consent.

Where, however, an injunction would inflict great injury on deft., & a delay in granting it would cause little or no loss to pltf., the ct. will not grant it on an interlocutory application, but will express its opinion & direct the motion to stand over till the hearing.—*WELLS v. ATTENBOROUGH* (1871), 24 L. T. 312; 19 W. R. 465.

618. —.]—(1) There is no difference in the right of an owner of land to the ordinary easement of light, whether it is acquired by twenty years' user or by grant from the owner of the servient tenement; & if the grant is accompanied by a covenant for quiet enjoyment of the premises, such covenant does not enlarge the right of the covenantee so as to entitle him to an injunction in equity to restrain an obstruction where the damage is not sufficient to enable him to maintain an action at law. But it is otherwise where the right to light claimed is not the ordinary easement, but a special right created by the covenant; in which case a ct. of equity will grant an injunction without regard to the amount of damage.

(2) Where the ct. was not satisfied from the evidence whether the wall proposed to be built by deft. would or not be a material obstruction to pltf.'s lights, the ct. directed a temporary screen to be erected to the height of the proposed wall, & appointed a surveyor to report on the effect.—*LEECH v. SCHWEDER* (1874), 9 Ch. App. 463; 43 L. J. Ch. 487; 30 L. T. 586; 38 J. P. 612; 22 W. R. 633, L. J. J.

*Annotations:—**As to* (1) *Appld. Manners v. Johnson* (1875), 1 Ch. D. 673. *Reid. Leader v. Moody* (1875), L. R. 20 Eq. 145; *Brigg v. Thornton* (1903), 73 L. J. Ch. 301. *Generally, Mentd. Pennington v. Brinsop Hall Coal Co.*

PART X.—MATTERS IN RESPECT OF WHICH INJUNCTION MAY BE GRANTED. 441

(1877), 5 Ch. D. 769; Bayley v. G. W. Ry. (1884), 20 Ch. D. 434; Warren v. Brown, [1900] 2 Q. B. 722; G. N. Ry. v. I. R. Comrs., [1901] 1 K. B. 416; Davis v. Town Properties Investment Corp., [1903] 1 Ch. 797; Colls v. Home & Colonial Stores, [1904] A. C. 179.

619. —.]—The question of substantial injury is not material for the purpose of an injunction, when the right established arises under contract.—

ALLEN v. SECKHAM (1878), as reported in 47 L. J. Ch. 742; *reversd.* on other grounds (1879), 11 Ch. D. 790, C. A.

Annotations:—**Mentd.** English & Scottish Mercantile Investment Co. v. Brunton, [1892] 2 Q. B. 700; Poulton v. Moore (1913), 83 L. J. K. B. 875.

620. —.]—The ct. will grant an injunction where, though the injury is very small, there is a clear breach of covenant.—COOKE v. GILBERT (1892), 8 T. L. R. 382, C. A.

Compare Sub-sect. 2, *post.*

See, also, Sub-sect. 6, B., *post.*

SUB-SECT. 2.—DAMAGES ADEQUATE REMEDY.

621. Injunction not granted.]—PICKERING v. ELY (Bp.), No. 657, *post.*

622. —.]—The proprietor of a pier erected under the powers of an Act of Parliament, which were to be exercised during a certain limited period, was authorised by the Act to demand certain specified tolls for the use of the pier when completed. By an agreement between him & a railway co. he agreed to complete his pier at a considerably earlier time than he was bound to do by the Act, & the co. agreed to complete a branch railway to the pier by the same time; but the agreement contained no stipulations as to opening the pier or railway, or as to the terms on which the pier was to be used. The owner of the pier completed it accordingly, but refused to permit the railway co. to use it, except upon terms to which the co. declined to accede. The ct. refused to grant on motion an injunction restraining the owner of the pier from obstructing the use of it by the co. at the statutory tolls.

The ct. ought not to interfere in favour of pltf's. I am unable to view the damage apprehended as irreparable, or as not susceptible of pecuniary compensation, if pltf's. make out their claim to it (KNIGHT BRUCE, V.-C.).—FURNESS RY. Co. v. SMITH (1847), 1 De G. & Sm. 299; 63 E. R. 1076.

623. —.]—Upon an application for an injunction to restrain the breach of an agreement, the ct. ordered the motion to stand over, with liberty for pltf. to take proceedings at law. Pltf. thereupon brought his action, & recovered a sum of £500 by way of liquidated damages, & then renewed his application for an injunction. The ct. refused to interfere.

PART X. SECT. 2, SUB-SECT. 2.

621 i. Injunction not granted.]—Pltf. applied for an injunction to restrain deft. from selling or otherwise disposing of lumber, of which he claimed to be owner under an alleged purchase from the co., the validity of which was disputed. The injunction was refused, pltf. having an adequate legal remedy at common law by action for damages.—MOREN v. SHELburne LUMBER Co. (circa 1874), R. E. D. 134.—CAN.

621 ii. —.]—CREIGHTON v. JENKINS (1884), 5 R. & G. 352.—CAN.

621 iii. —.]—BRITISH COLUMBIA POULTRY ASSOCN. v. ALLANSON, [1922] 2 W. W. R. 831.—CAN.

621 iv. —.]—The parties to the action entered into an agreement not to sell more than one cargo of fish each month, & at a price not less than 30s.

per drum. On a breach by deft., pltf. took action to recover the amount of damages provided by the agreement for such an event, & also claimed an injunction to prevent further breach. Upon application for an injunction:—**Held:** there was not sufficient ground for the exercise of the extraordinary power of the ct., & the application should be dismissed.—JOB v. BOWRING (1900), 8 Nfld. L. R. 411.—NFLD.

PART X. SECT. 2, SUB-SECT. 3.—A.

627 i. Covenant uncertain.]—Where in a written agreement it is provided that payment of certain money shall be made "when the exchange (between two specified countries) has dropped to a more normal rate," the words "more normal" are too indefinite upon which to base an injunction so as to give effect to the alleged intention of the

When a party comes here for an injunction against the breach of an agreement, the ct. assumes jurisdiction, because the remedy at law is not efficient, & the interest of the party requires that the act should be prevented, instead of his merely receiving compensation in the shape of damages; but this jurisdiction is exercised in reference to the right established by the legal contract (LORD COTTENHAM, C.).—SAINTER v. FERGUSON (1849), 1 Mac. & G. 286; 1 H. & Tw. 383; 19 L. J. Ch. 170; 14 L. T. O. S. 217; 14 Jur. 255; 41 E. R. 1275, L. C.

Annotations:—**Folld.** Carnes v. Nisbett (1861), 7 H. & N. 158; Carnes v. Nesbitt (1862), 7 H. & N. 778. **Distd.** Thornton v. Kendall (1863), 1 New Rep. 391. **Folld.** Young v. Chalkley (1867), 16 L. T. 286. **Consd.** Gent v. Harrison (1893), 69 L. T. 307. **Appld.** General Accident Assce. Corp. v. Noel, [1902] 1 K. B. 377. **Mentd.** Mercer v. Irving (1858), 27 L. J. Q. B. 291.

624. —.]—DOLLFUS v. PICKFORD, No. 218, *ante.*

625. —.]—GARRETT v. BANSTEAD & EPSOM DOWNS RY. Co., No. 647, *post.*

626. —.]—GLASSE v. WOOLGAR & ROBERTS (No. 2) (1897), 41 Sol. Jo. 573, C. A.

SUB-SECT. 3.—ENFORCEMENT OF CONTRACT.

A. In General.

627. Covenant uncertain.]—Covenant upon a conveyance in fee with the grantors, lessees of waterworks, not to sell or dispose of water from a well to the injury of the proprietors of the said waterworks, their heirs, exors., administrators, & assigns. The parties left to law, & a demurrer allowed, from the inconvenience of enforcing such a covenant by injunction.—COLLINS v. PLUMB (1810), 16 Ves. 454; 33 E. R. 1057, L. C.

Annotations:—**Distd.** Catt v. Tourle (1869), 4 Ch. App. 654. **Refd.** Lumley v. Wagner (1852), 1 De G. M. & G. 604; Clegg v. Hands (1889), 44 Ch. D. 506, n.

628. — **Negative covenant coupled with vague terms.]**—KIMBERLEY v. JENNINGS, No. 701, *post.*

629. —.]—On a dissolution of partnership the retiring partner, who received a large sum of money, covenanted "to retire from the partnership; & so far as the law allows, from the business, & not to trade, act, or deal in any way so as directly or indirectly to affect the continuing partners." The business had been carried on at Wolverhampton & in London. In an action by the survivor of the continuing partners & his assignees to restrain the retiring partner from carrying on a similar business in Middlesex:—**Held:** the covenant to retire from the business so far as the law allows was too vague for the ct. to enforce.—DAVIES v. DAVIES (1887), 36 Ch. D. 359; 56

parties.—BRUNIE & MATURE v. ROYAL BANK OF CANADA, [1922] 3 W. W. R. 82; 68 D. L. R. 318.—CAN.

r. Agreement not executed by all parties.]—Several proprietors of salt wells entered into an undertaking to sell their products through trustees, & in no other way; & a written agreement to this effect was executed by all the parties, except one, who was resident in England, & carried on his business through an agent. The business was carried on under the agreement, notwithstanding his non-execution of the deed, & one of the other parties having subsequently attempted to act in contravention of the agreement:—**Held:** the delay of the absent party to sign the contract could not be set up as answer to a motion for an injunction restraining the contravention.—ONTARIO SALT Co. v.

Sect. 2.—Contract: Sub-sect. 3, A. & B.]

L. J. Ch. 962; 58 L. T. 209; 36 W. R. 86; 3 T. L. R. 839, C. A.

*Annotations:—***Apld.** *Tinsley v. Tinsley* (1888), 4 T. L. R. 376. **Consd.** *Reeve v. Marsh* (1906), 23 T. L. R. 24. **Refd.** *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630. **Mentd.** *Davies, Turner v. Lowen* (1891), 64 L. T. 655; *Mills v. Dunham*, [1891] 1 Ch. 676; *Badische Anilin und Soda Fabrik v. Schott, Segner*, [1892] 3 Ch. 447; *Rivington v. Garden*, [1901] 1 Ch. 581; *Welstead v. Hadley* (1904), 21 T. L. R. 165; *North Western Salt Co. v. Electrolytic Alkali Co.* (1912), 107 L. T. 439; *Horwood v. Millar's Timber & Trading Co.*, [1917] 1 K. B. 305.

630. —.] — *TINSLEY v. TINSLEY* (1888), 4 T. L. R. 376.

631. —.] — In a contract of personal service a stipulation by the employed to "act exclusively for" his employers does not, in the absence of a negative covenant express or implied which is sufficiently clear & definite, confer upon the employers a right to obtain an injunction against the employed to restrain him from entering into the employment of other persons.—**MUTUAL RESERVE FUND LIFE ASSOCN. v. NEW YORK LIFE INSURANCE CO. & HARVEY** (1896), 75 L. T. 528; 13 T. L. R. 32; 41 Sol. Jo. 47, C. A.

*Annotation:—***Apld.** *Chapman v. Westerby* (1913), 58 Sol. Jo. 50.

632. Covenant oppressive.]—*KIMBERLEY v. JENNINGS*, No. 701, *post*.

633. —.] — A lease of mines contained a covenant that, if the lessor should at any time before the expiration or determination of the lease give notice, in writing, to the lessee, of his desire to take all or any part of the machinery, stock-in-trade, implements, etc., in or about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified in the notice to the lessor on his paying the value of them, such value to be ascertained in the manner therein mentioned:—**Held:** the covenant was so injurious & oppressive to the lessee, that the ct. ought not to enforce it, or to grant an injunction to prevent a breach of it.—**TALBOT v. FORD** (1842), 13 Sim. 173; 6 Jur. 843; 60 E. R. 66.

634. Illegal agreement.]—Deft., a duly qualified medical practitioner, agreed with pltf., a medical practitioner not duly qualified but who was described in the agreement as "medical practitioner," to serve pltf. as assistant in his profession as a medical practitioner & not to practise at R. within five years after the close of the engagement. Pltf. applied for an injunction to prevent deft. from practising at R. in breach of this agreement. Deft. showed that pltf. had given various certificates of cause of death which showed that pltf. had attended deceased persons during their last illness & from which it was to be inferred that he attended patients in the way in which a medical practitioner ordinarily attends, & in fact personally acted as an apothecary:—**Held:** his doing so was made illegal by Apothecaries Act, 1815

(c. 194), s. 14, the agreement therefore was to assist pltf. in carrying on a business which he could not lawfully carry on, & the agreement was illegal & could not be enforced.—**DAVIES v. MAKUNA** (1885), 29 Ch. D. 596; 54 L. J. Ch. 1148; 53 L. T. 314; 50 J. P. 5; 33 W. R. 668; 1 T. L. R. 420, C. A.

*Annotation:—***Mentd.** *Bellerby v. Heyworth*, [1909] 2 Ch. 23.

635. Enforcement of personal relationships—Interference with surgeon of hospital.]—Enormous inconvenience would be occasioned if cts. of equity were to enforce the continuance of strictly personal relations when those relations have become irksome, & enforced them under penalty of imprisonment for contempt of ct. That would be too gross an interference with the liberty of the subject, & upon that ground cts. of equity have refused to enforce them. The position of pltf. is twofold. He is a subscriber to the hospital, & so a governor, & that position was not interfered with. He is also a medical officer. It is not necessary to consider whether the appointment constitutes a contract with him or not; but if it does, it creates a purely personal relationship. There is sometimes a confusion between two classes of cases, one class where the parties contribute funds which are laid out on property which all enjoy in common, such as clubs, & the other class where the contract creates a purely personal relationship, such as master & servant. If in the latter class of case the party has suffered any injury, he has a right to damages only. Pltf.'s position as a medical officer being a purely personal one, cts. of equity would not interfere (**FRY, L.J.**).—**MILLICAN v. SULLIVAN** (1888), 4 T. L. R. 203, C. A.

636. Covenant against public policy—Drinking fountain with defamatory inscription.]—A contract by a local authority to maintain a drinking fountain, on which there were inscribed defamatory words calculated to hold up a public institution to execration, & to provoke a breach of the peace, is a contract against public policy, & not such a contract as the ct. will enforce by mandatory injunction.—**WOODWARD v. BATTERSEA CORPN.** (1911), 104 L. T. 51; 75 J. P. 193; 27 T. L. R. 196; 9 L. G. R. 248.

637. Contract impossible of performance—Injunction to restrain different act.]—**Semle:** although the ct. cannot compel a party to do an act contracted for on the ground of impossibility, it will restrain him from doing something different.—**SEAWELL v. WEBSTER** (1859), 29 L. J. Ch. 71; 7 W. R. 691.

Compare Sub-sect. 8, *post*.

638. —.] — Deft. agreed to let a houseboat to pltf. for a fortnight, but before the date fixed for the commencement of the tenancy deft. declined to carry out the arrangement & let the houseboat to other persons, & these persons were in occupation at the time of an application by pltf. for an *interim* injunction to restrain deft.

MERCHANTS SALT CO. (1871), 18 Gr. 551.—**CAN.**

t. Enforcement of covenant against assignee.]—**RYAN v. LOCKHART** (1872), 1 Pug. 127.—**CAN.**

a. Enforcement of conditions of oil & gas leases.]—**WELLAND COUNTY LIME WORKS CO. v. SHURR** (1912), 23 O. W. R. 397; 4 O. W. N. 336; 8 D. L. R. 720.—**CAN.**

b. —.]—**WELLAND COUNTY LIME WORKS CO. v. AUGUSTINE** (1912), 23 O. W. R. 399; 4 O. W. N. 338; 8 D. L. R. 1046.—**CAN.**

c. Enforcement of rights under special Act—Effect of statute in 1878 it was

the Govt. should construct the S. Railway if pltf.'s predecessor in title should defray the costs. It was further provided that, when constructed, the line would be managed & operated on such terms as the Minister for Public Works & pltf.'s predecessor in title should agree upon. In 1879, & after the line had been opened, the portion of the Act of 1878 under which the line was constructed was repealed. In 1890 the Railway Comrs., without consulting pltf., & in opposition to their wish, agreed with another co. to construct a siding with a view to connect the co.'s line with the S. Railway. On an application for an interlocutory injunction to restrain the comrs. &

co. from carrying out the agreement:—**Held:** pltf. had, for valuable consideration, acquired rights in the line, & the agreement was in derogation of these rights, & therefore pltf. were entitled to the injunction asked for.—**HAZLETT v. ALLEN** (1890), 8 N. Z. L. R. 500.—**N.Z.**

d. Enforcement of rights against subsequent owners.]—Pltf. under an agreement made in 1888 obtained from a railway co. the exclusive right to maintain & operate lines of tele-

— subsequently became the assignees to a lease assignment from the Govt. of the railway, & at a later

from letting the houseboat to other persons:—*Held*: pltf.'s remedy, if any, lay in damages only.

The other tenants are now in actual possession of the houseboat, &, in these circumstances, I am unable to grant the injunction (SARGANT, J.).—*DEVERELL v. MILNE* (1918), 34 T. L. R. 576.

B. Contract Involving Supervision of the Court.

639. General rule.]—An injunction will not be granted to restrain a threatened breach by a tenant of a stipulation in a farming agreement requiring him to keep on the farm a proper & sufficient stock of sheep, horses & cattle.

The ct. will not undertake to superintend the performance of a series of continuous acts (STIRLING, J.).—*PHIPPS v. JACKSON* (1887), 56 L. J. Ch. 550; 35 W. R. 378; 3 T. L. R. 387.

640. Execution of works.]—The ct. has not jurisdiction to decree the specific performance of a contract, for which the consideration on the part of pltf. is the execution of certain works which the ct. is unable to superintend.

Where the bill stated an agreement to employ pltf.s. as contractors for making a railway, & to pay for the works in debentures & shares of the co., a motion for an injunction to restrain the co. from dealing with the debentures, & transferring the shares in question to others, in derogation of pltf.s.' rights, was refused.—*PETO v. BRIGHTON, UCKFIELD & TUNBRIDGE WELLS RY. CO.* (1863), 1 Hem. & M. 468; 2 New Rep. 415; 32 L. J. Ch. 677; 9 L. T. 227; 11 W. R. 874; 71 E. R. 205.

Annotations:—*Apld.* Brett v. East India & London Shipping Co. (1864), 10 L. T. 187. *Refd.* Greenhill v. Isle of Wight (Newport Junction) Ry. (1871), 23 L. T. 886; Nuneaton L. B. v. General Sewage Co. (1875), L. R. 20 Eq. 127; Grimstone v. Cuninghame, [1894] 1 Q. B. 125; Measures v. Measures, [1910] 2 Ch. 248.

641. Farming agreement—Cultivation of land.]

—A lease of a plot of moorland was granted to a lessee, who covenanted to bring the same into cultivation within five years from the date of the lease, according to the most approved method of husbandry pursued in the neighbourhood of the premises, & to keep the same in good farming & husbandry-like condition. The former covenant was not performed by the lessee, & thirty years afterwards his assignee converted the land into a place of amusement, & constructed a running path thereon, & charged for admission thereto. The lessor filed the present bill to have the covenants of the lease performed, & for an injunction to restrain deft., the present holder of the lease, from using the land as a place of public amusement: *Semble*: if there had been a breach of the latter covenant it was not such a one as the ct. would enforce by mandatory injunction.

It is not such a covenant as the ct. would compel the performance of by mandatory injunction. If the ct. were to do so it would be constantly employed in regulating the cultivation of a great part of the country (JESSEL, M.R.).—*MUSGRAVE v. HORNER* (1874), 31 L. T. 632; 23 W. R. 125.

642. —Sufficient stocking of farm.]—*PHIPPS v. JACKSON*, No. 639, *ante*.

643. Employment of resident porter.]—The lease of a residential flat, in a block of buildings

let in flats to several tenants, contained a covenant by which it was agreed & declared by & between the parties to the lease that the premises were let subject to the regulations made by the lessors with respect to the duties of the resident porter, which were set forth in a schedule thereto. These regulations, in effect, provided that the block of buildings should be in charge of a resident porter appointed by the lessors, who was to act as the servant of the tenants in the block, to be constantly in attendance either by himself or, in his temporary absence, by some trustworthy assistant, & to perform certain services specified by the regulations. The lessors appointed to the situation of resident porter a man who was by avocation a cook. He for the most part employed boys & charwomen to perform his duties as porter, & absented himself from the premises every weekday for several hours for the purpose of acting as chef at a neighbouring club. In an action by the lessee against the lessors for breach of the covenant:—*Held*: that part of the agreement which provided for the appointment by the lessors of a porter was not divisible from so much of it as provided for the various duties of the porter, & as such a contract would require the constant supervision of the ct. during the existence of the lease, it was not one for which a decree of specific performance could be granted, & the ct. could not grant an injunction to prevent continuance of the breach of the covenant.—*RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCN.*, [1893] 1 Ch. 116; 62 L. J. Ch. 252; 67 L. T. 820; 41 W. R. 146; 9 T. L. R. 72; 37 Sol. Jo. 45; 2 R. 156, C. A.

Annotations:—*Consd.* Wolverhampton Corpn. v. Emmons, [1901] 1 K. B. 515. *Apld.* Barnes v. City of London Real Property Co., [1918] 2 Ch. 18. *Consd.* Kennard v. Cory, [1922] 2 Ch. 1. *Refd.* Davis v. Foreman, [1894] 3 Ch. 654; Alexander v. Mansions Proprietary (1900), 16 T. L. R. 431; Kirchner v. Gruban, [1900] 1 Ch. 413; L. C. & D. Ry. & S. E. & C. Ry. v. Spiers & Pond (1916), 32 T. L. R. 493; Prosperity v. Lloyds Bank (1923), 39 T. L. R. 372.

644. Supply of tape-recording instruments.]—Defts. were a co. incorporated under Cos. Act, 1862 (c. 89), & licensed by the Postmaster-General under Telegraph Act, 1869 (c. 73), s. 5, to establish telegraphs within the limits of their districts, which included the London Stock Exchange, for the purpose of simultaneously transmitting news to their subscribers. This news consisted, amongst other things, of current fluctuations of prices on the Stock Exchange, & was by the permission of the Stock Exchange collected there by defts.' agents & distributed from defts.' offices to the offices of their subscribers by means of tape-recording instruments supplied by defts. Pltf. was not a member of the Stock Exchange & was in the habit of advertising for business. Defts. had entered into three separate contracts with pltf. for which they undertook to supply him with three of their instruments. By the rules of the Stock Exchange its members were not allowed to advertise, & the Stock Exchange having required defts. to cease supplying outside brokers who advertised with the special information collected in the building, defts. disconnected the three instruments from the supply of that class of news.

date erected a line of telegraph along the roadway. In an action to restrain defts. from the operation of the line of telegraph:—*Held*: the agreement made in 1888 was binding on defts. & pltf.s. were entitled to an injunction to restrain defts. from operating the telegraph erected by them.—*ANGLO-AMERICAN TELEGRAPH CO. v. REID NEWFOUNDLAND CO., LTD.* (1909), 9 Nfld. L. R.

PART X. SECT. 2, SUB-SECT. 3.—B.

642 i. Farming agreement—Sufficient stocking of farm.]—Where a lessee covenanted that he would keep on the leased premises sufficient stock in trade to satisfy a distress for rent for a specified period:—*Held*: an injunction could not be granted to restrain the breach of the covenant on the ground that the ct. would not grant an injunction which really amounted

to a decree for specific performance requiring the continual superintendence of the ct. to carry it out.—*HILL v. FRASER* (1914), 29 W. L. R. 458; 7 W. W. R. 131; 18 D. L. R. 1; 7 Alta. L. R. 464.—CAN.

6. Agreement to run electric cars.]—The ct. will not order specific performance of an agreement by an electric railway co. to run its cars on certain

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L. J. Ch. 962; 58 L. T. 209; 36 W. R. 86; 3 T. L. R. 839, C. A.

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(c. 194), s. 14, the agreement therefore was to assist pltf. in carrying on a business which he could not lawfully carry on, & the agreement was illegal & could not be enforced.—**DAVIES v. MAKUNA** (1885), 29 Ch. D. 596; 54 L. J. Ch. 1148; 53 L. T. 314; 50 J. P. 5; 33 W. R. 668; 1 T. L. R. 420, C. A.

Annotation:—**Mentd.** *Bellerby v. Heyworth*, [1909] 2 Ch. 23.

635. Enforcement of personal relationships—Interference with surgeon of hospital.]—Enormous inconvenience would be occasioned if cts. of equity were to enforce the continuance of strictly personal relations when those relations have become irksome, & enforced them under penalty of imprisonment for contempt of ct. That would be too gross an interference with the liberty of the subject, & upon that ground cts. of equity have refused to enforce them. The position of pltf. is twofold. He is a subscriber to the hospital, & so a governor, & that position was not interfered with. He is also a medical officer. It is not necessary to consider whether the appointment constitutes a contract with him or not; but if it does, it creates a purely personal relationship. There is sometimes a confusion between two classes of cases, one class where the parties contribute funds which are laid out on property which all enjoy in common, such as clubs, & the other class where the contract creates a purely personal relationship, such as master & servant. If in the latter class of case the party has suffered any injury, he has a right to damages only. Pltf.'s position as a medical officer being a purely personal one, cts. of equity would not interfere (**FRY, L.J.**).—**MILLICAN v. SULLIVAN** (1888), 4 T. L. R. 203, C. A.

636. Covenant against public policy—Drinking fountain with defamatory inscription.]—A contract by a local authority to maintain a drinking fountain, on which there were inscribed defamatory words calculated to hold up a public institution to execration, & to provoke a breach of the peace, is a contract against public policy, & not such a contract as the ct. will enforce by mandatory injunction.—**WOODWARD v. BATTERSEA CORPN.** (1911), 104 L. T. 51; 75 J. P. 193; 27 T. L. R. 196; 9 L. G. R. 248.

637. Contract impossible of performance—Injunction to restrain different act.]—**Semble:** although the ct. cannot compel a party to do an act contracted for on the ground of impossibility, it will restrain him from doing something different.—**SEAWELL v. WEBSTER** (1859), 29 L. J. Ch. 71; 7 W. R. 691.

Compare Sub-sect. 8, post.

638. —.]—Deft. agreed to let a houseboat to pltf. for a fortnight, but before the date fixed for the commencement of the tenancy deft. declined to carry out the arrangement & let the houseboat to other persons, & these persons were in occupation at the time of an application by pltf. for an *interim* injunction to restrain deft.

MERCHANTS SALT CO. (1871), 18 Gr. 551.—**CAN.**

t. Enforcement of covenant against assignee.]—**RYAN v. LOCKHART** (1872), 1 Pug. 127.—**CAN.**

a. Enforcement of conditions of oil & gas leases.]—**WELLAND COUNTY LIME WORKS CO. v. SHURR** (1912), 23 O. W. R. 397; 4 O. W. N. 336; 8 D. L. R. 720.—**CAN.**

b. —.]—**WELLAND COUNTY LIME**

D. L. R.

c. Enforcement of rights under special Act—Effect of statute in 1878 it was

the Govt. should construct the S. Railway if pltf.'s predecessor in title should defray the costs. It was further provided that, when constructed, the line would be managed & operated on such terms as the Minister for Public Works & pltf.'s predecessor in title should agree upon. In 1879, & after the line had been opened, the portion of the Act of 1878 under which the line was constructed was repealed. In 1890 the Railway Comrs., without consulting pltf., & in opposition to their wish, agreed with another co. to construct a siding with a view to connect the co.'s line with the S. Railway. On an application for an *interlocutory* injunction to restrain the comrs.

co. from carrying out the agreement:—**Held:** pltf. had, for valuable consideration, acquired rights in the line, & the agreement was in derogation of these rights, & therefore pltf. were entitled to the injunction asked for.—**HAZLETT v. ALLEN** (1890), 8 N. Z. L. R. 500.—**N.Z.**

d. Enforcement of rights against subsequent owners.]—Pltf. under an agreement made in 1888 obtained from a railway co. the exclusive right to maintain & operate lines of telegraph along the roadway of the railway. Defts. subsequently became the assignees to a means assignment from the Govt. of the railway, & at a later

from letting the houseboat to other persons:—*Held*: pltf.'s remedy, if any, lay in damages only.

The other tenants are now in actual possession of the houseboat, & in these circumstances, I am unable to grant the injunction (SARGANT, J.).—*DEVERELL v. MILNE* (1918), 34 T. L. R. 576.

B. Contract Involving Supervision of the Court.

639. General rule.]—An injunction will not be granted to restrain a threatened breach by a tenant of a stipulation in a farming agreement requiring him to keep on the farm a proper & sufficient stock of sheep, horses & cattle.

The ct. will not undertake to superintend the performance of a series of continuous acts (STIRLING, J.).—*PHIPPS v. JACKSON* (1887), 56 L. J. Ch. 550; 35 W. R. 378; 3 T. L. R. 387.

640. Execution of works.]—The ct. has not jurisdiction to decree the specific performance of a contract, for which the consideration on the part of pltf. is the execution of certain works which the ct. is unable to superintend.

Where the bill stated an agreement to employ ptfs. as contractors for making a railway, & to pay for the works in debentures & shares of the co., a motion for an injunction to restrain the co. from dealing with the debentures, & transferring the shares in question to others, in derogation of ptfs.' rights, was refused.—*PETO v. BRIGHTON, UCKFIELD & TUNBRIDGE WELLS RY. CO.* (1863), 1 Hem. & M. 468; 2 New Rep. 415; 32 L. J. Ch. 677; 9 L. T. 227; 11 W. R. 874; 71 E. R. 205.

Annotations:—*Apld.* *Brett v. East India & London Shipping Co.* (1864), 10 L. T. 187. *Reid.* *Greenhill v. Isle of Wight (Newport Junction) Ry.* (1871), 23 L. T. 885; *Nuneaton L. B. v. General Sewage Co.* (1875), L. R. 20 Eq. 127; *Grimstone v. Cunningham*, [1894] 1 Q. B. 125; *Measures v. Measures*, [1910] 2 Ch. 248.

641. Farming agreement—Cultivation of land.]—A lease of a plot of moorland was granted to a lessee, who covenanted to bring the same into cultivation within five years from the date of the lease, according to the most approved method of husbandry pursued in the neighbourhood of the premises, & to keep the same in good farming & husbandry-like condition. The former covenant was not performed by the lessee, & thirty years afterwards his assignee converted the land into a place of amusement, & constructed a running path thereon, & charged for admission thereto. The lessor filed the present bill to have the covenants of the lease performed, & for an injunction to restrain deft., the present holder of the lease, from using the land as a place of public amusement: *Semle*: if there had been a breach of the latter covenant it was not such a one as the ct. would enforce by mandatory injunction.

It is not such a covenant as the ct. would compel the performance of by mandatory injunction. If the ct. were to do so it would be constantly employed in regulating the cultivation of a great part of the country (JESSEL, M.R.).—*MUSGRAVE v. HORNER* (1874), 31 L. T. 632; 23 W. R. 125.

642. —Sufficient stocking of farm.]—*PHIPPS v. JACKSON*, No. 639, *ante*.

643. Employment of resident porter.]—The lease of a residential flat, in a block of buildings

let in flats to several tenants, contained a covenant by which it was agreed & declared by & between the parties to the lease that the premises were let subject to the regulations made by the lessors with respect to the duties of the resident porter, which were set forth in a schedule thereto. These regulations, in effect, provided that the block of buildings should be in charge of a resident porter appointed by the lessors, who was to act as the servant of the tenants in the block, to be constantly in attendance either by himself or, in his temporary absence, by some trustworthy assistant, & to perform certain services specified by the regulations. The lessors appointed to the situation of resident porter a man who was by avocation a cook. He for the most part employed boys & charwomen to perform his duties as porter, & absented himself from the premises every weekday for several hours for the purpose of acting as chef at a neighbouring club. In an action by the lessee against the lessors for breach of the covenant:—*Held*: that part of the agreement which provided for the appointment by the lessors of a porter was not divisible from so much of it as provided for the various duties of the porter, & as such a contract would require the constant supervision of the ct. during the existence of the lease, it was not one for which a decree of specific performance could be granted, & the ct. could not grant an injunction to prevent continuance of the breach of the covenant.—*RYAN v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCN.*, [1893] 1 Ch. 116; 62 L. J. Ch. 252; 67 L. T. 820; 41 W. R. 146; 9 T. L. R. 72; 37 Sol. Jo. 45; 2 R. 156, C. A.

Annotations:—*Consd.* *Wolverhampton Corpn. v. Emmons*, [1901] 1 K. B. 515. *Apld.* *Barnes v. City of London Real Property Co.*, [1918] 2 Ch. 18. *Consd.* *Kennard v. Cory*, [1922] 2 Ch. 1. *Reid.* *Davis v. Foreman*, [1894] 3 Ch. 654; *Alexander v. Mansions Proprietary* (1900), 16 T. L. R. 431; *Kirchner v. Gruban*, [1900] 1 Ch. 413; *L. C. & D. Ry. & S. E. & C. Ry. v. Splers & Pond* (1916), 32 T. L. R. 493; *Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372.

644. Supply of tape-recording instruments.]—Defts. were a co. incorporated under Cos. Act, 1862 (c. 89), & licensed by the Postmaster-General under Telegraph Act, 1869 (c. 73), s. 5, to establish telegraphs within the limits of their districts, which included the London Stock Exchange, for the purpose of simultaneously transmitting news to their subscribers. This news consisted, amongst other things, of current fluctuations of prices on the Stock Exchange, & was by the permission of the Stock Exchange collected there by defts.' agents & distributed from defts.' offices to the offices of their subscribers by means of tape-recording instruments supplied by defts. Pltf. was not a member of the Stock Exchange & was in the habit of advertising for business. Defts. had entered into three separate contracts with pltf. for which they undertook to supply him with three of their instruments. By the rules of the Stock Exchange its members were not allowed to advertise, & the Stock Exchange having required defts. to cease supplying outside brokers who advertised with the special information collected in the building, defts. disconnected the three instruments from the supply of that class of news.

date erected a line of telegraph along the roadway. In an action to restrain defts. from the operation of the line of telegraph:—*Held*: the agreement in 1888 was binding on defts. & ptfs. were entitled to an injunction to restrain defts. from operating the telegraph erected by them.—*ANGLO-AMERICAN TELEGRAPH CO. v. REID NEWFOUNDLAND CO., LTD.* (1909), 9 d. L. R. 401.

PART X. SECT. 2, SUB-SECT. 3.—B.

642 i. Farming agreement—Sufficient stocking of farm.]—Where a lessee covenanted that he would keep on the leased premises sufficient stock in trade to satisfy a distress for rent for a specified period:—*Held*: an injunction could not be granted to restrain the breach of the covenant on the ground that the ct. would not grant an injunction which really amounted

to a decree for specific performance requiring the continual superintendence of the ct. to carry it out.—*HILL v. FRASER* (1914), 29 W. L. R. 458; 7 W. W. R. 131; 18 D. L. R. 1; 7 Alta. L. R. 464.—CAN.

e. Agreement to run electric cars.]—The ct. will not order specific performance of an agreement by an electric railway co. to run its cars on certain

Sect. 2.—Contract: Sub-sect. 3, B. & C. (a) & (b).]

Two of the three contracts were made without reference to the rules of the Stock Exchange; the third contract was made subject to the rules of the Stock Exchange:—*Held*: although there had been breaches by defts. of the two former contracts, pltf. was entitled to damages only, & not to an injunction, the contracts being for personal service, in reference to a chattel.

The reason for not granting an injunction in cases like the present is apparent, namely, that if such injunctions were granted there would be continued applications to the ct. to commit defts. if they broke the injunction & the ct. would be superintending a course of business (CHITTY, J.).—*COCHRANE v. EXCHANGE TELEGRAPH CO., LTD.* (1896), 65 L. J. Ch. 334; 12 T. L. R. 197; 40 Sol. Jo. 275.

C. Where Specific Performance Would Not be Decreed.**(a) In General.**

See, generally, SPECIFIC PERFORMANCE.

645. Whether injunction granted.]—The ct. will not interfere by injunction to prevent the violation of an agreement, of which, from the nature of the subject, there could be no decree for a specific performance; as, for instance, to restrain deft. from imparting the secret of an invention which had been the subject of a patent long since expired.—*NEWBERY v. JAMES* (1817), 1 Carp. Pat. Cas. 367; 2 Mer. 446; 35 E. R. 1011, L. C.

Annotations:—*Distd.* *Amber Size & Chemical Co. v. Menzel*, [1913] 2 Ch. 239. *Reid.* *Green v. Church* (1823), 1 L. J. O. S. Ch. 203; *Leather Cloth Co. v. American Leather Cloth Co.* (1863), 4 De G. J. & Sm. 137; *James v. James* (1872), 20 W. R. 434. *Mentd.* *Morison v. Moat* (1851), 20 L. J. Ch. 513.

646. —.]—Where a bill prayed specific performance of an agreement to let a certain spot at a certain rent, but the main relief sought was not in respect of the main subject of the agreement, but in respect of certain vague stipulations contained in it, & there had been a departure from the original terms of the agreement, & non-performance by defts. had been dealt with by pltf. as matter of compensation:—*Held*: the ct. could not decree specific performance, & motion for an injunction by pltf. to restrain certain acts alleged to be in violation of the agreement, refused.—*PARIS CHOCOLATE CO. v. CRYSTAL PALACE CO.* (1855), 3 Sm. & G. 119; 25 L. T. O. S. 7; 1 Jur. N. S. 720; 3 W. R. 267; 65 E. R. 588.

647. —.]—(1) The ct. will not, by interlocutory injunction, restrain one of the parties to a contract from an act for which, if wrongful, pltf. can obtain compensation in damages at the hearing of the cause, & where the contract is one of which specific performance cannot be decreed as against pltf.

(2) Where on motion for an interlocutory injunction the rights of the parties are doubtful, on the evidence, the ct. will act on the consideration

of the comparative injury, which may arise from granting or withholding the injunction.—*GARRETT v. BANSTEAD & EPSOM DOWNS RY. CO.* (1864), 4 De G. J. & Sm. 462; 12 L. T. 654; 11 Jur. N. S. 591; 13 W. R. 878; 46 E. R. 997, L. JJ.

Annotations:—*As to* (1) *Reid.* *Garrett v. Salisbury & Dorset Junction Ry.* (1866), L. R. 2 Eq. 358. *Generally, Mentd.* *Foster & Dicksee v. Hastings Corp.* (1903), 87 L. T. 736.

648. —.]—A firm of shipbuilders agreed to alter a vessel according to a specification; & it was provided that in case of their failing to execute the alterations according to the agreement the owners of the vessel should be at liberty, with workmen, to enter on the shipbuilders' yard, & themselves complete the alterations. The shipbuilders were adjudicated bkpts. before the vessel was completed:—*Held*: the ct. could not specifically perform the whole agreement, & therefore would not restrain the trustee under the bkpcy. from selling the dock in which the vessel was lying, although the owners might be thus prevented from themselves entering & completing the vessel pursuant to the agreement.—*MERCHANTS' TRADING CO. v. BANNER* (1871), L. R. 12 Eq. 18; 40 L. J. Ch. 515; 24 L. T. 861; 19 W. R. 707.

649. —.]—The ct. will not interfere by injunction to restrain the breach of a contract for the sale & delivery of chattels which it could not specifically perform.

Where the lessee of a colliery contracted to raise & deliver to pltf. all the get of coals in the colliery at a fixed price for five years, & subsequently agreed for the sale of the colliery to other parties:—*Held*: on demurrer, the ct. had no jurisdiction to grant an injunction to restrain the breach of contract.—*FOTHERGILL v. ROWLAND* (1873), L. R. 17 Eq. 132; 43 L. J. Ch. 252; 29 L. T. 414; 38 J. P. 244; 22 W. R. 42.

Annotations:—*Expld. & Distd.* *Donnell v. Bennett* (1883), 22 Ch. D. 835. *Consd.* *Keith, Prowse v. National Telephone Co.*, [1894] 2 Ch. 147; *Metropolitan Electric Supply Co. v. Glinder*, [1901] 2 Ch. 799. *Reid.* *Whitwood Chemical Co. v. Hardman* (1891), 64 L. T. 716; *Davis v. Foreman* (1894), 8 R. 725. *Mentd.* *Tailby v. Official Receiver* (1888), 13 App. Cas. 523.

650. —.]—Under an agreement in 1889 defts., a telephone co., supplied to pltf. the use of a telephone wire & apparatus for three years at a rent payable quarterly. Upon the expiration of the term the parties continued the agreement by mutual consent. On Dec. 30, 1893, being the last day of a quarter, defts. gave pltf. a notice determining the agreement forthwith, & stating their intention to disconnect the wire & remove the apparatus, & at the same time they demanded rent "up to Dec. 31," being one day beyond the quarter. This rent was duly paid to & accepted by defts. Upon a motion by pltf. for an injunction to restrain defts. from interfering with the wire & apparatus, an injunction was granted.

Here there is no question of erecting the wire & telephonic apparatus; that has all been done. The only question can be about maintenance; & it seems to me that the difficulty of supervising the maintenance ought not to prevent the ct.

streets at certain hours & with certain officers, as the ct. cannot oversee the carrying out of the judgment if granted. Nor will the ct. grant an injunction restraining the co. from carrying out such an agreement to the extent to which they are willing to carry it out unless & until they carry it out *in toto*, as this would also involve the same minute supervision.—*KINGSTON CITY v. KINGSTON, PORTSMOUTH &*

PART X. SECT. 2, SUB-SECT. 3.—C. (a).

645 i. Whether injunction granted.]—The ct. will not grant an injunction to restrain the breach of a contract for the sale & delivery of goods, where an action for specific performance does not lie.—*VANCOUVER ISLAND MILK PRODUCER'S ASSOCN. v. ALEXANDER* (1922), 30 B. C. R. 524.—CAN.

645 ii. —.]—Civil Procedure Code, 1859, ss. 92, 93, are not applicable

to a suit for specific performance of a contract to give in marriage, & the ct. will not grant an *interim* injunction to restrain deft. from making another marriage with a third person.—*RE GUNPUT NARAIN SINGH* (1875), 1 L. R. 1 Cal. 74.—IND.

645 iii. —.]—No injunction can be granted in support of a void contract.—*SIR DORABJI JAMSETJI TATA VIT v. LAUCE* (1917), 1 L. R. 42 Bom. 676.—IND.

from saying that the co. must not cut off the wires. They may not be compellable to maintain the wires & telephonic apparatus, that is to say, damages might be the only remedy for noncompliance with that part of the agreement; but yet the essence of the agreement is, that the wire & telephonic apparatus, being there, shall be open to the use of pltf.s.; & that seems necessarily to go to the root of the whole matter (KEKEWICH, J.).—KEITH, PROWSE & CO. v. NATIONAL TELEPHONE CO., [1894] 2 Ch. 147; 63 L. J. Ch. 373; 70 L. T. 276; 58 J. P. 573; 42 W. R. 380; 10 T. L. R. 263; 8 R. 776.

Annotations.—*Distd.* Cochrane v. Exchange Telegraph Co. (1896), 65 L. J. Ch. 334. *Mentd.* Civil Service Co-op. Soc. v. McGrigor's Trustee, [1923] 2 Ch. 347.

651. —[Damages inadequate remedy.]—PIPERNO v. HARMSTON (1886), 3 T. L. R. 219; *sub nom.* PEPERNO v. HARMISTON, 31 Sol. Jo. 154, C. A.

652. —[Where there is no right of specific performance of an agreement relating to the sale of patents, & for division of the proceeds of sale, an injunction restraining the registered owner of the patents from dealing with them ought not to be granted.—*Re HUTCHINSON'S PATENT, HASLETT v. HUTCHINSON* (1891), 8 R. P. O. 457.

Annotation.—*Mentd.* *Re Fletcher's Patent* (1893), 62 L. J. Ch. 938.

653. —[An infant & adult who were joint tenants entered into an agreement with pltf. to grant a lease. Pltf. sued for specific performance of the agreement & for an injunction against granting a lease to any other person:—*Held*: an injunction could only be granted where a case was made out for specific performance; specific performance by the infant was out of the question, & on the evidence could not be had against the adult; therefore pltf. was not entitled to an injunction.—LUMLEY v. RAVENSCROFT, [1895] 1 Q. B. 683; 64 L. J. Q. B. 441; 72 L. T. 382; 59 J. P. 277; 43 W. R. 584; 30 Sol. Jo. 345; 14 R. 347, C. A.

654. —[GLASSE v. WOOLGAR & ROBERTS (No. 2) (1897), 41 Sol. Jo. 573, C. A.

Enforcement of agency agreement, *see* AGENCY, Vol. I., p. 545, Nos. 1973, 1974.

Contract containing positive & negative covenants, *see* Sub-sect. 7, *post*.

As to injunction pending suit for specific performance, *see* Sub-sect. 9, *post*.

(b) Contracts for Personal Service.

See, generally, MASTER & SERVANT; SPECIFIC PERFORMANCE.

655. Whether injunction granted.]—The ct. cannot specifically perform an agreement whereby A. agrees to compose & write reports of cases determined in a ct. of justice, to be printed & published by a particular individual, for a stipulated remuneration, nor interfere by injunction to restrain the party from permitting reports

written by him to be published by another person. The remedy, if any, is at law.—CLARKE v. PRICE (1819), 2 Wils. Ch. 157; 37 E. R. 270, L. C.

Annotations.—*Consd.* Kemble v. Kean (1829), 6 Sim. 333. *Apld.* Baldwin v. Soc. for Diffusion of Useful Knowledge (1838), 9 Sim. 393. *Expld.* Dietrichsen v. Cabburn (1846), 1 Coop. temp. Cott. 72. *Distd.* Lumley v. Wagner (1852), 1 De G. M. & G. 604. *Consd.* Hope v. Hope (1856), 22 Beav. 351; De Mattos v. Gibson (1859), 4 De G. & J. 276; Mortimer v. Beckett, [1920] 1 Ch. 571. *Refd.* Pickering v. Ely (Bp.) (1843), 2 Y. & C. Ch. Cas. 249; Fechter v. Montgomery (1863), 33 Beav. 22; Merchants' Trading Co. v. Banner (1871), L. R. 12 Eq. 18; Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416; Prosperity v. Lloyds Bank (1923), 39 T. L. R. 372. *Mentd.* Taylor v. Davis (1834), 4 L. J. Ch. 18; Brace v. Wehnert (1858), 25 Beav. 348.

656. —[By an agreement between pltf.s. & defts., the former, in consideration of certain payments to be made by them to the latter, were to have the exclusive right of engraving & publishing a series of maps from drawings to be furnished to them, from time to time, by the latter. The ct. refused to restrain defts. from acting in violation of the agreement, as it could not compel defts. to furnish the drawings; & therefore, could not decree a specific performance of the agreement.—BALDWIN v. SOCIETY FOR THE DIFFUSION OF USEFUL KNOWLEDGE (1838), 9 Sim. 393; 2 Jur. 961; 59 E. R. 409.

Annotation.—*Refd.* Pickering v. Ely (Bp.) (1843), 12 L. J. Ch. 271.

657. —[By a grant or patent, dated in 1801, the then bishop of Ely having, as the grant stated, "confidence in the probity, fidelity, care, & industry of P.," granted to P., who was a solr., "the office of receiver of all issues, profits, sum & sums of money, arising & issuing" from the possessions of the see, to hold to P. by himself or his sufficient deputy or deputies, to be approved of by the bishop & his successors, for his life. The office of receiver was an ancient office, & had been exercised before the restraining statute of 1 Eliz. c. 19. P. held the office under three successive bishops, during the whole of which time he not only received the rents, but negotiated the renewals of leases, & prepared the leases of the see, & likewise attended all searches for records in the bishop's muniment room, of which he kept a key; for the performance of which acts he received fees & emoluments. It appeared also that his predecessor in office, who had held the office since 1785, had done the same. Upon the accession of A. to the bishopric in 1836, he refused to admit P.'s claim of right to perform these last-mentioned acts; upon which P. filed his bill against the bishop, praying a declaration of the rights in question in his favour, that he might be quieted in the possession of the office, & that the bishop might be restrained by injunction from obstructing pltf. in the exercise of such rights, & from doing acts in contravention of them:—*Held*: pltf.'s claims were not of such a nature as to induce this ct. to interfere to protect them, without being

PART X. SECT. 2, SUB-SECT. 3.—C. (b).

655 i. Whether injunction granted.]—The Supreme Ct. directed that pltf. should be at liberty to apply for such relief by way of *mandamus* injunction or otherwise as he might be advised:—*Held*: the word "*mandamus*" should be omitted from the order of the Supreme Ct. as suggesting an order in the nature of an order for specific performance of an agreement for the establishment of personal relations between parties.—MACQUEEN v. FRANKELTON (1909), 8 C. L. R. 673.—AUS.

655 ii. —[The statement of claim alleged that deft., who was

entitled under a contract with a colliery co. to the sole rights of certain coal won from the co.'s mine for a period of six years, entered into an agreement with pltf.s. that pltf.s. should take up the selling agency of the coal to be obtained by deft. under his contract with the colliery co. upon certain terms & conditions, amongst others that pltf.s. were to act as deft.'s sole selling agents, & that from the total proceeds derived from the sales of the said coal deft. was to deduct the net price paid by him for the coal to the colliery co. plus 4½d. per ton, the balance to be paid to pltf.s. in payment of their agency fees & expenses. Pltf.s. sought to restrain deft. from dealing with the said coal otherwise than by the agency of pltf.s.

Counsel for deft. demurred to the terms of the statement of claim on the ground that it disclosed no equity against deft.:—*Held*: the contract against pltf.s. & deft. was not an assignment of deft.'s rights under his contract with the colliery co. but an agreement for personal service, with an implied covenant not to employ any one else, & therefore the injunction should not be granted, the proper remedy being for damages at law.—CANT v. MILLER (1913), 13 S. R. N. S. W. 505; 30 N. S. W. W. N. 143.—AUS.

655 iii. —[CALLIANJI HARJIVAN v. NARSI TRICUM (1894), 1 L. R. 18 Bom. 702; 1 L. R. 19 Bom. 764.—IND.

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well satisfied (which the ct. was not) that his legal remedy was insufficient to do him complete justice; & the relief sought being analogous to the specific performance of an agreement, the bill must fail, on the ground of want of mutuality, the nature of the duties & services asserted by pltf. being such as preclude the possibility of a decree in this ct. against him, compelling their specific performance.—*PICKERING v. ELY* (Bp.) (1843), 2 Y. & C. Ch. Cas. 249; 12 L. J. Ch. 271; 7 Jur. 479; 63 E. R. 109.

*Annotations:—**Appld.* *Brett v. East India & London Shipping Co.* (1864), 2 Hem. & M. 404. *Consd.* *Millican v. Sullivan* (1888), 4 T. L. R. 203. *Refd.* *Johnson v. Shrewsbury & Birmingham Ry.* (1853), 3 De G. M. & G. 914.

658. —.]—By indenture between pltf. of the one part & defts. who were partners in a certain manufacture of which pltf. had been the patentee of the other part, it was stipulated that pltf. should have the conduct & management of the business & that the remuneration which he should receive in respect of his services should be such a sum of money as would be equal to £40 per cent. upon the net profits, that a reduced amount should be paid to his exors. in the event of his death until the expiration of the licence, that pltf. might purchase the business on certain terms, that defts. might determine pltf.'s engagement as manager if he should not in every respect perform the covenants contained in the indenture, but that so long as he continued to observe them his appointment as manager should be irrevocable during the continuance of the licence, & that nothing therein contained should extend to constitute a partnership. Pltf. being dismissed by defts. from their service, filed his bill for an injunction to restrain defts. from excluding him from the management:—*Held*: discharging the injunction which had been granted, the contract being of hiring & service was one of which specific performance could not be enforced.—*STOCKER v. BROCKELBANK* (1851), 3 Mac. & G. 250; 20 L. J. Ch. 401; 18 L. T. O. S. 177; 15 Jur. 591; 42 E. R. 257, L. C.

*Annotations:—**Consd.* *Harrington v. Churchward* (1860), 29 L. J. Ch. 521. *Appld.* *Frith v. Frith*, [1906] A. C. 254. *Refd.* *Lumley v. Wagner* (1852), 1 De G. M. & G. 604; *Brett v. East India & London Shipping Co.* (1864), 10 L. T. 187. *Mentd.* *Pooley v. Driver* (1876), 5 Ch. D. 458; *Moore v. Davis* (1879), 11 Ch. D. 261.

659. —.]—A railway co. agreed with contractors that the contractors should work the line & keep the engines & rolling plant in repair at a specified remuneration & that the contract should be in force for seven years, but with a proviso for its determination if the contractors did not, within forty-eight hours after notice given by the co. obey the instructions contained in such notice:—*Held*: the agreement was not of such a kind as to be enforceable by injunction restraining the co. from determining the contract & resuming the possession of their line for non-obedience to impracticable instructions.—*JOHNSON v. SHREWSBURY & BIRMINGHAM RY. CO.* (1853), 3 De G. M. & G. 914; 22 L. J. Ch. 921; 17 Jur. 1015; 43 E. R. 358, L. JJ.

*Annotations:—**Consd.* *Horne v. L. & N. W. Ry.* (1861), 10 W. R. 170. *Expld.* *Greenhill v. Isle of Wight (Newport Junction) Ry.* (1871), 23 L. T. 885. *Refd.* *Brett v. East India & London Shipping Co.* (1864), 10 L. T. 187; *Munro v. Wivenhoe & Brightlingsea Ry.* (1865), 4 De G. J. & Sm. 723; *Millican v. Sullivan* (1888), 4 T. L. R. 203; *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416. *Mentd.* *Mair v. Himalaya Tea Co.* (1885), L. R. 1 Eq. 411; *Wolverhampton & Walsall Ry. v. L. & N. W. Ry.* (1873), L. R. 16 Eq. 433; *Barton v. Muir* (1874), L. R. 6 P. C. 134.

660. —.]—An agreement had been entered into by carriers & a railway co., by which, for

certain considerations, certain duties were to be performed by the carriers in loading & unloading goods at the termini of such railway. It was thereby "declared & understood between the parties thereto that it was not the intention of the co. to take such duties into their own hands, unless their interests should appear to them absolutely so to require in consequence of such duties not having been performed satisfactorily by the agents, the carriers, or by the servants under their control." The co. came to a resolution "that the present system of dealing with the goods traffic inside the — & other London stations of the co. was unsatisfactory & that the interests of the co. require that the loading & unloading of the goods traffic in such stations should be performed by the co. themselves":—*Held*: the ct. would not interfere by injunction to restrain the co. from acting up to their resolution, the agreement involving personal service, & as such being one of which the ct. was not in the habit of granting a decree for specific performance.—*CHAPLIN v. NORTH WESTERN RY. CO.* (1861), 5 L. T. 601; *sub nom.* *HORNE v. LONDON & NORTH WESTERN RY. CO.*, 10 W. R. 170.

*Annotation:—**Refd.* *Brett v. East India & London Shipping Co.* (1864), 10 L. T. 187.

661. —.]—The duties of the agent of a limited co. being in the nature of personal service, & as such incapable of being enforced in equity, the ct. refused to restrain the directors from acting upon or enforcing the resignation of A. whose management & agency was made a prominent condition in the prospectus on the formation of the co., & expressly provided for by the arts. of assocn.—*MAIR v. HIMALAYA TEA CO.* (1865), L. R. 1 Eq. 411; 13 L. T. 586; 11 Jur. N. S. 1013; 14 W. R. 165.

662. —.]—In an action of ejectment the jury found that applt. was in possession under a power of attorney for which he had given consideration other than & additional to that mentioned therein, viz., a personal guarantee to a mtge. of the estate in suit that he would pay the mtge. debt on the day of redemption:—*Held*: assuming the power to be irrevocable, he had not a good equitable defence to ejectment, since the contract with him was entire, & an inseparable part of it related to personal service; applt. accordingly could not obtain specific performance thereof, & therefore could not obtain an injunction against an action of ejectment.—*FRITH v. FRITH*, [1906] A. C. 254; 75 L. J. P. C. 50; 94 L. T. 383; 54 W. R. 618; 22 T. L. R. 388, P. C.

*Annotation:—**Refd.* *Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372.

663. —.]—Pltf. having borne the expense of training deft. as a boxer from 1911 to 1914, deft. in 1914 entered into an agreement with pltf. in the following terms: "In consideration of the sum of 10s. & also in consideration of your many services rendered & to be rendered to me, I undertake that you shall have the sole arrangements of matching me for all my boxing contests & engagements during the period of the next seven years, & . . . I undertake that . . . you are to benefit to the extent of 50 per cent. of any purses put up for me above the sum of £25 & in other specified ways." In Dec. 1919, deft. declined to employ pltf. any longer. Pltf. now moved in this action for an *interim* injunction to restrain deft. from entering into any boxing engagement except such as had been, or should be, arranged for him through pltf.:—*Held*: (1) although an implied negative agreement to employ no one but pltf. for arranging boxing engagements might be inferred from the

word "sole," no injunction could be granted in the absence of an independent negative stipulation to that effect; (2) the services to be rendered by pltf. were left so undefined that the agreement lacked mutuality, & for this reason also the ct. should, in its discretion, refuse any injunction.

The authorities support the view that the ct. will not grant an injunction upon such a contract as this (RUSSELL, J.).—MORTIMER v. BECKETT, [1920] 1 Ch. 571; 89 L. J. Ch. 245; 123 L. T. 27; 64 Sol. Jo. 341.

See, also, Nos. 635, 644, ante, & compare, Nos. 698, 700, 701, 706, post.

SUB-SECT. 4.—CONTRACT WITH PROVISION FOR PAYMENT ON BREACH.

Whether liquidated damages or penalty, see DAMAGES, Vol. XVII., pp. 136-153, Nos. 422-546.

664. Sum payable as damages—Whether court will interfere.]—The ct. will interfere by injunction to restrain the breach of an agreement with a proviso for the payment of a penalty upon breach, unless such penalty is plainly intended by the parties to be liquidated damages.—CLARK v. WATKINS (1863), 1 New Rep. 227; 7 L. T. 616; 11 W. R. 253; on appeal, 1 New Rep. 342, L. JJ. Annotations:—Mentd. Allen v. Taylor (1870), 39 L. J. Ch. 627; Dales v. Weaver (1870), 18 W. R. 993.

665. ———.]—An infant entered into a contract with his employers, milk sellers, not to carry on a milkman's business within a distance of two miles nor to solicit his employers' customers, "under a penalty of £200 to be recovered as &

by way of liquidated damages & not by way of penalty." In an action for an injunction to restrain the infant from carrying on a milkman's business within the specified distance:—Held: the contract was binding on the infant, the clause as to the payment of the £200 only binding him to pay the damages actually caused by his breach of contract, & not being a penalty clause in the ordinary sense.—MORRISON, FLEET & Co., LTD. v. FLETCHER (1900), 17 T. L. R. 95.

———.]—See, also, BONDS, Vol. VI., p. 253, Nos. 951-953; AGRICULTURE, Vol. II., p. 19, Nos. 107, 108.

Sum payable a penalty—Enforcement by injunction.]—See DEEDS, Vol. XVII., pp. 403, 404, Nos. 2123-2131.

—— Whether covenantor can elect to break covenant.]—See DEEDS, Vol. XVII., pp. 402, 403, Nos. 2113-2117.

—— Whether penalty recoverable in addition to equitable remedy.]—See DEEDS, Vol. XVII., pp. 403, 404, Nos. 2118-2122, 2128.

SUB-SECT. 5.—BUILDING CONTRACTS.

See BUILDING CONTRACTS, Vol. VII., pp. 401 et seq.

SUB-SECT. 6.—EXPRESS NEGATIVE COVENANTS.

A. In General.

666. Enforcement by court.]—DOHERTY v. ALLMAN, No. 14, ante.

PART X. SECT. 2, SUB-SECT. 4.

664 i. Sum payable as damages—Whether court will interfere.]—L. bound himself to H. under articles of clerkship, & in addition to the usual covenants, that on admission as a solr. he would not practise in the town of T. or within a radius of 50 miles thereof, & that he would pay the sum of £2,000 as liquidated damages to H. on breach of this covenant:—Held: the £2,000 was not to be considered as the price on payment of which L. would be entitled to so practise, & a permanent injunction should be granted.—HAMILTON v. LETHBRIDGE (1912), 14 C. L. R. 236.—AUS.

664 ii. ———.]—Deft. agreed to serve pltf., with special stipulations as to not serving customers on his own behalf, & in case of any breach he would forfeit \$50:—Held: pltf. were at liberty to waive their claim for damages, & elect to have relief by injunction.—TORONTO DAIRY CO. v. GOWANS (1879), 26 Gr. 290.—CAN.

664 iii. ———.]—Held: as the parties had agreed in the contract for liquidated damages in case of breach, the ct. would not grant an injunction.—VANCOUVER ISLAND MILK PRODUCER'S ASSOCN. v. ALEXANDER (1922), 30 B. C. R. 524.—CAN.

664 iv. ———.]—Where the covenant is not to do a particular act, & a penalty or forfeiture is annexed to the doing of that act, this penalty does not authorise the party to do the act; & before the act is done the ct. will restrain him by injunction.—FRENCH v. MACALE (1842), 2 Dr. & War. 269.—IR.

664 v. ———.]—A lease contained a covenant that a house, to be built immediately adjoining the house in which the lessor lived, should be built fit for a private family, under a penalty of £10 yearly additional rent, unless the lessor should convert his house to any public use:—Held: the lessor

was not restricted to suing for the additional rent, but was entitled to an injunction to restrain the tenants converting the house into a public-house.—BRAY v. FOGARTY (1870), 4 I. R. Eq. 544.—IR.

664 vi. ———.]—Where it was stipulated in a contract between a tailor in L. & his agent in E., that the latter should not exercise the trade of a tailor in E. for a period of twelve months after the agency should cease, & the agent bound himself in the sum of £200, "to be taken & considered as liquidated damages, & not as in terrorem, or by way of penalty"; & the agent openly exercised the trade within the twelve months:—Held: bill of suspension should be passed, & interdict granted on caution, though the agent insisted that nothing but damages could be claimed.—CURTIS v. SANDERSON (1831), 10 Sh. (Ct. of Sess.) 72.—SCOT.

PART X. SECT. 2, SUB-SECT. 6.—A.

666 i. Enforcement by court.]—A mtge. to a brewery of an hotel held upon a lease contained a covenant by the mtgor. that during the continuance of the lease he would deal exclusively with the mtgee. for all colonial beer sold upon the mortgaged premises:—Held: an injunction restraining the mtgor. from purchasing beer from any one but the mtgee. should be refused.—PERTH BREWERY CO. v. SIMMS (1903), 5 W. A. L. R. 24.—AUS.

666 ii. ———.]—NIMMONS v. GILBERT (1907), 6 W. L. R. 531.—CAN.

666 iii. ———.]—INTERNATIONAL COAL & COKE CO. v. TRELLE (1908), 7 W. L. R. 264; 1 Alta. L. R. 170.—CAN.

666 iv. ———.]—Action for injunction restraining defts. from erecting an apartment house upon certain lands in alleged breach of covenant, the lands being granted "to be used only as a site for a detached brick or stone dwelling house," but there being no

express covenant to the same effect in the deed. Pltf. had purchased other lands in the same street from the same grantor subject to similar restrictions, & had obtained from the grantor's legal representatives an assignment of the right to enforce the covenant:—Held: injunction should be granted.—PEARSON v. ADAMS (1912), 22 O. W. R. 909; 3 O. W. N. 1660; 27 O. L. R. 87; 7 D. L. R. 139.—CAN.

666 v. ———.]—The owners of a patented article & a retail dealer entered into an agreement by which the owner was to supply the articles to the dealer for a certain time, the dealer agreeing to handle the owners' articles exclusively:—Held: such an agreement would be enforced by injunction restraining the dealer from selling the goods of a trade competitor of the owners.—BERLINER GRAMOPHONE CO. v. SOYTHES (1916), 34 W. L. R. 1216.—CAN.

666 vi. ———.]—Where, after the entering into of a covenant restricting the use to which the land comprised in a building scheme may be put, there has been a general change in the character of the neighbourhood, the ct. will not enforce the covenant.—COWAN v. FERGUSON (1919), 45 O. L. R. 161; 15 O. W. N. 425; 48 D. L. R. 616.—CAN.

666 vii. ———.]—A ct. will by injunction restrain deft. from buying material from other persons in breach of his contract for a certain period to buy only from pltf., where it is important in pltf.'s interests that such contract be carried out.—TORONTO TYPE FOUNDRY CO., LTD. v. LEACH, [1920] 2 W. W. R. 18.—CAN.

666 viii. ———.]—Deft. contracted to use "exclusively" pltf.'s ready-prints in publishing his local newspaper, without further stipulation that he would not use any others:—Held: deft. should be restrained from using other ready-prints.—TORONTO TYPE

Sect. 2.—Contract: Sub-sect. 6, A., B., C. & D.]

667. — No privity of contract—Discretion of court.]—The ct. has a judicial discretion with regard to granting an injunction to prevent the breach of a restrictive covenant, where there is no privity of contract between the parties; & it will not grant an injunction where no damage can be proved by the person seeking to enforce the covenant & the breach is not of a kind to cause any nuisance or annoyance.—**KELLY v. BARRETT**, [1924] 2 Ch. 379; 94 L. J. Ch. 1; 132 L. T. 117; 40 T. L. R. 650; 68 Sol. Jo. 664, C. A.

668. —.]—**LORD STRATHCONA S.S. Co. v. DOMINION COAL Co.**, No. 724, *post*.

B. Proof of Damage.

669. Whether necessary.]—**DICKENSON v. GRAND JUNCTION CANAL Co.**, No. 679, *post*.

670. —.]—The purchaser of a plot of land, part of an estate laid out for building, covenanted with the vendors, who were the mtgees. in fee in possession of the estate, their heirs & assigns, not to erect any "building" on his plot nearer to the road in which it was situate than the line of frontage of the then present houses in that road, which houses were about 40 feet apart, & about 80 feet from the road. He then erected two houses on his plot, each of which had a bay window projecting 3 feet beyond the line of the existing houses, & carried from the foundation up to the roof. Upon bill for injunction filed by the transferee from the mtgees., & by a subsequent purchaser from them of a contiguous plot, who had entered into similar covenants:—**Held**: there being a clear breach of covenant, the covenantees were entitled to their injunction without the necessity of showing damage.

There was distinct notice given & persisted in from beginning to end, by reason of which deft. must be taken to have done everything at his own peril; even to the extent of the ct. interfering by mandatory injunction (**HALL, V.-C.**).—**MANNERS (LORD) v. JOHNSON** (1875), 1 Ch. D. 673; 45 L. J. Ch. 404; 40 J. P. 345; 24 W. R. 481.

Annotations:—**Consd.** **Sharp v. Harrison**, [1922] 1 Ch. 502. **Mentd.** **Long Eaton Recreation Grounds Co. v. Mid. Ry.** (1901), 71 L. J. K. B. 74.

671. —.]—(1) Where the vendors of land have covenanted with the purchaser against the carrying on of certain trades upon other parts of the land the purchaser is not prevented from obtaining an injunction against an assignee of other part of the land because he has not attempted to prevent previous unimportant breaches of the covenant.

A covenant had been entered into not to sell wines & spirits on certain premises:—**Held**: the covenantee, by not interfering with the sale of British wines to a limited extent, did not lose his right to an injunction to restrain a more extensive breach.

(2) An assignee of land with notice of a covenant

is subject to the same measure of relief as if he had been party to the covenant & the covenantee suing on breach of covenant is no more bound to prove substantial damage in one case than in the other.—**RICHARDS v. REVITT** (1877), 7 Ch. D. 224; 47 L. J. Ch. 472; 37 L. T. 632; 26 W. R. 166.

Annotations:—**As to** (1) **Refd.** **Renals v. Coulshaw** (1878), 38 L. T. 503; **Meredith v. Wilson** (1893), 69 L. T. 336. **As to** (2) **Refd.** **Formby v. Barker** (1903), 89 L. T. 249; **Osborne v. Bradley**, [1903] 2 Ch. 446; **Elliston v. Reacher**, [1908] 2 Ch. 374; **Sharp v. Harrison**, [1922] 1 Ch. 502.

672. —.]—**DOHERTY v. ALLMAN**, No. 14, *ante*.

673. —.]—**ALLEN v. SECKHAM**, No. 619, *ante*.

674. —.]—Proof of damage is not necessary for the granting of an injunction in a case in which the parties to a contract for valuable consideration, with their eyes open, contract that a particular thing shall not be done (**VAUGHAN WILLIAMS, L.J.**).—**FORMBY v. BARKER**, [1903] 2 Ch. 539; 72 L. J. Ch. 716; 89 L. T. 249; 51 W. R. 646; 47 Sol. Jo. 690, C. A.

Annotations:—**Refd.** **Brigg v. Thornton**, [1904] 1 Ch. 386; **Re Nisbet & Pott's Contract** (1906), 75 L. J. Ch. 238; **Elliston v. Reacher**, [1908] 2 Ch. 665; **Chelsham v. Woldingham Assocn. v. Hayward** (1911), 76 J. P. 52; **L. C. C. v. Allen** (1914), 3 K. B. 642; **Ives v. Brown**, [1919] 2 Ch. 314; **Northbourne v. Johnston**, [1922] 2 Ch. 309; **Chambers v. Randall**, [1923] 1 Ch. 149; **Mentd.** **L. C. C. v. Cannon Brewery Co.**, [1911] 1 K. B. 235; **Lord Strathcona S.S. Co. v. Dominion Coal Co.** (1925), 42 T. L. R. 86.

675. —.]—An injunction restraining the breach of restrictive covenants may be granted without proof of substantial damage, though where pltf.'s right is equitable only the ct. may more readily award damages.—**ELLISTON v. REACHER**, [1908] 2 Ch. 665; 78 L. J. Ch. 87; 99 L. T. 701, C. A.

Annotations:—**Consd.** **Sharp v. Harrison**, [1922] 1 Ch. 502. **Refd.** **Westhoughton U. C. v. Wigan Coal & Iron Co.**, [1919] 1 Ch. 159; **Kelly v. Barrott**, [1924] 2 Ch. 379. **Mentd.** **Reid v. Bickerstaff**, [1909] 2 Ch. 305; **Willé v. St. John**, [1910] 1 Ch. 84; **Wilkes v. Spooner**, [1911] 2 K. B. 473.

676. —.]—**SHARP v. HARRISON**, No. 681, *post*.

677. — Suit by reversioner.]—The ct. will not at the instance of a person having a mere reversionary interest in the freehold, interfere to restrain the breach of a covenant entered into by the tenant with the lessor against carrying on a business upon the demised premises, unless special damage is shown.—**JOHNSTONE v. HALL** (1856), 2 K. & J. 414; 25 L. J. Ch. 462; 27 L. T. O. S. 230; 20 J. P. 579; 2 Jur. N. S. 780; 4 W. R. 417; 69 E. R. 844.

Annotations:—**Consd.** **Holloway v. Hill**, [1902] 2 Ch. 612. **Refd.** **German v. Chapman** (1877), 7 Ch. D. 271. **Mentd.** **Wilson v. Church** (1879), 13 Ch. D. 1.

— **Damage very slight.]**—*See* No. 683, *post*.

C. Breach Beneficial or Not Injurious to Plaintiff.

678. General rule.]—Injunction granted, prohibitory in form, but mandatory in its effect.

Tenant of a mine restrained, on motion, from

FOUNDRY Co., LTD. v. JUCKES, [1920] 2 W. W. R. 22.—**CAN.**

666 ix. —.]—Mines were demised by pltf.s for a term determinable upon three months' notice. There was a covenant that if the notice of surrender were given by the lessees, the machinery should not be removed for six months after notice given. The assignees of the lessees served notice on Apr. 2, of their intention to surrender; & in Sept. were removing the machinery from the mines:—**Held**: injunction should be granted for six months dating from Apr. 2.—**HAMILTON v. DUNSFORD** (1857), 6

. Ch. R. 412.—**IR.**

PART X. SECT. 2, SUB-SECT. 6.—B.

669 i. Whether necessary.]—Breach of a mutual covenant with each other by persons engaged in the same trade not to carry on a certain branch of that trade for such time as an incorporated co. which they were then uniting to form for the purpose of carrying on that particular branch of their common trade, should continue to carry it on, may be restrained by injunction in an action by one or more of the other parties thereto though no actual damage is proved to have resulted

from the breach.—**MCCAUSLAND v. HILL** (1896), 23 A. R. 738.—**CAN.**

669 ii. —.]—An agreement super-added to a contract of sale of land, that the purchaser shall not allow the sale of intoxicating liquor on the land without the permission of the vendor, is binding upon the exor. of the purchaser. Interdict granted restraining the extrix. of the purchaser from selling intoxicating liquors on the land sold without proof of pecuniary damage to the vendor.—**STETTLERVILLE CON-SISTORY v. BOSMAN** (1893), 10 S. C. 67.—**S. AF.**

permitting a communication with an adjoining mine to continue open, & water to flow through the same, the effect intended being to compel defts. to close the communication.

Pltfs. have a right to insist on their own view of their own interest, & even if the violation of the covenants should be as beneficial to them as has been argued on the other side, they may nevertheless choose to insist on having the terms of the contract strictly obeyed. . . .

If parties come & ask for an injunction *ex parte* the ct. looks most minutely to the time in which they have permitted the matter complained of to proceed, & will not allow them to obtain an injunction in the absence of the other party, when they have themselves, for some time, acquiesced. It is quite reasonable that that should be so, because the granting of an injunction *ex p.* is the exercise of a very extraordinary jurisdiction (LANGDALE, M.R.).—*MEXBOROUGH (EARL) v. BOWER* (1843), 7 Beav. 127; 49 E. R. 1011; *on appeal*, 2 L. T. O. S. 205, L. C.

Annotation.:—*Refd.* *Bowser v. Maclean* (1860), 2 De G. F. & J. 415.

679. —.] — A contract was entered into between a canal co. & pltfs., the owners of paper mills, as to the mode of enjoyment of the waters by which both were supplied. The co. did acts in violation of the contract:—*Held*: it was no answer, upon a bill for a perpetual injunction, to say that the acts proposed would not be injurious, or even to prove that they were beneficial to pltfs.; & the ct., although no evidence was given of any actual damage done, made a decree for a perpetual injunction.—*DICKENSON v. GRAND JUNCTION CANAL CO.* (1852), 15 Beav. 260; 51 E. R. 538.

Annotations.:—*Distd.* *Ingram v. Morecraft* (1863), 33 Beav. 49. *Folld.* *Leech v. Schweder* (1874), 9 Ch. App. 465, n. *Refd.* *Manners v. Johnson* (1875), 1 Ch. D. 673.

680. —.] — A. sold a piece of land to C. & covenanted for quiet enjoyment. Afterwards A. raised the level by 3 inches of a brook running past C.'s grounds through his, A.'s, property:—*Held*: this was not a proper subject of complaint for the interference of the ct.—*INGRAM v. MORECRAFT* (1863), 33 Beav. 49; 55 E. R. 284.

681. —.] — Where deft. commits a breach of a negative legal covenant after warning, pltf. is "speaking generally" entitled to a mandatory injunction without proving damage. But if deft. proves that no damage has been occasioned & offers undertakings that will effectually prevent any future damage by the continuing breach, & the granting of a mandatory injunction would inflict damage on deft. out of all proportion to the relief given to pltf., the ct. ought to refuse it.

Pltf.'s & deft.'s houses were separated by a narrow passage belonging to pltf. from whom deft. had purchased her house with two second floor windows overlooking the passage. In defiance of a covenant in her conveyance & notwithstanding pltf.'s repeated warnings deft. in converting her house into flats opened a frosted window in the first-floor flat overlooking the passage & immediately opposite pltf.'s lavatory. Pltf. claimed a mandatory injunction & damages. Five months after the writ deft. let the flat on a five years' lease to a tenant, who was not made a party to the action. Pltf. attempted but failed to prove that his house would be depreciated in value. Dft., on the other hand, besides proving that no depreciation whatsoever would be caused, offered at the trial to give any undertakings necessary to prevent the acquisition of an easement, to keep the window frosted, & subject to her tenant's consent, to fasten up the lower part,

& merely keep an internal fanlight at the top. Pltf., however, declined to make a new bargain at the trial & pressed for a mandatory injunction:—*Held*: having regard to all the circumstances, including the absence of damage, the five years' tenancy in a non-party, & deft.'s proposed undertakings which the ct. accepted, it would not be right to grant a mandatory injunction, but it would be sufficient to declare that the opening of the window was a breach of covenant, & to give pltf. 40s. nominal damages & costs for that breach. Dft.'s undertakings would be embodied in the order.—*SHARP v. HARRISON*, [1922] 1 Ch. 502; 91 L. J. Ch. 442.

682. —.] — *KELLY v. BARRETT*, No. 667, *ante*.

D. Public Convenience.

683. General rule.]—(1) A railway co., for the purpose of constructing its line, entered into an agreement with pltf. for the purchase of certain lands belonging to him, & in the conveyance covenanted not to raise "any building or erection" of more than a certain height within a certain distance of pltf.'s property. The agreement contained, after the words "building or erection" the words "except the said railway," but these latter words were not in the conveyance:—*Held*: although a portion of the viaduct had been already raised within the prohibited limits, its toleration by pltf. did not bind him to tolerate every other infringement of the covenant. The ct. would not refuse to interfere on the ground that the aggrieved party might have already permitted some other infringement of the covenant.

(2) *Semble*: there may be cases in which the ct. will refuse interference on the sole ground that the damage occasioned by the breach is exceedingly small; but the evidence must put it beyond doubt that such is the case.

Whether there are or may be any cases in which it is so clear that the damages to arise from breach of the covenant would be inappreciable, & in which this ct. would, on that ground alone, refuse its interference, I am not prepared to say. Possibly there may be such a case; but such cases, if such there be, must be free from all possible doubt. It must be clear that there is no appreciable, or, at all events, no substantial damage, before this ct. would, upon the ground of smallness of the damages, withhold its hand from enforcing the execution of the covenant (*TURNER, L.J.*).

(3) *Semble*: although the performance of a covenant, which is valid at law, may occasion great loss to the covenantor & serious mischief to the public, & the damage occasioned by its breach may be susceptible of pecuniary compensation, the ct. will not, on those grounds, refuse to exercise its jurisdiction to restrain a breach thereof.—*LLOYD v. LONDON, CHATHAM & DOVER RY. CO.* (1865), 2 De G. J. & Sm. 568; 6 New Rep. 54; 34 L. J. Ch. 401; 12 L. T. 363; 29 J. P. 743; 11 Jur. N. S. 380; 13 W. R. 698; 46 E. R. 496, L. JJ.

684. —.] — In an action brought to obtain a mandatory injunction to compel defts. to pull down a goods station & cattle sheds which they had erected 140 yards from Bala station, in the face of a private Act which provided, "that at that station there should be no goods or cattle station, etc." pltf. had not objected to the buildings until they were nearly completed, owing to his being abroad at the time, & ignorant of their erection until his return. Defts. contended that the buildings in question had not been erected "at" the station, as they were 140 yards off;

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that, if they had been, it was for the public convenience they should be there, & that pltf. was precluded by his acquiescence from now obtaining a mandatory injunction to remove:—*Held*: by the Act defts. had made a statutory contract not to do what the ct. was of opinion they had done, so that the question of public convenience did not apply, & the acquiescence of pltf. was not such as would preclude him from obtaining the injunction, but the ct. would grant one, compelling defts. to remove the buildings as prayed.

Defts., who had completed their building . . . cannot say that by reason of anything done by pltf. they have expended money because they had been warned what the construction put upon the Act of Parliament by pltf. was (CHITTY, J.).—PRICE v. BALA & FESTINOG RY. CO. (1884), 50 L. T. 787.

E. Particular Covenants.

685. Not to ring church bells.]—Pltf.'s house being so near the church that the five o'clock bell rung in the morning disturbed her, pltf. came to an agreement in writing with the churchwardens & inhabitants at a vestry, that pltf. would erect a cupola & clock at the church, & in consideration thereof the five o'clock bell should not be rung in the morning:—*Held*: this was a good agreement, binding in equity.—MARTIN v. NUTKIN (1724), 2 P. Wms. 266; 24 E. R. 724.

Annotations:—*Consd.* Dietrichsen v. Cabburn (1846), 2 Ph. 52; Lond v. Murray (1851), 17 L. T. O. S. 248. *Appld.* Lumley v. Wagner (1852), 1 De G. M. & G. 604.

686. Not to publish — Private letters.]—*—* v. EATON (1813), cited in 2 Ves. & B. at p. 23; 35 E. R. 227, L. C.

Annotation:—*Distd.* Perceval v. Phipps (1813), 2 Ves. & B. 19.

687. — Books or periodicals.]—An author having sold the copyright of a work published under his own name, & covenanted with the purchaser not to publish any other work to prejudice the sale of it. *Semble*: another publisher, who had no notice of this covenant, will be restrained from publishing a work subsequently purchased by him from the same author, & published under his name, on the same subject, but under a different title, & though there be no piracy of the first work.

If pltf., who has obtained an injunction, misrepresents to the public what has been done by the ct., & deft., to correct that misrepresentation, does an act, which, in strictness, is a breach of the injunction, the ct. will not entertain any complaint against him on the part of pltf., for such a breach.—BARFIELD v. NICHOLSON (1824), 2 Sim. & St. 1; 2 L. J. O. S. Ch. 90; 57 E. R. 245.

Annotations:—*Refd.* Ainsworth v. Bentley (1866), 14 W. R. 630. *Mentd.* Shepherd v. Conquest (1856), 17 C. B. 427; Nottage v. Jackson (1883), 52 L. J. Q. B. 760; Affalo v. Lawrence & Bullen, [1903] 1 Ch. 318; Tate v. Fullbrook (1908), 98 L. T. 706.

688. — — —.]—Pltf. in 1857 purchased the copyright of an illustrated weekly publication (not a newspaper) from deft., who covenanted not to publish or join in publishing any periodical of a similar description. In Apr. 1858, a precisely similar weekly publication, with a different title, was commenced by a third person from the office of deft.; & in May, 1859, a daily newspaper, at

the same price as pltf.'s publication, & with the same title, altered only by prefixing to it the word "Daily," was advertised by deft. as about to be published by him at his office. Pltf. filed his bill for an injunction, which was granted; &, on pltf.'s undertaking to abide by the order of the ct. as to damages, & to begin an action against deft. within one week, the order was confirmed.—INGRAM v. STIFF (1859), 33 L. T. O. S. 195; 5 Jur. N. S. 947, L. JJ.

Annotations:—*Distd.* Walter v. Emmott (1885), 54 L. J. Ch. 1059. *Refd.* Borthwick v. Evening Post (1888), 37 Ch. D. 449.

689. — — —.]—(1) An agreement by a publisher not to publish in future a magazine of a particular description, is analogous to an agreement by a tradesman not to deal in a particular article, &, like this latter agreement, is not void as a too general restraint on trade. On an interlocutory application for an injunction to restrain the breach of such an agreement by the publication of a certain named magazine, or any other magazine coming within the description contained in the agreement, the publication of the named magazine only will be restrained. On an interlocutory application for an injunction to restrain the publication of a magazine, the ct. will not take so harsh a step as to suspend the publication altogether until the hearing of the cause.

(2) The argument that a person, by offering to accept a certain sum of money as the price of his abstaining from taking proceedings, has shown that the harm he anticipates is not irremediable, & that therefore he ought not to apply for an injunction, does not go far with the ct.—AINS-WORTH v. BENTLEY (1866), 14 W. R. 630.

690. — — —.]—STANLEY v. TROUP (1889), 5 T. L. R. 635.

See, further, COPYRIGHT, Vol. XIII., pp. 221 et seq.

691. — Judgment debt.]—(1) J. being indebted to T., an agreement was entered into, by which a judgment for the whole amount was to be signed, but not entered up, against J., for securing the payment of the debt by instalments, T. agreeing not to enter up judgment (so as to get into the Tradesman's, etc., Circular) nor publish it in any way. Shortly afterwards T. threatened to sell the judgment debt at the periodical sale of M. & Co., which would necessarily involve by the advertisements, etc., the publication of J.'s indebtedness. The ct., being of opinion that this threat was not *bonâ fide* for the purpose of sale but for the purpose of getting better terms from J., restrained such publication by injunction.

(2) J. having in the first place obtained an *ex p.* injunction, T. offered immediately & before any further expenses were incurred, to submit to a perpetual injunction, but refused to pay any costs. J. thereupon brought the point to a hearing:—*Held*: J. was entitled to all the costs up to the hearing.—JAMIESON v. TEAGUE (1857), 3 Jur. N. S. 1206.

692. — Particular facts.]—Publication of facts contrary to agreement restrained, *ex p.*, although occasioned by a very small difference in money arrangements.—ANON. (1857), 3 Jur. N. S. 685.

693. Not to apply for Act of Parliament—Jurisdiction of court to prevent breach.]—(1) The ct. has undoubted jurisdiction to prevent the

PART X. SECT. 2, SUB-SECT. 6.—E.

1. Agreement with theatrical manager not to perform elsewhere.]—Deft. an actor agreed to serve pltf. who was a

theatrical manager, for two years & covenanted that he would not during the continuance of the agreement, perform in any manner other than for the benefit of pltf.:—*Held*: an in-

junction would lie to prevent breach of the covenant.—HALLAM v. HARVEY (1901), 1 S. R. N. S. W. 155; 18 N. S. W. N. 225.—AUS.

breach of an agreement not to apply for an Act of Parliament; but where the agreement was not to apply to Parliament for a measure affecting the public benefit, the ct. declined to interfere.

(2) Applications to Parliament on public & private grounds distinguished. The latter may, in a proper case, be restrained; the former cannot, in any case, be restrained by injunction.—**LANCASTER & CARLISLE RY. CO. v. NORTH WESTERN RY. CO.** (1856), 2 K. & J. 293; 25 L. J. Ch. 223; 4 W. R. 220; 69 E. R. 792.

Annotations:—As to (1) *Consd.* **Steele v. North Metropolitan Ry.** (1867), 2 Ch. App. 237; *Re London, Chatham & Dover Ry. Arrangement Act, Ex p. Hartridge & Allender* (1869), 5 Ch. App. 671. *Generally, Mentd.* **Hare v. L. & N. W. Ry.** (1861), 30 L. J. Ch. 817.

694. When public interest affected—Court will not interfere.—**LANCASTER & CARLISLE RY. CO. v. NORTH WESTERN RY. CO.**, No. 693, *ante*.

See, also, Nos. 911–919, *post*.

695. Not to give notice to treat.—**BEECHAM v. LASTINGHAM & ROSEDALE LIGHT RY. CO.**, [1907] W. N. 101.

696. Not to increase tolls.—By a Bridge Act it was enacted that tolls not exceeding the tolls specified in the schedule to that Act be demanded & taken by such person as the comrs. should appoint for each & every time of passing over the bridge; provided that tolls should only be payable once on the same day in the case of foot passengers, private carriages not plying for hire, & carts, notwithstanding that they might pass or repass more than once on the same day. By the schedule to the Act a toll of 6d. was payable for every horse drawing a carriage. Deft. tendered for the tolls on the footing, as he alleged, of the above provisions; & the comrs., by lease demised to deft., at an annual rent, the tolls which were or could then be demanded & taken, subject to all statutory restrictions & exemptions, & so as such tolls to be taken during the demise should not be increased beyond the tolls then levied. At the date of the lease one toll only was demanded in respect of a hackney carriage passing over the bridge with passengers & returning with the same passengers or without passengers on the same day, & no toll was demanded in respect of a hackney carriage passing without passengers. Deft. proposed to charge a toll in the case of a carriage plying for hire every time it crossed the bridge. Thereupon the comrs. brought an action claiming an injunction to restrain him from so doing. Deft. counter-claimed that the lease might be rectified on the ground that it did not give effect to the contract between the comrs. & himself by their acceptance of his tender for the tolls:—*Held*: the proposed increase of the tolls was not permissible, having regard to the terms of the lease.—**CONWAY BRIDGE COMRS. v. JONES** (1910), 102 L. T. 92; 26 T. L. R. 259, C. A.

Covenants restraining user of land.—*See* LANDLORD & TENANT; SALE OF LAND.

—**Farming covenants.**—*See* AGRICULTURE, Vol. II., pp. 19, 20, 25, 55, Nos. 114, 120, 147, 300.

Restraint of building.—*See* LANDLORD & TENANT; SALE OF LAND.

Restraint of particular trades.—*See* LANDLORD & TENANT; TRADE & TRADE UNIONS.

Restraint of trade generally.—*See* TRADE & TRADE UNIONS.

Covenants in separation deeds.—*See* HUSBAND & WIFE, Vol. XXVI., pp. 243, 244, Nos. 2135–2149.

SUB-SECT. 7.—CONTRACTS CONTAINING BOTH POSITIVE AND NEGATIVE COVENANTS.

A. In General.

697. Whether breach of negative covenants restrained.—In adjudicating upon covenants in the nature of restrictive covenants, where an affirmative covenant has a negative element in it, or where a covenant is partly affirmative & partly negative, the ct. will in a proper case enforce the negative portion of the covenant.—**CLEGG v. HANDS** (1890), 44 Ch. D. 503; 59 L. J. Ch. 477; 62 L. T. 502; 25 J. P. 180; 38 W. R. 433; 6 T. L. R. 233, C. A.

Annotations:—*Consd.* **Birmingham Breweries v. Jameson** (1898), 78 L. T. 512. *Refd.* **Manchester Brewery Co. v. Coombs**, [1901] 2 Ch. 608; **L. C. C. v. Allen**, [1914] 3 K. B. 642; **Barnes v. City of London Real Property Co.**, [1918] 2 Ch. 18. *Mentd.* **White v. Southend Hotel Co.**, [1897] 1 Ch. 767; **British Electric Traction Co. v. I. R. Comrs.**, [1902] 1 K. B. 441; **Chapman v. Smith**, [1907] 2 Ch. 97; **Dewar v. Goodman**, [1908] 1 K. B. 94; **Hubbard v. Weldon** (1909), 25 T. L. R. 356.

698. ——The ct. granted an injunction to enforce a negative covenant entered into by a servant in a contract of personal service.—**STAR NEWSPAPER CO., LTD. v. O'CONNOR & WETTON** (1893), 9 T. L. R. 526.

699. ——**GRIMSTON v. CUNINGHAM**, No. 572, *ante*.

700. — Positive covenants unenforceable.—The proprietors of Covent Garden Theatre agreed with an actor that he should act for twenty-four nights, during a certain period of time, at their theatre, & that, in the meantime, he should not act at any other place in London:—*Held*: the ct. could not enforce the positive part of the contract, & therefore, it would not restrain by injunction any breach of the negative part.—**KEMBLE v. KEAN** (1829), 6 Sim. 333; 58 E. R. 619.

Annotations:—*Overd.* **Lumley v. Wagner** (1852), 1 De G. M. & G. 604. *Refd.* **Daggett v. Ryman** (1868), 16 W. R. 302. *Mentd.* **Pickering v. Ely (Bp.)** (1843), 12 L. J. Ch. 271.

701. ——(1) Where a party agrees not to do a particular act, & there are other terms in the agreement which are so vague that the ct. cannot enforce them, it will not grant an injunction to restrain the breach of the negative term.

A. agreed to serve B. & C., partners, for six years, at a fixed salary, & not to be employed for any other person during that time; at the expiration of which he was to be admitted into the partnership, but no terms were settled. A. left the service of B. & C. during the term, & commenced business in the same trade:—*Held*: both parts of the agreement must be taken together, & as one part could not, on account of its vagueness, be enforced, the ct. would not interfere to restrain A. from carrying on his business.

(2) The ct. will not give any assistance to a party seeking to enforce a hard bargain.—**KIMBERLEY v. JENNINGS** (1836), 6 Sim. 340; 5 L. J. Ch. 115; 58 E. R. 621.

Annotations:—As to (1) *Consd.* **Dietrichsen v. Cabburn** (1846), 2 Ph. 52; **Lumley v. Wagner** (1852), 1 De G. M. & G. 604. *Refd.* **Daggett v. Ryman** (1868), 16 W. R. 302. As to (2) *Distd.* **Cornwall v. Hawkins** (1872), 41 L. J. Ch. 435. *Refd.* **Pickering v. Ely (Bp.)** (1843), 12 L. J. Ch. 271.

702. ——A patentee entered into an agreement with A. to purchase exclusively from him all such quantities of a particular article as should be used, according to the patent processes, in the manufacture of a certain product,

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697 i. Whether breach of negative covenants restrained.—An injunction

will not be granted restraining the breach by a principal of a contract giving an agent the sole agency for the sale of goods in a specified area,

unless the contract contains an express negative covenant.—**MACDONALD v. CASEIN, LTD.**, [1917] 2 W. W. R. 1132; 35 D. L. R. 443.—CAN.

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which product the patentee agreed to sell to A. exclusively. A. on the other hand, agreed to supply the patentee with all such quantities of the first-mentioned article as should be required, & to purchase from him all the particular product. Upon a bill filed by A. to have this agreement specifically performed:—*Held*: the ct. had no jurisdiction to compel performance by A. of the positive part of the agreement, & it would not therefore interfere by injunction to restrain the patentee from buying from or selling to other parties than A.—*HILLS v. CROLL* (1845), 2 Ph. 60; 1 Coop. temp. Cott. 83; 14 L. J. Ch. 444; 5 L. T. O. S. 493; 9 Jur. 645; 41 E. R. 864, L. C.

Annotations:—*Consd.* *Lumley v. Wagner* (1852), 1 De G. M. & G. 604; *Hope v. Hope* (1856), 22 Beav. 351; *Catt v. Tourle* (1869), 4 Ch. App. 654; *Donnell v. Bennett* (1883), 22 Ch. D. 835. *Refd.* *Dietrichsen v. Cabburn* (1846), 7 L. T. O. S. 445. *Mentd.* *Blackett v. Bates* (1865), 1 Ch. App. 117; *Bowen v. Hall* (1881), 6 Q. B. D. 333.

703. Entire contract not specifically enforceable.]—Where an agreement is so infirm that the ct. can decree no substantial performance of it, there the parties will be left to their legal remedies; but where there is a clear negative agreement on the one side the ct. will not refrain from enforcing that agreement by injunction, because there may be some positive stipulations which the ct. cannot enforce against pltf.

There is a different rule with respect to injunctions from that upon which the ct. acts with respect to specific performance. Injunction will be granted in cases where there can be no specific performance.

The rule respecting injunctions cannot be confined to cases where there is a positive agreement not enforced against pltf. If there is such infirmity in the agreement that the ct. cannot perform the whole, it may decline to interfere. But where there is a consideration paid for a negative agreement, or an agreement prohibiting certain acts, the ct. will interfere by injunction (*LORD COTTENHAM, C.*)—*DIETRICHSEN v. CABBURN* (1846), 2 Ph. 52; 1 Coop. temp. Cott. 72; 7 L. T. O. S. 445; 10 Jur. 601; 41 E. R. 861, L. C.

Annotations:—*Consd.* *G. N. Ry. v. M. S. & L. Ry.* (1851), 5 De G. & Sm. 138; *Donnell v. Bennett* (1883), 22 Ch. D. 835. *Refd.* *Waring v. M. S. & L. Ry.* (1849), 7 Hare, 482; *Lumley v. Wagner* (1852), 1 De G. M. & G. 604; *Pollard v. Clayton* (1855), 1 K. & J. 462; *Stocker v. Wedderburn* (1857), 3 K. & J. 393; *Little v. Kingswood Collieries Co.* (1882), 20 Ch. D. 733. *Mentd.* *Bowen v. Hall* (1881), 6 Q. B. D. 333.

704. — — —.]—The ct. will grant an injunction to restrain deft. from violating a negative term in an agreement, although the agreement be such that there can be no specific performance.—*HOPNER v. BRODRIPP* (1840), 1 Coop. temp. Cott. 89; 47 E. R. 761.

705. — — —.]—The ct. will grant an injunction restraining defts. from acting contrary to a negative agreement, although it cannot specifically enforce the performance of the whole of the agreement.—*GREAT NORTHERN RY. CO. v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1851), 5 De G. & Sm. 138; 18 L. T. O. S. 344; 16 Jur. 146; 64 E. R. 1053.

Annotations:—*Mentd.* *Llanelly Ry. & Dock Co. v. L. & N. W. Ry.* (1873), 8 Ch. App. 942; *Waring & Gillow v. Thompson* (1912), 29 T. L. R. 154.

706. — — —.]—W. agreed with L. that she, W., would sing at L.'s theatre during a certain period of time, & would not sing elsewhere without his written authority:—*Held*: on a bill filed to restrain W. from singing for a third party, & granting an injunction for that purpose, the

positive & negative stipulations of the agreement formed but one contract, & the ct. would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract.—*LUMLEY v. WAGNER* (1852), 1 De G. M. & G. 604; 21 L. J. Ch. 898; 19 L. T. O. S. 264; 16 Jur. 871; 42 E. R. 687, L. C.

Annotations:—*Consd.* *Johnson v. Shrewsbury & Birmingham Ry.* (1853), 3 De G. M. & G. 914; *De Mattos v. Gibson* (1859), 4 De G. & J. 276; *Peto v. Brighton, Uckfield, & Tunbridge Wells Ry.* (1863), 1 Hem. & M. 468. *Distd.* *Brett v. East India & London Shipping Co.* (1864), 2 Hem. & M. 404. *Consd.* *Adamson v. Gill* (1868), 17 L. T. 464. *Apld.* *Daggett v. Ryman* (1868), 16 W. R. 302. *Consd.* *Montague v. Flockton* (1873), L. R. 16 Eq. 189; *Warne v. Routledge* (1874), L. R. 18 Eq. 497. *Apld.* *Donnell v. Bennett* (1883), 22 Ch. D. 835. *Distd.* *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416. *Consd.* *Lanner v. Palace Theatre Eccarius & Armstrong* (1893), 9 T. L. R. 165; *Silver v. Gatti* (1893), 37 Sol. Jo. 776. *Apld.* "Star" Newspaper v. O'Connor & Wetton (1893), 9 T. L. R. 526. *Distd.* *Davis v. Foreman*, [1894] 3 Ch. 654; *Mutual Reserve Fund Life Assocn. v. New York Life Insco. & Harvey* (1896), 75 L. T. 528; *Ehrman v. Bartholomew*, [1898] 1 Ch. 671. *Consd.* *Chapman v. Westerby* (1913), 58 Sol. Jo. 50. *Distd.* *Mortimer v. Beckett*, [1920] 1 Ch. 571. *Consd.* *Lord Strathcona SS. Co. v. Dominion Coal Co.* (1925), 42 T. L. R. 86. *Refd.* *Dollfus v. Pickford* (1854), 2 W. R. 220; *South Wales Ry. v. Wythes* (1854), 5 De G. M. & G. 880; *Paris Chocolate Co. v. Crystal Palace Co.* (1855), 3 Sm. & G. 119; *Stocker v. Wedderburn* (1857), 3 K. & J. 393; *Ogden v. Fossick* (1862), 4 De G. & J. 426; *Fechter v. Montgomery* (1863), 33 Beav. 22; *Messageries Impariales Co. v. Baines* (1863), 7 L. T. 763; *Catt v. Tourle* (1869), 4 Ch. App. 654; *Merchants Trading Co. v. Banner* (1871), L. R. 12 Eq. 18; *Cornwall v. Hawkins* (1872), 20 W. R. 653; *Crosse v. Duckers* (1873), 21 W. R. 287; *Fothergill v. Rowland* (1873), L. R. 17 Eq. 132; *Wolverhampton & Walsall Ry. v. L. & N. W. Ry.* (1873), L. R. 16 Eq. 433; *Piperno v. Harmston* (1886), 3 T. L. R. 219; *Lanner v. Palace Theatre Eccarius & Armstrong* (1893), 9 T. L. R. 162; *Ryan v. Mutual Tontino Westminster Chambers Assocn.*, [1893] 1 Ch. 116; *Cochrane v. Exchange Telegraph Co.* (1896), 65 L. J. Ch. 334; *Robinson v. Heuer*, [1898] 2 Ch. 451; *Alexander v. Mansions Proprietary* (1900), 16 T. L. R. 431; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37; *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799; *Yorkshire Miners' Assocn. v. Howden*, [1905] A. C. 256; *Kirchner v. Gruban*, [1909] 1 Ch. 413. *Mentd.* *Stevens v. Benning* (1855), 6 De G. M. & G. 223; *Hope v. Hope* (1857), 8 De G. M. & G. 731; *Gladstone v. Ottoman Bank* (1863), 1 Hem. & M. 505; *Wilkinson v. Clements* (1872), 8 Ch. App. 96; *Leech v. Schweder* (1874), 9 Ch. App. 465, n.; *Bowen v. Hall* (1881), 6 Q. B. D. 333; *Keith, Prowse v. National Telephone Co.*, [1894] 2 Ch. 147; *Formby v. Barker*, [1903] 2 Ch. 539.

707. — — —.]—Where a contract contains both a negative & an affirmative agreement the ct. will interfere by injunction to restrain a breach of the negative portion of the contract, without regard to the question whether or not the whole contract is capable of being specifically enforced.

C., a fish curer & smoker, entered into a contract in writing with D., a manure manufacturer, whereby he agreed to sell to D., at a fixed price, & for a stated period, all fish refuse not used by him in his own business, & not to sell, during the stated period, any such fish refuse to any other manufacturer. C., having broken his contract by selling all his fish refuse to a third party:—*Held*: an injunction must be awarded to restrain such a breach.—*DONNELL v. BENNETT* (1883), 22 Ch. D. 835; 52 L. J. Ch. 414; 48 L. T. 68; 47 J. P. 342; 31 W. R. 316.

Annotations:—*Consd.* *Davis v. Foreman*, [1894] 3 Ch. 654; *Grimston v. Cuninghame*, [1894] 1 Q. B. 125. *Apld.* *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799. *Refd.* *Powell v. Hemsley* (1909), 78 L. J. Ch. 741.

708. — — — Covenants severable.]—If an agreement consists of two distinct parts, one of which the ct. can enforce, but not the other, & a bill is filed, simply for an injunction to restrain the violation of the former part, the ct. will grant the injunction, notwithstanding it would not enforce the agreement *in toto*.—*ROLFE v. ROLFE*

(1846), 15 Sim. 88; 1 Coop. temp. Cott. 87; 6 L. T. O. S. 518; 10 Jur. 61; 60 E. R. 550.

Annotations.—**Consd.** Lumley v. Wagner (1852), 1 De G. M. & G. 604. **Foll.** Daggett v. Ryman (1868), 17 L. T. 486. **Consd.** Catt v. Tourle (1869), 4 Ch. App. 654. **Refd.** Newling v. Dobell (1868), 38 L. J. Ch. 111; Allen v. Taylor (1870), 19 W. R. 35; Smith v. Hancock (1894), 1 Ch. 209; Pearks v. Cullen (1912), 28 T. L. R. 371.

709. ————.]—An agreement was entered into between K. & P. that K. should take out a patent for purifying paraffin & assign it to P.; that P. thereupon would work it for fourteen years, if it could be so long worked at a profit; would not purify paraffin by any other process, & would pay to K. a royalty upon all purified paraffin sold; that P. would keep accurate account of all paraffin purified according to the patent, render them half yearly & verify them, & that the provisions of this agreement & all other provisions usual & proper in such deeds should be incorporated in the deed of assignment of the patent, such deed to be prepared by counsel to be agreed on by the solrs. of the parties. The patent was taken out, & P. commenced working under it, but shortly afterwards abandoned the use of the process, alleging that it could not be worked at a profit, & refused to pay any royalty. K. thereupon brought an action at law for royalties & recovered judgment. Pending this action, P. gave notice to determine the agreement because the invention could not be worked to a profit. K., after obtaining judgment, filed his bill, asking for an account of subsequent royalties, an injunction to restrain the deft. from purifying paraffin under any other process, & for a reference to chambers to settle a proper deed of assignment, or if the ct. should hold the agreement to have been determined, then for relief against deft. as an infringer of the patent:—**Held**: in a case of this nature it was in the discretion of the ct. whether it would direct an account or leave the parties to their remedy at law, & in the present case the account being only a part of an agreement which the ct. could not wholly enforce, pltf. ought to be left to his remedy at law, & for the same reason the execution of the assignment ought not to be decreed.

The ct. cannot enforce the agreement in all its parts, & it is not certainly according to its usual course to enforce agreements partially. It has done so, indeed, in some cases, of what may be termed negative covenants, but those have been cases in which the negative covenant has formed a distinct branch of the agreement (TURNER, L.J.).—**KERNOT v. POTTER** (1862), 3 De G. F. & J. 447; 45 E. R. 951, L. JJ.

710. ————.]—A. purchased from B. certain premises, fixtures & the goodwill of a business. As part of the consideration for the purchase of the goodwill B. covenanted not to carry on business at a particular place. A. covenanted to employ B. B. having been dismissed set up business in breach of his covenant:—**Held**: although there was not sufficient evidence to show that B. had been properly dismissed yet A. was entitled to an injunction to restrain B. from committing a breach of his covenant.—**DAGGETT v. RYMAN** (1868), 17 L. T. 486; 16 W. R. 302.

711. ————]—Where injunction merely incidental to principal relief.]—The ct. will not compel specific performance of an agreement by a co. to employ pltf. as their broker; & the contract being at an end, that which is merely an adjunct to the principal relief sought, viz., an injunction to restrain the co. from advertising, in breach of a stipulation contained in the agreement, the name

of any other person as their broker, will not be granted.—**BRETT v. EAST INDIA & LONDON SHIPPING CO., LTD.** (1864), 2 Hem. & M. 404; 3 New Rep. 688; 10 L. T. 187; 12 W. R. 596; 71 E. R. 520.

Compare Nos. 655–663, *ante*.

See, further, LANDLORD & TENANT; MASTER & SERVANT; SALE OF GOODS.

B. Principles on Which Court acts.

712. Injunction dependent on plaintiff's performance.—The ground upon which the ct. goes, in enforcing, by injunction, a negative term in an agreement, the positive terms in which cannot be enforced by decree for specific performance is, that the injunction is dependent upon pltf.'s performing his part of the contract, & will be dissolved upon his failing to do so.—**STOCKER v. WEDDERBURN** (1857), 3 K. & J. 393; 26 L. J. Ch. 713; 30 L. T. O. S. 71; 5 W. R. 671; 69 E. R. 1162.

Annotations.—**Mentd.** Ogden v. Fossick (1862), 7 L. T. 515; London Corpn. v. Southgate (1868), 38 L. J. Ch. 141; Douglas v. Baynes, [1908] A. C. 477.

713. Substance of stipulation to be considered.—In considering whether to grant or refuse an injunction to restrain a breach of a particular clause of an agreement, the ct. will look to the substance of the act to be performed, & not merely to the presence or absence of negative words.

A lease of a line of railway contained an agreement by the lessee co. to carry over it all traffic between certain places, & to pay the lessor co. one-half the receipts in respect of such traffic. The lease contained other provisions on which no relief could have been obtained in equity, & it contained no negative stipulation restricting the lessee co. from carrying the traffic in question over other lines. On demurrer to a bill by the lessor co., alleging that the lessee co. were carrying the traffic mentioned in the agreement over other lines of their own, & praying for an injunction to restrain them:—**Held**: relief could be granted in such a case, & the demurrer must be overruled.—**WOLVERHAMPTON & WALSALL RY. CO. v. LONDON & NORTH WESTERN RY. CO.** (1873), L. R. 16 Eq. 433; 43 L. J. Ch. 131, L. C.

Annotations.—**Consd.** Donnell v. Bennett (1883), 22 Ch. D. 835; Davis v. Foreman (1894), 8 R. 725; Metropolitan Electric Supply Co. v. Ginder, [1901] 2 Ch. 799; Lord Strathcona S.S. Co. v. Dominion Coal Co. (1925), 42 T. L. R. 86. **Refd.** Piperno v. Harnston (1886), 3 T. L. R. 219; Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416; Ryan v. Mutual Tontine Westminster Chambers Assocn., [1892] 1 Ch. 427; Silver v. Gatti (1893), 37 Sol. Jo. 776; London Electric Supply Corpn. v. Westminster Electric Supply Corpn. (1913), 11 L. G. R. 1046; Mortimer v. Beckett, [1920] 1 Ch. 571; Prosperity v. Lloyds Bank (1923), 39 T. L. R. 372. **Mentd.** L. C. & D. Ry. v. S. E. Ry. (1888), 40 Ch. D. 100; Talby v. Official Receiver (1888), 13 App. Cas. 523; R. v. England & Wales Charity Comrs. (1897), 76 L. T. 199; Re Cary-Elwes' Contract, [1906] 2 Ch. 143.

714. ————]—Agreement negative in form—Affirmative in substance.]—The principle of *Lumley v. Wagner*, No. 706, *ante*, ought not to be applied to an agreement which, though negative in form, is affirmative in substance.

An agreement for the employment of a manager of a business contained a clause providing that the employer would not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ. The employer gave to the manager notice purporting to determine the agreement & the service created thereby, & the manager brought an action for an injunction to restrain the employer from acting on the notice:—**Held**: the clause above mentioned, though negative in form, was affirmative in

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substance, being equivalent to a stipulation by the employer that he would retain the manager in his employ, & an injunction ought not to be granted.—*DAVIS v. FOREMAN*, [1894] 3 Ch. 654; 64 L. J. Ch. 187; 43 W. R. 168; 8 R. 725.

Annotations:—Folld. Kirchner v. Gruban, [1909] 1 Ch. 413. *Consd. Mortimer v. Beckett*, [1920] 1 Ch. 571.

715. ———.—]—By an agreement in writing dated June 30, 1905, deft., a German subject, agreed with pltf's. a Leipzig firm, to act as their representative in the United Kingdom; to devote all his activity & industry exclusively to the sale of their goods; not to divulge any business matters to any one; & under a money penalty to remain in his position & not to give notice before July 1, 1910; to be three months' notice if then given. The parties agreed to submit themselves in all cases of dispute to the exclusive jurisdiction of the Leipzig cts. & to the exclusive applicability of the German law. After the expiration of three months' previous notice to determine the agreement, deft. left the pltf's' employment on May 1, 1908, & entered the service of a rival English firm. Pltf's. then issued the writ in this action for injunctions & other relief. Deft. entered a conditional appearance & applied by summons to stay proceedings on the ground that the disputes should be referred to the Leipzig ct. Thereupon pltf's. served notice of motion for (a) an injunction to restrain deft. from engaging in any other business than theirs until after July 1, 1910, or until a final order by the Leipzig ct.; (b) an injunction restraining him for a similar period from divulging matters relating to the pltf's' business. On the hearing of the summons & motion:—*Held*: (1) pltf's. were not entitled to the first injunction asked on the ground that the stipulation sought to be enforced, although negative in form, was affirmative in substance, & the ct. could not grant an injunction which in effect would compel specific performance of a contract of service.

(2) The principle on which the ct. acts in restraining an employee from divulging matters relating to his master's business is that there is an implied term in the contract of service not to use, to the master's detriment, information obtained in the course of his service.—*KIRCHNER & CO. v. GRUBAN*, [1909] 1 Ch. 413; 78 L. J. Ch. 117; 99 L. T. 932; 53 Sol. Jo. 151.

Annotations:—As to (1) Consd. Mortimer v. Beckett, [1920] 1 Ch. 571. *Refd. L. C. & D. Ry. & S. E. & C. Ry. Co.'s Managing Committee v. Spiers & Pond* (1916), 32 T. L. R. 493; *Prosperity v. Lloyd's Bank* (1923), 39 T. L. R. 372. *Generally, Mentd. The Cap Blanco*, [1913] P. 130.

716. ———.—]—A skipper contracted to devote the whole of his time, attention, ability, & energies to the performance of his duties as skipper in a trawler, the property of his employers, & not to give his time to any other business or occupation:—*Held*: an injunction could not be granted to restrain him from obtaining other employment, as that would practically amount to enforcing a specific performance of the contract.—*CHAPMAN v. WESTERBY* (1913), 58 Sol. Jo. 50.

See, further, LANDLORD & TENANT; MASTER & SERVANT; TRADE & TRADE UNIONS.

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g. Whether negative covenants implied—Agreement to buy material exclusively from other party.]—Deft., contracted with pltf's., "to accept use exclusively every week" pl

prints would, in the ordinary course of business, be prepared for deft., he used the ready-prints of a rival publisher, instead of pltf's' Deft. contended that the contract contained no express negative clause, & that no should be implied:—*Held*:

SUB-SECT. 8.—IMPLIED NEGATIVE COVENANTS.

A. In General.

717. General rule — Contract affirmative in form—Negative in substance.]—Where a contract, although affirmative in form, is negative in substance, the ct. will, notwithstanding the absence of a negative stipulation, imply one, & grant an injunction accordingly, upon the principle of *Lumley v. Wagner*, No. 706, *ante*.

Deft. signed a form of request to pltf. co. to supply him with electric energy subject to the following terms: the consumer agrees to take the whole of the electric energy required for the premises mentioned below from the co. for a period of not less than five years; the charge for electric energy to be 4½d. per Board of Trade unit. There was no covenant by the co. to supply, nor by deft. to take, any energy. Similar forms of request had been signed by other persons for different terms of years & at different prices:—*Held*: the request was in substance a contract not to take energy from any other person, & it could be enforced by injunction.—*METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. GINDER*, [1901] 2 Ch. 799; 70 L. J. Ch. 862; 84 L. T. 818; 65 J. P. 519; 49 W. R. 508; 17 T. L. R. 435; 45 Sol. Jo. 467.

Annotations:—Mentd. Husey v. London Electric Supply Corp'n., [1902] 1 Ch. 411; *A.-G. for Victoria v. Melbourne Corp'n.*, [1907] A. C. 469; *A.-G. v. Long Eaton U. D. C.*, [1914] 2 Ch. 251; *A.-G. v. Hackney Corp'n.*, [1918] 1 Ch. 372.

Compare Nos. 712–716, ante.

718. Whether negative covenants implied — Contract to give "first refusal" of property.]—An agreement between a racecourse co., & a canal co. contained a clause that if the racecourse should be at any time proposed to be used for dock purposes, the racecourse co. should give the canal co. the "first refusal" thereof:—*Held*: the canal co. were entitled to enforce their right as against the racecourse co. & the intending purchaser on the ground that the contract to give the canal co. the "first refusal" involved a negative contract not to part with the racecourse to any one else without giving them that "first refusal."—*MANCHESTER SHIP CANAL CO. v. MANCHESTER RACECOURSE CO.*, [1901] 2 Ch. 37; 70 L. J. Ch. 468; 84 L. T. 436; 49 W. R. 418; 17 T. L. R. 410; 45 Sol. Jo. 394, C. A.

Annotations:—Refd. Sharpe v. Durrant (1911), 55 Sol. Jo. 423. *Mentd. Crossfield v. Manchester Ship Canal Co.* (1904), 73 L. J. Ch. 345; *Re Wilton's S. E.*, [1907] 1 Ch. 50; *Talbot v. Scarisbrick* (1908), 77 L. J. Ch. 436; *Ryan v. Thomas* (1911), 55 Sol. Jo. 364.

See, further, SALE OF LAND.

719. — Agreement to take whole supply of electric energy from specified company.]—*METROPOLITAN ELECTRIC SUPPLY CO., LTD. v. GINDER*, No. 717, *ante*.

—— **Building regulations.] — See PUBLIC HEALTH.**

—— **Charterparties.] — See Sub-sect. 8, B., post.**

—— **Contracts for personal services.] — See Sub-sect. 3, C. (b), ante; & generally, MASTER & SERVANT; TRADE & TRADE UNIONS.**

—— **Covenants in leases.] — See LANDLORD & TENANT.**

—— **Contracts of sale.] — See SALE OF GOODS; SALE OF LAND.**

contract, in view of all the circumstances, meant that deft. would not use the ready-prints of others during the life of the contract, & an injunction restraining him from doing so should be granted.—*WINNIPEG SATURDAY POST v. COUZENS* (1911), 19 W. L. R. 28; 91 Man. T. R. 582.—CAN.

Building schemes.]—See SALE OF LAND.

—Sale of business “with goodwill.”]—See PARTNERSHIP; TRADE & TRADE UNIONS.

—Injunction to restrain removal of fixtures.]—See LANDLORD & TENANT.

B. Charterparties.

See, generally, SHIPPING.

720. Not to employ vessel in different manner.]

—Where property, either immovable or movable, is disposed of with notice of a prior contract entered into by the person disposing of it for its use in a particular manner, the person taking it with such notice may be restrained from using it otherwise.

The ct. will not affirmatively enforce a charterparty, but it is implied in such a contract, that if the charterer provides a cargo, the ship shall not be employed for any other purpose; & a mtgee., with notice of a prior charterparty effected with the mtgor., will be in general restrained from doing anything to prevent its performance. Where, however, the mtgor. in such a case was unable to put the ship into proper repair to make the voyage, or otherwise to perform the contract, & the charterer took no step for several months with respect to it:—*Held*: the mtgee. ought not to be further restrained from exercising the powers contained in his mtge.—*DE MATTOS v. GIBSON* (1859), 4 De G. & J. 276; 28 L. J. Ch. 498; 34 L. T. O. S. 36; 5 Jur. N. S. 555; 7 W. R. 514; 45 E. R. 108, L. C.

Annotations:—*Apld.* *Sevin v. Deslandes* (1860), 30 L. J. Ch. 457. *Foll.* *Messageries Imperiales Co. v. Baines* (1863), 7 L. T. 763. *Apld.* *Adamson v. Gill* (1868), 17 L. T. 464. *Consd.* *Catt v. Tourle* (1869), 4 Ch. App. 654. *Apld.* *Montague v. Flockton* (1873), L. R. 16 Eq. 189. *Consd.* *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416; *The Celtic King*, [1894] P. 175. *Distd.* *Bucknall v. Tatem* (1900), 83 L. T. 121. *Consd.* *L. C. C. v. Allen*, [1914] 3 K. B. 642. *Apld.* *Macdonald v. Eyles*, [1921] 1 Ch. 631; *The Lord Strathcona*, [1925] P. 143. *Foll.* *Lord Strathcona S.S. Co. v. Dominion Coal Co.* (1925), 42 T. L. R. 86. *Refd.* *Peto v. Brighton, Uckfield & Tunbridge Wells Ry.* (1863), 1 Hem. & M. 468; *Greenhill v. Isle of Wight (Newport Junction) Ry.* (1871), 23 L. T. 885; *Luker v. Dennis* (1877), 7 Ch. D. 227; *Piperno v. Harmston* (1886), 3 T. L. R. 219; *Davis v. Foreman*, [1894] 3 Ch. 654; *Formby v. Barker*, [1903] 2 Ch. 539; *Brigg v. Thornton*, [1904] 1 Ch. 386. *Mentd.* *Herne Bay Steam Boat Co. v. Hutton*, [1903] 2 K. B. 683; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *Barker v. Stickney*, [1919] 1 K. B.

721. By a charterparty the shipowner agreed that his vessel should proceed to a named port & there load a cargo for the charterer, & it was provided that if the vessel should not be at that port ready to load by a specified date, the charterer should be at liberty to cancel the charterparty. The vessel was then at another port unloading, & was delayed in doing so for so long that it became impossible for her to arrive at the agreed port by the specified date. The charterer refused to extend the time for cancellation, or to promise to load the vessel if she proceeded to the agreed port, & said that if he did load, the rate of freight must be reduced, & he insisted on the vessel proceeding to the agreed port. The shipowner thereupon refused to send his vessel there:—*Held*: an injunction ought not to be granted to restrain the shipowner from using the vessel for any purposes other than those of the charterparty.

Where there is a legal right, ordinarily the person having that right can come to a ct. of equity & obtain an injunction. That rule is, however, subject to this qualification, that pltf. must not have done anything which may disentitle him to come to a ct. of equity to ask for an injunc-

tion (*SMITH, L.J.*).—*BUCKNALL BROTHERS v. TATEM & Co.* (1900), 83 L. T. 121, C. A.

Annotation:—*Refd.* *Moel Tryvan Ship Co. v. Weir*, [1910] 2 K. B. 844.

722. —.]—In consequence of the public announcement of an intended Royal naval review at Spithead on June 28, 1902, an agreement in writing was entered into between pltf. & deft. that pltf.'s steamship should be “at the disposal” of deft. on June 28 to take passengers from Herne Bay “for the purpose of viewing the naval review & for a day’s cruise round the fleet; also on June 29 for similar purposes; price £250 payable, £50 down, balance before ship leaves Herne Bay.” On the signing of the agreement deft. paid the £50 deposit. On June 25 the review was officially cancelled, whereupon pltf. wired to deft. for instructions, stating that the ship was ready to start, & also requesting payment of the balance. Receiving no reply, pltf., on June 28 & 29, used the ship for their own purposes, thereby making a profit. On June 29 deft. repudiated the contract *in toto*. During the two days in question the fleet remained anchored at Spithead.

This contract did not amount to a demise of the ship. It was, however, a contract entered into for valuable consideration as to the employment of the ship on the two days in question; & it at least conferred this interest on deft., that if pltf. had attempted to violate it, that attempted violation would have been a ground for an injunction at the instance of pltf. to prevent it. That is established by *De Mattos v. Gibson*, No. 720, *ante* (*STIRLING, L.J.*).—*HERNE BAY STEAM BOAT CO. v. HUTTON*, [1903] 2 K. B. 683; 72 L. J. K. B. 879; 89 L. T. 422; 52 W. R. 183; 19 T. L. R. 680; 47 Sol. Jo. 768; 9 Asp. M. L. C. 472, C. A.

Annotations:—*Refd.* *The Lord Strathcona*, [1925] P. 143. *Mentd.* *Metropolitan Water Board v. Dick Kerr*, [1917] 2 K. B. 1; *Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540.

723. —.]—A time charter provided that the owners should let & the charterers should hire a steamship for twelve months at a certain sum payable monthly for hire. The charter contained certain restrictions on the user of the ship & certain exceptions by one of which restraint of princes was mutually excepted. The charterers were to have the option of sub-letting the ship. After the ship had been placed at the charterers’ disposal the Admiralty by notices addressed first to the owners & then to the charterers requisitioned the ship for the service of the Government, & sent the owners a form of charterparty free from the restrictions of the time charter & specifying a monthly sum for hire less than that named in the time charter. The ship was then placed at the disposal of the Admiralty & was restored to the owners during the currency of the time charter.

An injunction was granted restraining the owners from employing the vessel otherwise than in accordance with the terms of the charterparty, or from dealing with the vessel in any way so as to interfere with the charterers’ right of use of the vessel under the charterparty:—*Held*: the owners were entitled to hire under the time charter notwithstanding the requisition of the ship by the Admiralty.—*MODERN TRANSPORT CO., LTD. v. DUNERIO S.S. Co.*, [1917] 1 K. B. 370; 86 L. J. K. B. 164; 115 L. T. 535; 33 T. L. R. 55; 61 Sol. Jo. 71; 13 Asp. M. L. C. 490; 22 Com. Cas. 125, C. A.

Annotation:—*Mentd.* *Anglo Northern Trading Co. v. Emlyn Jones & Williams*, [1917] 2 K. B. 78.

724. —.]—The purchaser of a ship who has notice of the terms of a charterparty entered into

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for its employment is in the position of a constructive trustee, & he can be restrained, at the suit of the charterers, from employing the ship in any way inconsistent with the charterparty. It is not material that specific performance cannot be enforced; the ct. can grant an injunction if a negative stipulation is expressed or clearly implied in the charterparty.—**LORD STRATHCONA S.S. Co. v. DOMINION COAL Co.**, [1926] A. C. 108; 42 T. L. R. 86, P. C.

725. Not to act inconsistently with charterparty.]—Parties who have mutually bound themselves will be restrained from doing any act inconsistent with a charterparty which they have entered into *bond fide*.—**SEVIN v. DESLANDES** (1860), 30 L. J. Ch. 457; 3 L. T. 461; 7 Jur. N. S. 837; 9 W. R. 218; 1 Mar. L. C. 1.

Annotation:—**Distd. Bucknall v. Tatem** (1900), 83 L. T. 121.

726. — Injunction pending inquiry into state of cargo.]—A vessel having been chartered to convey a cargo of coals to China, & having become damaged, the master was forced to discharge the cargo, & the owner declined to re-ship it on the ground that having become wet it was liable to spontaneous combustion. On a bill by the charterers to restrain the owner from employing the ship in any manner inconsistent with the charterparty, the ct. directed an inquiry as to the state of the cargo, & granted an injunction pending such inquiry.—**HERIOT v. NICHOLAS** (1864), 12 W. R. 844, L. J.

Annotation:—**Consd. Adamson v. Gill** (1868), 18 L. T. 278.

727. — Contract impossible of performance.]—Pltfs. chartered deft.'s vessel to carry a cargo of coal from an English port to Bombay, & fulfilled their part of the contract. The ship sailed, but received damage in a storm & was obliged to put into Belfast to repair. Here the coal was unloaded, & deft., being advised that by reloading it in its damaged state he would run the risk of spontaneous combustion, sold the greater part & delivered it to the purchaser. He then entered into another engagement for the employment of his vessel, & pltfs. filed this bill for an injunction. Upon pltfs.' undertaking to supply at the English port a second cargo of coal, & to compensate deft. for his loss of time upon the voyage to Belfast & back as the ct. might direct, an injunction was granted restraining deft. from using the vessel in any manner inconsistent with the charterparty. On appeal:—**Held**: the only right in pltfs. was to have the charterparty carried into effect; that had become impossible; there was no right to compel deft. to do what was never in the con-

templation of the parties, & the injunction could not be maintained.—**ADAMSON v. GILL** (1868), 18 L. T. 278; 16 W. R. 639 3 Mar. L. C. 49, L. J.

728. Not to interfere with performance of charterparty—Injunction against purchaser with notice.]—Injunction granted to restrain persons purchasing an American ship with notice of a charterparty previously entered into by the masters in this country, from interfering with the performance of the charterparty.—**MESSAGERIES IMPERIALES Co. v. BAINES** (1863), 7 L. T. 763; 11 W. R. 322; 1 Mar. L. C. 285.

Annotations:—**Refd. Adamson v. Gill** (1868), 17 L. T. 464; **The Lord Strathcona**, [1925] P. 143.

SUB-SECT. 9.—INJUNCTION IN AID OF SPECIFIC PERFORMANCE.

See, generally, SPECIFIC PERFORMANCE.

729. General rule.]—(1) Injunction to restrain the vendor of copyhold premises, after delivery of possession & receipt of part of the purchase-money, from surrendering them to persons other than the purchasers.

(2) In general during a suit for specific performance, the ct. will not restrain the owner from dealing with his property.—**SPILLER v. SPILLER** (1819), 3 Swan. 556; 36 E. R. 974, L. C.

Annotations:—**As to (1) Foll. G. W. Ry. v. Birmingham & Oxford Junction Ry.** (1848), 2 Ph. 597; **London & County Banking Co. v. Lewis** (1882), 21 Ch. D. 490. **As to (2) Consd. Shrewsbury & Chester Ry. v. Shrewsbury & Birmingham Ry.** (1851), 1 Sim. N. S. 410. **Foll. Hadley v. London Bank of Scotland** (1865), 3 De G. J. & Sm. 63.

730. Discretion of court to grant.]—**LOW v. INNES**, No. 1154, *post*.

731. Injunction against vendor of property.]—**ECHLIFF v. BALDWIN** (1809), 16 Ves. 267; 33 E. R. 986.

Annotations:—**Consd. A.-G. v. Liverpool Corpn.**, **A.-G. v. Aspinall** (1837), 7 L. J. Ch. 51. **Appl. G. W. Ry. v. Birmingham & Oxford Junction Ry.** (1848), 2 Ph. 597.

732. —.]—Application for an injunction to enforce an agreement to enter into a contract for the sale of real estate refused.—**JOHNSTON v. BOYES** (1898), 14 T. L. R. 475; 42 Sol. Jo. 610.

733. — Contract clear & undisputed.]—(1) On a bill filed for specific performance of an alleged contract for sale of premises by defts. to pltf., defts. contended that they never entered into the contract alleged. Upon the evidence before the ct. upon a motion for an injunction to restrain defts. from selling the property except to pltf., the Ct. of Appeal, even assuming that pltf. would succeed in his suit, were governed by

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725 i. Not to act inconsistently with charterparty.]—Where a charterparty has been actually completed, the ct. will, by injunction prevent an employment of the ship inconsistent with the terms of the charterparty; but where there is only an agreement for a charterparty, no such injunction will be granted.—**ABDUL ALLARAKHI v. ABDUL BACHA** (1881), 1 L. R. 6 Bom. 5.—**IND.**

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h. Injunction against vendor of property—Prospective vendee with prior claim.]—The ct. will restrain a vendor from selling leasehold property previously contracted to be sold, if the vendee has not been negligent in carrying out his part of the agreement.—**MCLEAN v. COONS** (1851), 3 Gr. 112.—**CAN.**

k — Where alienation threatened.]

—In a suit for the specific performance of an agreement for the sale of lands, or to set aside a conveyance for fraud, pltf. is not of right entitled to an injunction to restrain alienation, unless it is alleged by the bill & proved that the holder of the land threatens & intends to convey the lands.—**KERR v. HILLMAN** (1860), 8 Gr. 285.—**CAN.**

1. Injunction against purchaser—Pending payment of purchase-money.]—By agreement in writing, dated Oct. 15, 1873, A. agreed to sell, & B. & C. agreed to purchase, all the merchantable white & red pine timber, suitable for their purposes, on certain premises owned by A., for \$600, payable, \$400 on date of agreement, & the balance in one year, with a provision that the timber should be cut & removed off the lands, on or before Oct. 15, 1881. It was further provided that B. & C., their agents, representatives, or assigns, should have

the right to enter upon the premises at all times during the period for which the agreement was to continue in force, for the purpose of cutting & removing said timber; & that if B. & C. should remove the whole of the timber off the land before the expiration of the year, they would pay the whole of the purchase-money immediately after removing the said timber. B. & C. did not pay the \$200, & after the expiration of one year from the date of the agreement, assigned it to defts., who had no actual notice that the \$200 remained unpaid, but the agreement was registered against the lands:—**Held**: the vendor was entitled to an injunction to prevent cutting & removing by the defts. until the \$200 was paid.—**SUMMERS v. COOK** (1880), 28 Gr. 179.—**CAN.**

— having agreed to purchase lands,

the consideration that the inconvenience of granting the injunction would be far greater than that of withholding it; & they therefore dissolved the injunction which had been granted by the Vice-Chancellor.

(2) When there is a clear & undisputed contract the ct. will restrain the vendor, until the hearing of the cause, from transferring the legal estate.—**HADLEY v. LONDON BANK OF SCOTLAND, LTD.** (1865), 3 De G. J. & Sm. 63; 12 L. T. 747; 11 Jur. N. S. 554; 13 W. R. 978; 46 E. R. 562, L. JJ.

Annotations:—As to (1) **Folld.** Johnston v. Boyes (1898), 14 T. L. R. 475. As to (2) **Refd.** Lysaght v. Edwards (1876), 2 Ch. D. 499.

734. — Contract in doubt — Balance of convenience.—**HADLEY v. LONDON BANK OF SCOTLAND, LTD.**, No. 733, *ante*.

735. — Chattel sold abroad.—The ct. will specifically enforce against a foreigner a contract of sale made abroad, if the subject matter of the contract is within its jurisdiction. Therefore, where a contract was made abroad for the sale of a foreign vessel to be delivered in this country, the ct. granted an *interim* injunction to restrain the removal of the ship from an English port, allowing substituted service of the notice of motion on the captain.—**HART v. HERWIG** (1873), 8 Ch. App. 860; 42 L. J. Ch. 457; 29 L. T. 47; 21 W. R. 663; 2 Asp. M. L. C. 63, L. JJ.

Annotation:—**Mentd.** Burn v. Herlofson & Siemens, The Faust (1887), 56 L. T. 722.

736. — To enable valuation to proceed — House sold with fixtures at valuation.—Where an agreement has been entered into for the sale of a house at a fixed price, & of the fixtures & furniture therein at a valuation by a person named by both parties, & he undertakes the valuation, but is refused permission by the vendor to enter the premises for that purpose, the ct. will make a mandatory order to compel the vendor to allow the entry to enable the valuation to proceed. The ct. has jurisdiction to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing.—**SMITH**

entered, & carried on their works without the vendor's leave, & without having paid him, or lodged the money in bank. The ct. granted an injunction till the money should be paid.—**ANDERSON v. NEWRY & WARRENPOINT RY. CO.** (1849), 1 Ir. Jur. 11.—**IR.**

n. — Alleged breach of agreement.—The owner of lands over which the G. Ry. would pass offered to convey a portion thereof for a station house upon certain conditions, which offer was rejected. Afterwards an agreement was made with the solr. of the contractors, which was reduced into writing & signed by the owner, agreeing to convey a quantity of land not to exceed ten acres, upon condition that the station should be placed upon it. The owner afterwards refused to convey unless the contractors would secure to him three crossings over the railway track, & brought ejectment to turn the parties out of possession of the land so agreed to be conveyed. The ct. decreed specific performance of the agreement to convey & an injunction to stay the ejectment, notwithstanding that deft. swore that the condition upon which he agreed to convey was that the crossing should be secured to him.—**JACKSON v. JESSOP** (1856), 5 Gr. 524.—**CAN.**

o. Agreement to erect & maintain station.—Station erected but not maintained.—In consideration of a bonus granted by pltf., a railway co. covenanted "to erect & maintain a permanent freight & passenger station "

at G. Shortly afterwards the road was leased, with notice of this agreement, to defts., who discontinued G. as a regular station, having no officer of the co. to sell tickets or make arrangements for despatching or receiving freight, but merely stopping there when there were any passengers to be let down or taken up:—**Held**: the mere erection of the station was not a fulfilment of the covenant, & the municipality was entitled to have it specifically performed. The decree, which enjoined defts. from allowing any of their ordinary freight, accommodation, express, or mail trains, other than special trains, to pass without stopping for the purpose of taking up or letting down passengers, was varied by limiting it to such trains as are usually stopped at ordinary stations.—**WALLACE TOWNSHIP CORPN. v. GREAT WESTERN RY. CO.** (1878), 3 A. R. 44.—**CAN.**

p. Injunction against works by railway company.—Where not according to agreement.—A railway co. in respect of the execution, according to a plan agreed upon, of certain roads & bridges specified, obtained from a proprietor a disposition to certain grounds, & a discharge of all claims of damage. Another co., whose line the first co. became bound to lease & work, made, according to a plan approved by the engineers of both cos., a junction near one of the roads & arches in question, without giving any notice that the ground where they were would be required, & without, in fact, affecting them, although they

v. PETERS (1875), L. R. 20 Eq. 511; 44 L. J. Ch. 613; 23 W. R. 783.

Annotation:—**Mentd.** County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

737. — Patent rights — Important questions to be decided.—Deft. was owner of an English patent & also of foreign patents for the same invention. Pltfs. entered into a correspondence with deft. which resulted in an agreement by letter to purchase deft.'s patent. Pltfs. afterwards insisted that the agreement included both the English & foreign patents. Deft.'s view was that he was selling only the English patent. A third party alleged that deft. was not in a position to deal with any of the patents, as a prior option of purchase had been given to him which he claimed to have exercised. Pltfs. brought their action for specific performance of the agreement, & moved for an *interim* injunction to restrain deft. from parting with or dealing with any of the patents:—**Held**: pltfs. were entitled to enforce their claim for specific performance with regard to the English patent; &, as there were important questions to be decided at the hearing of the action upon the claim of the third party, an *interim* injunction ought to be granted.—**PRESTON v. LUCK** (1884), 27 Ch. D. 497; 33 W. R. 317, C. A.

Annotations:—**Mentd.** Bristol Cardiff & Swansea Aerated Bread Co. v. Maggs (1890), 44 Ch. D. 616; **Berners v. Fleming**, [1925] Ch. 264.

738. Injunction against purchaser.—To restrain purchase of other property.—A co. was formed for the purchase of land at B. for the erection, alteration, finishing, & maintenance of a brewery or breweries thereon, & also for the purchase of a particular brewery, called the N. street Brewery, at B. One of the arts. of assocn. said "the directors shall purchase" the N. street Brewery for £64,000. There being a difficulty in raising the requisite capital, the directors proposed to purchase a smaller brewery at B. Some dissentient shareholders filed a bill to restrain the co. from effecting the proposed purchase, on the ground that it was *ultra vires*, & would render the purchase of the N. street Brewery impossible. Injunction refused.

were within their limits of deviation. The second co. then handed over the line to the first co. Thereafter the first co. accepted payment from the second co., which had been bound by their Act to execute the works necessary for the function, & agreed to make additional sidings. The first co. then commenced making a siding within the limits of deviation of the second co., but on the land acquired under the disposition referred to. The siding affected one of the roads & bridges, & on the proprietor complaining, the second co. agreed with the first to go on with the works on their guaranteeing them against the costs of any litigation that might follow:—**Held**: whichever co. executed the works, the right to do so depended on & was excluded by the terms of the contract between the proprietor & the first co. therefore that the proprietor was entitled to interdict against the works proceeding, & the interdict declared perpetual.—**EDINBURGH & GLASGOW RY. CO. v. CAMPBELL** (1863), 1 Macph. (Ct. of Sess.) 53, H. L.—**SCOT.**

q. Where disputes to be submitted to arbitration.—Injunction to prevent breach of contract.—A condition of a contract, providing that legal proceedings under the contract should be stayed pending arbn., does not preclude a party to the contract from obtaining an interdict restraining breach of the contract pending proceedings.—"**FARMERS' ADVOCATE**," LTD. v. **ANDREWS** (1912), 33 N. L. R. 461.—**S. AF.**

Sect. 2.—Contract: Sub-sect. 9. Sects. 3 & 4: Sub-sect. 1, A. (a).]

A vendor is not entitled to an injunction to restrain a purchaser from buying another estate, on the ground that it will incapacitate him from completing his first purchase.—*SYERS v. BRIGHTON BREWERY Co., LTD., WRIGHT v. SAME* (1964), 11 L. T. 560; 13 W. R. 220.

SECT. 3.—COPYRIGHT AND LITERARY PROPERTY.

Grounds for granting or refusing.]—See COPYRIGHT, Vol. XIII., pp. 216, 221–223, 224, Nos. 523, 582–626, 640.

Protection of property in unpublished works.]—See COPYRIGHT, Vol. XIII., pp. 176, 177.

Covenants not to publish—Injunction to restrain breach.]—See Nos. 686–692, *ante*.

Form of injunction.]—See COPYRIGHT, Vol. XIII., pp. 223, 224, Nos. 627–635.

SECT. 4.—CORPORATE AND UNINCORPORATE BODIES.

SUB-SECT. 1.—CORPORATE BODIES.

A. Companies.

(a) Companies under the Companies Acts.

739. To restrain ultra vires act—Right of single shareholder to injunction.]—Any act which is *ultra vires* a joint stock co., though sanctioned by all the directors & a large majority of the shareholders, may be resisted by any single shareholder, and a ct. of equity will interpose on his behalf by injunction (LORD CAMPBELL, C.).—*SIMPSON v. WESTMINSTER PALACE HOTEL Co.* (1860), 8 H. L. Cas. 712; 2 L. T. 707; 6 Jur. N. S. 985; 11 E. R. 608, H. L.

Annotations:—*Consd.* Yorkshire Miners' Asscn. v. Howden, [1905] A. C. 256. *Apld.* Mosely v. Koffyfontein Mines, [1911] 1 Ch. 73. *Refd.* MacDougall v. Jersey Imperial Hotel Co. (1864), 2 Hem. & M. 528; Taunton v. Royal Insce. (1864), 2 Hem. & M. 135; Russell v. Wakefield Waterworks Co. (1875), L. R. 20 Eq. 474; Studdert v. Grosvenor (1886), 33 Ch. D. 528; Henderson v. Bank of Australasia (1888), 40 Ch. D. 170; A.-G. v. Mersey Ry., [1907] 1 Ch. 81. *Mentd.* Re Era Asscn., Williams' Case, Anchor Case (1862), 1 Hem. & M. 672; Featherstonhaugh v. Lee Moor Porcelain Clay Co. (1865), L. R. 1 Eq. 318; Joint Stock Discount Co. v. Brown (1866), L. R. 3 Eq. 139; Re London & Colonial Co., *Ex p.* Horsey (1868), 37 L. J. Ch. 393; Polini v. Gray, Sturla v. Freccia (1879), 12 Ch. D. 438; Guinness v. Land Corp'n. of Ireland (1882), 22 Ch. D. 349; Russell v. Amalgamated Soc. of Carpenters & Joiners, [1912] A. C. 421.

740. — Disposal of property by directors.]—No doubt, a disposition of the property by the directors might be void in equity if it were contrary to the objects of the co.; the directors would then be restrained from doing the act, as being an abuse of their fiduciary position (SIR W. R. JAMES, L.J.).—*Re PATENT FILE Co., Ex p. BIRMINGHAM BANKING Co.* (1870), 6 Ch. App. 83; 40 L. J. Ch. 190; 23 L. T. 484; 19 W. R. 193, L. J.J.

Annotations:—*Refd.* Re General Provident Asscn., *Ex p.* National Bank (1872), L. R. 14 Eq. 507; General Auction Estate & Monetary Co. v. Smith, [1891] 3 Ch. 432. *Mentd.* R. v. Reed (1880), 5 Q. B. D. 483; Re Clough, Bradford Commercial Banking Co. v. Cure (1885), 31 Ch. D. 324.

741. To restrain exclusion from board of directors—Director holding shares in own right.]—

Pltf. was adjudicated a bkpt. in 1888 & never obtained his discharge. In Apr. 1902, he was a director of & held one thousand shares in a co. the arts. of assocn. of which required that the qualification of a director should be the holding "in his own right" of one hundred shares, & that his office should be vacated if he ceased to hold the qualifying number of shares. In the same month pltf.'s trustee in bkpcy. wrote to the co. claiming these shares as his, but postponing his decision whether he would be registered himself or have some nominee registered as transferee. Thereupon the other directors excluded pltf. from the board on the ground that he had become disqualified. Subsequently a transfer of one hundred other shares in pltf.'s favour was executed, & lodged with the co. for registration. Although the trustee had not raised any objection to registration the directors refused to register the transfer:—*Held*: pltf. had ceased to hold the one thousand shares "in his own right," & was not entitled to an injunction to restrain his exclusion from the board.—*SUTTON v. ENGLISH & COLONIAL PRODUCE Co.*, [1902] 2 Ch. 502; 71 L. J. Ch. 685; 87 L. T. 438; 50 W. R. 571; 18 T. L. R. 647; 10 Mans. 101.

Annotation:—*Mentd.* Boschoek Proprietary Co. v. Fuke, [1906] 1 Ch. 148.

742. — Undisclosed interest in contract with company.]—Art. 70 of the arts. of assocn. of a co., provided that the office of any director should be vacated if, among other things, he contracted with the co., or was concerned in or participated in the profits of any contract with, or work done for the co., without declaring his interest at a meeting of the directors & that no director so interested should vote on any question relating to such contract or work. Pltf. was a director, & at a meeting of the board on Apr. 14, 1893, he informed the chairman, prior to the commencement of the business, that he was "jointly interested" with M. in a contract, concerning which some question was on the agenda paper for discussion, but he did not specify the precise nature or extent of his interest. Pltf. took no part in the business, & was recorded on the minutes as "neutral." At a meeting of the board on Aug. 11, 1893, no notice of which was given to pltf., a resolution was passed declaring that his seat as a director had been vacated under art. 70. On motion, treated by consent as the trial of the action:—*Held*: (1) "declare his interest" meant declare the nature of his interest, & the words were not satisfied by a mere declaration that pltf. had an interest in the matter; (2) notice should have been given to pltf. & a board meeting summoned to give him an opportunity of justifying himself.

Perpetual injunction granted, without costs.—*TURNBULL v. WEST RIDING ATHLETIC CLUB LEEDS, LTD.* (1894), 70 L. T. 92; 10 T. L. R. 191.

Annotation:—*As to* (2) *Consd.* Re Bodega Co., [1904] 1 Ch. 276.

—.]—*See, also*, Nos. 816, 817, *post*.

See, also, COMPANIES, Vol. IX., p. 526, No. 3461, 3462.

743. To restrain infringement of patent.]—(1) In 1885, a patent was granted to W. for the manufacture of an illuminant appliance, for gas & other burners. The owners of this patent, brought an action for infringement of the same

PART X. SECT. 4, SUB-SECT. 1.—A. (a).

739 i. To restrain ultra vires act—Right of single shareholder to injunction.]

—In an action by a shareholder against the co. & the directors:—*Held*: the shareholder was not entitled to an injunction to restrain the co. & the directors from carrying on the business

of the co. otherwise than with a view to earning profits for distribution among all the members.—*MILES v. SYDNEY MEAT PRESERVING Co., LTD.* (1912), 16 C. L. R. 50.—*AUS.*

against a co. who were manufacturing mantles :—

Held: defts. had infringed the patent. Judgment was given for pltfs. with costs, & a certificate of validity having previously been granted, no order was made depriving the pltfs. of costs, as between solr. & client. (2) One of defts. was secretary of deft. co. He delivered no defence, but adopted that of the co. at the trial, & appeared by the same counsel & solrs. :—*Held*: an injunction ought to be awarded against him with costs, but under the circumstances, no inquiry as to damages.—**WELSBACH INCANDESCENT GAS LIGHT CO., LTD. v. DAYLIGHT INCANDESCENT MANTLE CO., LTD.** (1899), 16 R. P. C. 344.

Annotation:—As to (2) *Distd.* **British Thomson-Houston Co. v. Sterling Accessories, Same v. Crowther & Osborn**, [1924] 2 Ch. 33.

744. To restrain registration of company formed for fraudulent purposes.]—(1) A foreign trader whose goods are in fact imported into England, although he has no English agency, has a sufficient English market to entitle him to an injunction restraining the piracy of his trade name & reputation.

(2) The signatories of a co. formed for a fraudulent purpose & duly registered are guilty of a fraudulent conspiracy to effect that purpose, & together with their co. can be restrained by injunction.—**SOCIÉTÉ ANONYME DES ANCIENS ÉTABLISSEMENTS PANHARD ET LEVASSOR v. PANHARD LEVASSOR MOTOR CO., LTD.**, [1901] 2 Ch. 513; 85 L. T. 20; 50 W. R. 74; 17 T. L. R. 680; 45 Sol. Jo. 671; *sub nom.* **PANHARD ET LEVASSOR (SOCIÉTÉ ANONYME ANCIENS ÉTABLISSEMENTS) v. PANHARD LEVASSOR MOTOR CO., LTD.**, 70 L. J. Ch. 738.

745. To restrain carrying out resolution—Carried by show of hands—Opposition of majority of shareholders.]—A co.'s arts. provided that at general meetings resolutions were to be decided by a numerical majority of votes, unless a poll was demanded by three members, & that when two or more persons were entitled to a share the one whose name stood first on the register should be the only one entitled to vote. Pltfs., who numbered more than three, held a majority of shares & they opposed certain resolutions, which were, however, carried on a show of hands. Owing to some of pltfs.' shares being jointly held they only counted as two persons & so did not amount to the three persons necessary for the demand of a poll. Pltfs. brought an action to restrain the carrying out of the resolutions & asked for an injunction until the trial :—*Held*: without prejudice to the question whether pltfs. would be entitled to an injunction at the trial, they should have an interlocutory injunction.—**CORY v. REINDEER STEAMSHIP, LTD.** (1915), 31 T. L. R. 530; 59 Sol. Jo. 629.

Annotation:—*Consd.* **Siemens v. Burns, Burns v. Siemens Dynamo Works, Same v. Same** (1918), 119 L. T. 352.

746. — Electing directors—Validity of election.]—One of the arts. of assocn. of a co. pro-

vided that a member should not be qualified to be elected a director unless written notice of the intention in that behalf were given to the co. not less than fourteen clear days before the "day of election" of directors. The ordinary general meeting of the co. was held on Dec. 10, 1915, at which meeting, according to the arts. the two deft. directors retired by rotation. The report of the directors was not adopted; there was no election of directors, but a committee of shareholders was appointed to investigate the affairs of the co. & report to a general meeting, & the meeting stood adjourned to receive this report. On Feb. 21, 1916, written notice was given to the co. by a shareholder stating that at the adjourned meeting he proposed to move the election of four named members as directors. The adjourned meeting was held on Mar. 10, 1916, to consider the committee's report & to transact the unfinished business. The chairman ruled the notice of Feb. 21, 1916, to be out of order, & after declaring the election of auditors said there was no further business & left the chair. Subsequently the shareholders appointed a chairman & elected the four new directors. On motion by the shareholders for an interlocutory injunction to restrain the two former directors from acting :—*Held*: the day of election of directors within the meaning of the art. was the date of the adjourned meeting on Mar. 10, 1916; the notice of Feb. 21, 1916, was in compliance with that art.; & the first two persons elected as directors in lieu of the two who retired were duly elected. The injunction asked for must be granted.—**CATESBY v. BURNETT**, [1916] 2 Ch. 325; 85 L. J. Ch. 745; 114 L. T. 1022; 32 T. L. R. 380.

Annotation:—*Mentd.* **Neuschild v. British Equatorial Oil Co.**, [1925] Ch. 346.

Restraint of right to act as director.]—See COMPANIES, Vol. IX., p. 465, Nos. 3029–3032.

Enforcement of right to appoint director.]—See COMPANIES, Vol. IX., p. 438, Nos. 2845–2849.

To restrain shareholders winding up company.]—See COMPANIES, Vol. X., p. 987, No. 6834.

Restraint of sale of assets to another company for shares—No special resolution.]—See COMPANIES, Vol. IX., p. 579, No. 3868.

Interference of court with rights of majority & minority.]—See COMPANIES, Vol. IX., p. 613, No. 4077 *et seq.*

Powers & liabilities of company—Interference by court.]—See COMPANIES, Vol. IX., pp. 616–619, Nos. 4098–4110.

Restraint of calls.]—See COMPANIES, Vol. IX., p. 341, Nos. 2154–2157.

Restraint of forfeiture of shares.]—See COMPANIES, Vol. IX., pp. 426, 432, Nos. 2756, 2763, 2808–2811.

Restraint of transfer of shares.]—See COMPANIES, Vol. IX., pp. 385, 386, Nos. 2436–2438.

744 i. To restrain registration of company formed for fraudulent purposes.]—**A.-G. v. MYDDLETONS, LTD.**, [1907] 1 I. R. 471.—*IR.*

R. Agreement to alter articles—Injunction to restrain dealing with shares so as to impair right of voting.]—A co. was registered with a share capital of 50,000 of which 28,000 were allotted to deft. & 12,500 to pltfs. & L. It was then agreed that deft. should transfer 2,500 of his shares to pltfs., & that pltfs., deft. & L. or any two of them might sell all or any of the shares, transfers to carry out this being signed in blank. Pltfs. had two out of three seats on the board of

directors, the other being held by deft. Subsequently a further agreement was entered into between pltfs. & deft. whereby, it was agreed to alter the arts. of assocn. so as to increase the number of directors & give pltfs. another seat on the board & both parties covenanted to do all acts by way of voting in respect of their shares or otherwise. Pltfs. commenced an action against defts. for specific performance of the latter agreement & pltfs. moved for an interlocutory order that deft. might be ordered to vote at meetings of the co. for the purpose of altering the articles & that he might be restrained from dealing with the

shares of the co. under the powers contained in the first agreement :—*Held*: to order deft. to vote at meetings would be equivalent to ordering specific performance & injunction refused at that stage but injunction granted till hearing restraining deft. from dealing without pltfs. consent, with shares of the co. in any manner which might inspire his right to vote in respect of his shares or otherwise prevent specific performance.—**ALLEN & SONS, LTD. v. CLIFTON**, [1902] S. R. Q. 167.—*AUS.*
t. No-liability company.]—Interlocutory injunction granted against a no-liability co., to restrain mining for gold on private property, on

Sect. 4.—Corporate and unincorporate bodies: Sub-sect. 1, A. (a) & (b).]

Restraint of distribution of assets in winding up.]
—See COMPANIES, Vol. X., pp. 1000, 1001, Nos. 6946–6948.

Restraint of execution.]—See COMPANIES, Vol. X., pp. 964, 965, Nos. 6619–6624.

Restraint of payment of dividends.]—See COMPANIES, Vol. IX., pp. 595, 596, Nos. 3974–3982.

Restraint of issue of shares for improper purpose.]
—See COMPANIES, Vol. IX., p. 292, Nos. 1810, 1812, 1814.

Enforcement of right to inspect register of mortgages.]—See COMPANIES, Vol. X., p. 788, No. 4929.

Enforcement of right to inspect register of members.]—See COMPANIES, Vol. IX., p. 209, Nos. 1295–1299.

Regulation & management meetings of members.]
—See COMPANIES, Vol. IX., pp. 582, 583, Nos. 3897–3904.

Restraint of reconstruction & amalgamation of companies in voluntary winding up.]—See COMPANIES, Vol. X., pp. 1015 *et seq.*

(b) *Statutory Companies.*

747. Exercise of statutory power to lower road.]
—The trustees of a turnpike road agreed to assent to a bill in Parliament for the formation of a railway, on the condition that the railway should pass over the road at a sufficient elevation, & the road be not lowered or otherwise prejudiced. This qualified assent was returned in both houses of Parliament. The bill passed. Sect. 12 of the act, among other powers, authorised the co. to raise & sink rivers or streams, roads or ways, in order the more conveniently to carry the same over or under, or by the side of the railway, provided that the co. should not divert, obstruct, or impound any river or water to the prejudice of any mill or manufactory. Sect. 72 enacted, that the arch of any bridge for carrying the railway over or across any turnpike road, should be of a height from the surface of such road to the centre of such arch, of not less than 16 feet, provided that the descent under any such bridge should not exceed 1 foot in 30 feet. The act contained no particular proviso as to the road in question:—*Held*: the modified assent of the road trustees, the terms of which were neither embodied in any agreement between the trustees & the co., nor adopted by the legislature, afforded no equitable ground for restraining the co. from enforcing, with regard to the road in question, all the powers conferred by the act. The co. were authorised to sink the original surface of a turnpike road, in order to give the specified elevation to the arch of a bridge, erected for carrying the railway over such road, notwithstanding that the effect, from the peculiar situation of the road, would be, to render it liable to be occasionally flooded.—*ALDRED v. NORTH MIDLAND RY. Co.* (1839), 1 Ry. & Can. Cas. 404; 3 Jur. 244.

748. To enforce agreement—To stop trains at particular station.]—RIGBY v. GREAT WESTERN RY. Co., No. 186, *ante*.

749. To restrain ultra vires act—Laying pipes to supply water outside statutory limits.]—The C. co. were proceeding to lay down pipes, which they

alleged were necessary for the supply of C., but which, they admitted, they intended to use for the purpose of carrying water beyond the limits of their powers. At the suit of the board of health of C., the ct. restrained the C. co. from laying down pipes under the streets of C. for the purpose of supplying with water any parish or place not being part of the port of C., or any parish or place within or adjoining such town.—*CARDIFF CORPN. v. CARDIFF WATERWORKS Co.* (1859), 33 L. T. O. S. 104; 24 J. P. 21; 5 Jur. N. S. 953; 7 W. R. 386; *on appeal*, 4 De G. & J. 596, L. JJ.

Annotation:—*Appld. Marriott v. East Grinstead Gas & Water Co.*, [1909] 1 Ch. 70.

750. ———.]—A water co. authorised by their special Act to supply water to certain places, defined by the Acts to be the limits of the Act, cannot supply water outside those limits, although not expressly forbidden by the Act to do so. A water co., authorised by their special Acts to erect water-works & supply water within certain limits which included the parish of A., agreed to supply water to W., the owner of property in the adjoining parish of H., & accordingly extended their main in the parish of A. to the boundary where it adjoined the parish of H., & then, at the cost of W., laid a main some distance along a highway in the parish of H. & thence laid pipes to W.'s property:—*Held*: the water co. on the construction of their special Acts, were not by virtue either of any express or incidental powers entitled to supply water outside their statutory limits. The water co. were supplying water to W., not at the point where their mains reached the boundary in the parish of A., but at the terminals on W.'s property where he received and applied it to his use. Therefore, the water co. were acting *ultra vires*, & an injunction was granted at the suit of the A.-G.—*A.-G. v. WEST GLOUCESTERSHIRE WATER Co.*, [1909] 2 Ch. 338; 78 L. J. Ch. 746; 101 L. T. 258; 73 J. P. 453; 25 T. L. R. 650; 7 L. G. R. 1078, C. A.

751. ——— Amalgamation of companies—Lease of railway.]—A railway co. entered into an agreement to lease their line to another co. The agreement contained provisions which were legal & others which were *ultra vires*, but an application was to be made to Parliament for power to carry out such provisions as should be *ultra vires*:—*Held*: as the agreement provided for a number of things to be done, which were all for the purpose of accomplishing a certain object that was *ultra vires*, the parties had no right, by virtue of that agreement, until they had obtained the authority of Parliament, to do even those acts which independently of the agreement they did not require the authority of Parliament to do. The ct., in granting an injunction to this extent, refused to restrain two directors, appointed under the agreement, from acting, on the ground that the directors had power to remove them, & that their removal might be detrimental to the business of the co.—*HATTERSLEY v. SHELBURNE (EARL)*, (1862), 31 L. J. Ch. 873; 7 L. T. 650; 10 W. R. 881.

Annotation:—*Repld. Maunsell v. Mid. G. W. (of Ireland) Ry.* (1863), 32 L. J. Ch. 513.

752. ——— Scope of statutory powers.]—A co. established for one purpose cannot, against the

information by the A.-G. at the relation of the owners of the land who were not joined as plffs. *Qu.*: whether such injunction would have been granted against a co. with ordinary liability.—*A.-G. v. HUSTLER'S CONSOLS CO. NO LIABILITY* (1872), 3 V. R. (Eq.) 121.—*AUS.*

PART X. SECT. 4, SUB-SECT. 1.
A. (b).

752 i. To restrain ultra vires act—Scope of statutory powers.]—JENKINS v. CENTRAL ONTARIO RY. Co. (1884), 4 O. R. 593.—*CAN.*

752 ii. ———.]—When railway

cos. or individuals exceed their statutory powers in dealing with other people's property, & an injunction is sought to restrain their actions, no question of damage or public convenience is raised.—*A.-G. v. RYAN* (1888), 5 Man. L. R. 81.—*CAN.*

a. ——— *Where restriction only im-*

will of any dissentient minority, however small, undertake a business foreign to its original object. Thus a railway co. cannot become a steam boat co. or carry on a brewery. No portion of the funds of a co. can be applied in procuring the means of carrying on a different undertaking such as soliciting a bill in Parliament to confer powers necessary for that purpose. The ct. will take the interests of the public into consideration when asked to interfere with a railway.—*LYDE v. EASTERN BENGAL RY. Co.* (1866), 36 Beav. 10; 55 E. R. 1059.

Annotations:—*Apld.* *Deuchar v. Gas Light & Coke Co.*, [1924] 2 Ch. 426. *Refd.* *A.-G. v. N. E. Ry.*, [1906] 2 Ch. 675.

753. To restrain misapplication of funds—Amalgamation of companies.]—On an application being made to Parliament for an Act to extend the N. & E. R. Co. a subscription contract was entered into, & the parliamentary deposit therein mentioned was professedly paid by the directors, while in fact it consisted of a sum borrowed by them, & subsequently debited to the N. & A. R. Co., in which the N. & E. R. Co. was incorporated by the Act applied for. The ct. granted an injunction restraining directors of the N. & A. R. Co. from debiting that co. with the deposit, or any sums paid for calls made in respect of the amounts mentioned in the contract.—*SPACKMAN v. LATTIMORE* (1860), 3 Giff. 16; 4 L. T. 45; 7 Jur. N. S. 179; 9 W. R. 229; 66 E. R. 304.

— **Costs of application to Parliament.]** — See COMPANIES, Vol. X., pp. 1165, 1166, Nos. 8261–8266.

754. To restrain alteration of road—Public improvement.]—Defts. proposed turning an inclined road or slipway, leading from the town to the sea-shore, from the north-east to the north-west.

plied—Consequences of act negligible.]—Defts. were incorporated by letter patent under the Street Ry. Act, 1887 (c. 171), which authorised them to construct & operate, on all days except Sunday, a street railway:—*Held*: an action would not lie by the Crown to restrain defts. from operating the road on Sunday, the restriction against their doing so being at most an implied one, & no substantial injury to the public, or any interference with proprietary rights, being shown.—*A.-G. v. NIAGARA FALLS, WESLEY PARK & CLIFTON TRAMWAY Co.* (1891), 18 A. R. 453.—CAN.

b. — Injury to individual—Remedy must be available apart from special statute.]—*SHEPHERD v. PORT OF BOMBAY TRUSTEES* (1876), 1 L. R. 1 Bom. 132.—IND.

c. To restrain arbitrary & unreasonable act.]—Action to restrain C. Electric Light & Powers Co. from arbitrary & unreasonable exercise of its franchise. Defts. had lowered its wires solely to obstruct & if possible kill the municipal project for competition:—*Held*: above was an arbitrary & unreasonable exercise of its franchise & should be restrained.—*A.-G. (TRURO) v. CHAMBERS ELECTRIC LIGHT & POWER Co.* (1913), 13 E. L. R. 443; 14 D. L. R. 883.—CAN.

d. To restrain evasion of statute.]—22 Vict. c. 122, incorporating the Northwest Transit Co., enacted that it should not be lawful for the co. to proceed with their operations under the Act until £50,000 of the capital stock should have been subscribed, & 10 per cent. paid thereon. Subsequently, & before £50,000 had been subscribed or the percentage paid thereon, a proposition was made by C. to certain stockholders in the enterprise, that C. should sell a steam vessel belonging to him to the co. for £5,000, & that in that event he should become a sub-

scriber to the amount of £50,000, & that the steamer should be paid for by taking her as a payment of 10 per cent. on the £50,000, which was acceded to, & the subscription & purchase made accordingly, in compliance with a resolution of the co.:—*Held*: this was an evasion of the statute, & an injunction was granted on motion, restraining the co. from proceeding with any of the operations thereof until the conditions pointed out by the statute had been complied with.—*HOWLAND v. MCNAB* (1860), 8 Gr. 47.—CAN.

e. To enforce performance of statutory duty.]—A railway co. who take possession of land under the compulsory powers conferred by the statute, are bound to erect fences for the proper separation of the railway from the remainder of the land, within six months from the time of possession being taken, not from the time of notice being given requiring such fences to be constructed, which need only be a reasonable notice to fence; & if they neglect to do so they may be enjoined from further using the line of railway. Under the circumstances:—*Held*: the possible injury & loss to defts., by the sudden & immediate stoppage of their work, largely outweighed any possible advantage to the pltf.; & the proper relief was by a *mandamus*, or mandatory injunction, requiring the co. to construct the fences; & if there was jurisdiction to restrain the further use of the road, as to which any expression of opinion was avoided, it should not be exercised in the case of a contumacious refusal.—*MASSON v. GRAND JUNCTION RY. Co.* (1879), 26 Gr. 286; *reversd.* 26 Gr. 289, n.—CAN.

f. —.]—By deft.'s Act of incorporation, 36 Vict. c. 100 (O.), the amending Act, 56 Vict. c. 90, & the contract & bye-law contained in

It appeared that this, so far from producing any injury, would make a more convenient landing-place:—*Held*: whether defts. were authorised or not, the ct. would not interfere in the matter.—*RYDE COMRS. v. ISLE OF WIGHT FERRY Co.* (1862), 30 Beav. 616; 54 E. R. 1029.

755. To restrain interference with foreshore.]—*Held*: comrs. of sewers are entitled to restrain a railway co. by injunction until the hearing, from interfering with a natural deposit of beach forming a protection to the country from the inundations of a tidal navigable river within the survey of the comrs.; & this notwithstanding a purchase by the railway co. from the lord of the manor, under their Parliamentary powers, of the spot in question.—*CROSSMAN v. BRISTOL & SOUTH WALES UNION RY. Co.* (1863), 1 Hem. & M. 531; 11 W. R. 981; 71 E. R. 233.

Annotations:—*Refd.* *Battersea Vestry v. County of London & Brush Provincial Electric Lighting Co.*, [1899] 1 Ch. 474; *Nesbitt v. Mablethorpe U. C.*, [1918] 2 K. B. 1.

756. To restrain obstruction of light.]—Pltf. was the owner in fee of a house with three windows overlooking the station yard of defts., a railway co. Pltf. or his predecessors had enjoyed light & air through the windows without interruption for sixteen years, when defts. requested him to pay a nominal rent for the enjoyment of the light & air. Pltf. having refused to pay the rent, the co. put up a screen on their land & blocked up the lights. In an action to restrain defts. from interfering with the light & air of pltf., an interlocutory mandatory injunction was granted directing defts. to pull down & remove the obstruction complained of, until the hearing of the action or until further order:—*Held*: the injunction must be dissolved, pltf. not having acquired a right to light & air, & a railway co. being, *prima facie*, entitled to use

the schedule to the latter Act, defts. were bound to sell the tickets called "workmen's tickets" upon their cars to the public & to receive them in payment of fares at the hours mentioned in the bye-law, not from workmen only, but from the public generally. Defts. having refused to sell certain classes of tickets upon their cars, or to accept them from persons from whom they were bound to accept them in payment of fares, were restrained from running cars upon which these tickets were not kept for sale, & this restraint was coupled with a declaration that they were bound to sell them on their cars to all persons desiring to buy them, & to receive them from all persons in payment of fares during the hours mentioned in the bye-law.—*HAMILTON v. HAMILTON STREET RY. Co.* (1904), 25 C. L. T. 15; 8 O. L. R. 642; 4 O. W. R. 311, 411; 10 O. L. R. 594; 6 O. W. R. 207; *affd.*, 39 S. C. R. 673.—CAN.

g. Exercise of statutory power—Restraint of unnecessary damage.]—Railway Clauses Act, 1845, enacts that, subject to the Act, & of any Act incorporated therewith, the railway co. may do all acts necessary for making the railway "provided always that in the exercise of the powers by this or the special Act granted, the co. shall do as little damage as can be. Where contractors for a railway co. in executing works under above Act, are causing serious damage to adjoining property, the owner thereof is entitled to interdict against the contractors continuing their operations, unless they succeed in showing that they are using all reasonable precautions.—*GILLESPIE v. LUCAS & AIRD* (1893), 20 R. (Ct. of Sess.) 1035; 30 Sc. L. R. 843; 1 S. L. T. 152.—SCOT.

h. Where statutory powers abandoned—Power to enjoin performance.]—Applt., a landowner, through whose

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their own land as they thought fit, provided it was for no purpose inconsistent with their Act of Parliament.—*BONNER v. GREAT WESTERN RY. Co.* (1883), 24 Ch. D. 1; 48 L. T. 619; 47 J. P. 580; 32 W. R. 190, C. A.

Annotations:—*Apld.* *Foster v. L. C. & D. Ry.*, [1895] 1 Q. B. 711. *Refd.* *Greenhalgh v. Brindley*, [1901] 2 Ch. 324; *Boyce v. Paddington B. Co.*, [1903] 2 Ch. 556.

757. Right to inspect register.]—The right of inspection & perusal of the register of debenture stock-holders, which by Cos. Clauses Act, 1863 (c. 118), s. 28, is given to mtgees., bondholders, debenture stock-holders, shareholders & stock-holders of the co., includes a right to take copies. The fact that a person has taken his stock in a co. at the instance of a rival co., & for the purpose of serving the interests of the rival co., does not disentitle him to the assistance of the ct. in enforcing this statutory right.—*MUTTER v. EASTERN & MIDLANDS RY. Co.* (1888), 38 Ch. D. 92; 57 L. J. Ch. 615; 59 L. T. 117; 36 W. R. 401; 4 T. L. R. 377, C. A.

Annotations:—*Apld.* *Nelson v. Anglo-American Land Mortgage Agency Co.*, [1897] 1 Ch. 130; *Boord v. African Consolidated Land & Trading Co.*, [1898] 1 Ch. 596. *Distd.* *Re Balaghât Gold Mining Co.*, [1901] 2 K. B. 865. *Apld.* *Davies v. Gas Light & Coke Co.*, [1909] 1 Ch. 708. *Refd.* *Bevan v. Webb*, [1901] 2 Ch. 59; *Ormerod, Grierson v. St. George's Ironworks*, [1905] 1 Ch. 505. *Mentd.* *Everett v. Griffiths*, [1924] 1 K. B. 941.

See, also, COMPANIES, Vol. X., p. 1128, Nos. 7940–7942.

758. Pollution of water supply by gas company.]—Pltfs. were the owner & the occupiers of two

houses which obtained their water supply from a well by means of a pipe laid in the main road, & belonging to the owner of the houses. Defts. were a gas co. incorporated under Acts of Parliament, & owned gas mains & pipes which were laid in the same road. In an action by pltfs. to restrain the co. from polluting the water supply with gas escaping from their pipes, which pltfs. alleged to be defective:—*Held*: defts. had no statutory authority to create a nuisance, & there was a nuisance; as however, it had ceased after action brought, there would be no injunction, but a declaration that defts. were not entitled to pollute pltfs.' water.—*BATCHELLER v. TUNBRIDGE WELLS GAS Co.* (1901), 84 L. T. 765; 65 J. P. 680; 17 T. L. R. 577; 45 Sol. Jo. 577.

759. Noise & vibration from electric station.]—Where it is proved that a serious nuisance is caused to the owners of property of machinery used by a public co. incorporated under statutory powers to supply electrical energy within a certain district, the remedy is not limited to money compensation but an injunction can also be granted against the co., although the co. have not acted unreasonably in the mode in which they carried out their statutory duties.—*DEMERARA ELECTRIC Co. v. WHITE*, [1907] A. C. 330; 76 L. J. P. C. 54; 96 L. T. 752; 51 Sol. Jo. 497, P. C.

Restraint of issuing & stamping proxy papers.]—*See* COMPANIES, Vol. X., p. 1155, No. 8181.

Restraint of allotment & issue of shares.]—*See* COMPANIES, Vol. X., pp. 1130 *et seq.*

Restraint of directors.]—*See* COMPANIES, Vol. X., p. 1130, No. 7963.

property a railway was proposed to be constructed expressed himself as satisfied with the course it was to take but while the bill was before Parliament he sought to obtain an undertaking from the co. for the purpose of better securing his rights. The co.'s offer to refer all claims to an arbiter was accepted. On the co. resolving to abandon their undertaking, applt. sought a suspension & interdict against the dissolution of the co. & the return to the shareholders of deposits & calls paid:—*Held*: an injunction or interdict would not be granted.—*ANSTRUTHER v. EAST OF FIFE RY. Co.* (1852), 1 Macq. 98; 24 Sc. Jur. 419; 1 Stuart, 691; *affg.* 12 Dunl. (Ct. of Sess) 127; 22 Sc. Jur.

To restrain acts contrary to policy.]—The ct. will grant an *ad interim* injunction to restrain a railway co. from carrying out, without the sanction of Parliament, a contract to purchase the property of a canal co., when that purchase would create a monopoly.—*M'DONNELL v. MIDLAND GREAT WESTERN RAILWAY OF IRELAND Co.*, *M'DONNELL v. GRAND CANAL Co.* (1853), 5 Ir. Jur. 185.—*IR.*

l. To restrain levy of tolls—Where dependent on state of road.]—General Road Cos. Act, 1887, c. 159, relating to tolls, taken in connection with 53 Vict. c. 42 (O.), apply to a road co. incorporated by special Act, so as to prevent the co. from demanding tolls after the engineer appointed under 53 Vict. c. 42 (O.), has reported the road to be out of repair, until he further reports that the road has been put in good & efficient repair; & an action will lie at the suit of the A.-G. to restrain such collection.—*A.-G. v. ROAD Co.* (1892), 21 O. R. 19 A. R. 234; 21 S. C. R. 631.—

m. Cancellation of stock—Authorised by statute.]—Pltfs. obtained an interim restraining order to restrain defts. cancelling certain stocks to which claimed to be entitled:—*Held*:

under 1893 Act, c. 46, ratifying & confirming an agreement entered into between the Western Counties Ry. Co. & a body known as "the syndicate" deft. co. were required to do the act pltfs. sought to restrain them from doing, & the restraining order must therefore be set aside.—*KINNEY v. PLUNKETT* (1894), 26 N. S. R. 158.—*CAN.*

n. Railway obstructing navigable waters.]—Upon an application by pltf. co. for a mandatory injunction to compel deft. co. to cease obstructing certain navigable rivers, & to remove a temporary bridge built across one of them, also to make openings in two permanent steel bridges constructed pursuant to statutory authority. Upon the evidence:—*Held*: the injunction be refused, as the requirements of the Railway Act of Canada had been complied with, & the public works department of Canada had sanctioned the temporary obstruction of these streams.—*BRITISH COLUMBIA EXPRESS Co. v. GRAND TRUNK PACIFIC RY. Co.*—*CAN.*

o. To restrain expropriation of Municipal property—Act sanctioned by railway committee of Privy Council.]—*TORONTO CITY v. METROPOLITAN RY. Co.* (1900), 31 O. R. 367.—*CAN.*

p. Use of streets by electric light company—After expiration of time limited—Though subsequent use acquiesced in.]—Deft. co. had acquired the rights & business of a co. which had in 1891 secured the right to erect poles & wires in the streets of the Town of Selkirk & to carry on the business of supplying electric light & power in the town for a period of ten years. After the expiration of that period & until the year 1909, deft. co. & its predecessors in title continued the business & erected from time to time new poles & wires in the streets without procuring any extension of the franchise, but also without any action being taken by the town to prevent the carrying on of the business:—*Held*: the town was not estopped from passing

a bye-law in 1909 revoking & terminating the rights & privileges previously granted & then exercised by deft. co. & requiring the immediate removal of all their poles & wires from the streets & was entitled to a declaration that deft. co. had no right any longer to maintain its system, an injunction to restrain it from maintaining the same or erecting poles or wires or transmitting electricity within the Town, & an order requiring the co. to remove their poles & equipment from the streets of the Town.—*SELKIRK TOWN v. SELKIRK ELECTRIC LIGHT Co.* (1910), 20 Man. L. R. 461.—*CAN.*

j. Powers granted under Dominion Act—Exercise in violation of Provincial law—Whether restrained.]—*Canadian Act*, 37 Vict. c. 103, which created a corp'n. with power to carry on certain definite kinds of business within the Dominion, was within the legislative competence of the Dominion Parliament. The fact that the corp'n. chose to confine the exercise of its powers to one Province, & to local & provincial objects, did not affect its status as a corporation, or operate to render its original incorporation illegal as *ultra vires* of the said Parliament:—*Held*: the corp'n. could not be prohibited generally from acting as such within the Province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed & adapted to that purpose.—*LORANGER v. COLONIAL BUILDING & INVESTMENT ASSOCN.* (1882), 5 L. N. 116; 2 Cart. 275.—*CAN.*

r. To restrain increase of railway rates—Statutory maximum.]—An interdict was granted at the instance of a trader, to prevent the levying, by a railway co. of certain rates for the conveyance of coals, which was under the maximum rate, sanctioned by the Railway Act. The ct. recalled the interdict. The trader presented a note of suspension craving interdict against the levying of the rate complained of pending an appeal. The

Restraint of ultra vires acts of statutory corporation generally.]—See CORPORATIONS, Vol. XIII., pp. 354 *et seq.*

Limitation of powers generally.]—See COMPANIES, Vol. X., p. 1163.

Regulation & management.]—See COMPANIES, Vol. X., p. 1162.

(c) *Chartered Companies.*

To restrain surrender of charter.]—See CORPORATIONS, Vol. XIII., p. 287, No. 185.

To restrain acts involving surrender of charter.]—See CORPORATIONS, Vol. XIII., p. 358, No. 940.

To restrain ultra vires acts.]—See CORPORATIONS, Vol. XIII., p. 359, No. 944.

To restrain directors from making calls & carrying on business.]—See COMPANIES, Vol. X., p. 1194, No. 8484.

To restrain forfeiture of shares for non payment of call.]—See COMPANIES, Vol. X., p. 1195, No. 8486.

B. *Municipal Corporations.*

Ultra vires & generally.]—See CORPORATIONS, Vol. XIII., pp. 354 *et seq.*

760. To restrain illegal payments out of corporate funds—Breach of trust—Endowment of churches.]—In cases of injunction, the ct. exercises a discretion; so that where the effect of continuing an injunction would have been to exclude a question on a doubtful statute from ever being discussed, & no apparent danger to the property was shown, the ct. dissolved the injunction.

When any act involving a breach of trust is intended to be done, though not in its consequences irremediable, the ct. will prevent it by injunction.

It is an established rule, that where a party obtains an *ex p.* injunction by misrepresenting the facts of the case, he shall not afterwards be permitted to support the injunction, by showing another state of circumstances in which he would be entitled to it.

By Municipal Corporation Act, 1835 (c. 76), all the property then belonging to corpsns. included therein, became, from the passing of the Act until the election of the new officers, held by the old corpn. in trust for the public for the purposes mentioned in that statute. Between the passing of the Act, & the election of the new officers, the old corpn. raised out of its property a sum of £105,000, & appropriated the same towards the better endowment of the clergy of the town, who were inadequately provided for:—*Held*: such an application of the funds was contrary to the spirit of that Act, & on the part of the old corpn., a breach of trust.—*A.-G. v. LIVERPOOL CORPN.*, *A.-G. v. ASPINALL* (1837), as reported in 7 L. J. Ch. 51; 1 J. P. 4, L. C.; *previous proceedings sub nom. A.-G. v. LIVERPOOL CORPN.* (1835), 1 My. & Cr. 171.

Annotations:—*Consd. Greenhalgh v. Manchester & Birmingham Ry.* (1838), 3 My. & Cr. 784. *Refd. A.-G. v.*

Wilson (1837), 9 Sim. 30; *A.-G. v. Poole Corpn.* (1838), 4 My. & Cr. 17; *Galbreath v. Armour* (1845), 4 Bell, Sc. App. 374; *Armitstead v. Durham* (1848), 11 Beav. 556; *A.-G. v. Wigan Corpn.* (1854), 23 L. T. O. S. 43; *A.-G. v. Newcastle-upon-Tyne Corpn. & N. E. Ry.* (1889), 23 Q. B. D. 492. *Mentd. R. v. Liverpool Corpn.* (1839), 9 Ad. & El. 435; *A.-G. v. Wilson* (1840), Cr. & Ph. 1; *Holdsworth v. Clifton Dartmouth Hardness Corpn.* (1840), 11 Ad. & El. 490; *Ex p. Hythe Corpn.* (1840), 4 Y. & C. Ex. 55; *Parr v. A.-G.* (1842), 8 Cl. & Fin. 409; *Gloucester Corpn. v. Wood* (1844), 9 Jur. 673; *Arnold v. Gravesend Corpn.* (1858), 2 K. & J. 574; *A.-G. v. Avon Corpn.* (1863), 33 Beav. 67; *Mill v. Hawker* (1874), L. R. 9 Exch. 309; *Stevens v. Chown*, *Stevens v. Clark*, [1901] 1 Ch. 894; *A.-G. v. De Winton*, [1906] 2 Ch. 106; *R. v. Kensington Income Tax Comrs.*, *Ex p. de Polignac*, [1917] 1 K. B. 486.

761. — Compensation for loss of office.]

—*Municipal Corporations Act, 1835* (c. 76), creates a public trust of the property of municipal corpsns. & of the funds raised for the purposes of the Act, subject, like other property held in trust, to the jurisdiction of the ct. of Ch. Although the Act contains provisions for correcting abuses in respect of the borough property, there is nothing in it to exclude the ordinary jurisdiction of the ct. of Ch. to prevent breaches of trust:—*Held*: accordingly, that a bond given by the town council of a borough, to secure compensation out of the borough fund to an officer, for the profits of offices, some of which he continued to hold, was a breach of trust & illegal.—*PARR v. A.-G.* (1842), 8 Cl. & Fin. 409; 8 E. R. 159; *sub nom. A.-G. v. PARR*, 5 Jur. 245, H. L.; *affg. S. C. sub nom. A.-G. v. POOLE CORPN.* (1838), 4 My. & Cr. 17, L. C.

Annotations:—*Mentd. Lund v. Blanshard* (1844), 4 Hare, 9; *Inman v. Wearing* (1850), 3 De G. & Sm. 729; *Pratt v. Keith* (1864), 3 New Rep. 406.

762. — Costs of opposing quo warranto proceedings—Title & existence of corporation in question.]—Pltf. seeking to charge a party with the consequences of a breach of trust, is bound so to state his case upon the bill that the circumstances alleged, if proved, must necessarily & at all events constitute a breach of trust. Where, therefore, an information is filed, alleging that certain payments, charged to be illegal & improper, were about to be made, by a municipal corpn., out of the corporate funds, & praying that the corpn. might be restrained from making them, but the payments were of such a kind that, under certain circumstances, the existence of which was not negatived by any statements in the information, they might be justifiable, a demurrer for want of equity was allowed.

Semble: a municipal corpn. is justified in discharging, out of the corporate funds, the expenses of opposing *quo warranto* informations against individual members of the corporation, if the object of such informations be to impeach the title, or destroy the legal existence of the corpn., as a body.—*A.-G. v. NORWICH CORPN.* (1837), 2 My. & Cr. 406; 1 J. P. 132; 1 Jur. 398; 40 E. R. 695, L. C.

Annotations:—*Refd. Holdsworth v. Clifton Dartmouth Hardness Corpn.* (1840), 11 Ad. & El. 490; *R. v. Leeds Corpn.* (1843), 4 Q. B. 796; *Lewis v. Rochester Corpn.*

note was refused.—*FINNIE v. GLASGOW & SOUTH WESTERN RY. Co.* (1858), 18 Dunl. (Ct. of Sess.) 325; 28 Sc. Jur. 149.—SCOT.

t. To restrain railway construction—Pending declaratory action.]—An Act of Parliament authorised the construction of a railway from Cape Town to Wellington by a private co. The co. commenced the terminus for the latter place at a distance of nearly a mile from the village. It was alleged on behalf of the co. that the cost of bringing the railway right into the village would, owing to engineering difficulties, be very great. On applica-

tion by an inhabitant of the village:—*Held*: an interdict must be granted restraining the co. from going on with the erection of the terminus pending a declaratory action to be forthwith brought by appot.—*MALAN v. CAPE TOWN & WELLINGTON RY. Co.* (1861), 4 S. 81.—S. AF.

PART X. SECT. 4, SUB-SECT. 1.—B.

a. General rule.]—It is not the practice to interfere with corporate bodies unless they are manifestly abusing their powers.—CALCUTTA CORPN. v. BEJOY KUMAR ADDY (1923), I. L. R. 50 Cal. 813.—IND.

b. —.]—A municipal corpn. may not enter into any contract its council thinks fit. The councillors are trustees for the ratepayers, whose interests they must conserve. It is not, however, the function of the ct. to supervise the council's work or to dictate to it what contract should or should not be accepted by it. All that the ct. can do is to lay down the general principle of law & inquire whether it has been violated by the corpn. The ct. will set aside as ultra vires a contract entered into by a municipal corpn. that is, on the face of it, manifestly impolitic, improvident,

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(1860), 9 C. B. N. S. 401; *Fraser v. Murdoch* (1881), 6 App. Cas. 855; *A.-G. v. Newcastle-upon-Tyne Corpn. & N. E. Ry.* (1889), 23 Q. B. D. 492. **Mentd.** *Foot v. Bessant* (1838), 3 Y. & C. Ex. 320; *Bennett v. Harrison* (1843), 7 Jur. 436; *Foss v. Harbottle* (1843), 2 Hare, 461; *A.-G. v. Wigan Corpn.* (1854), 23 L. T. O. S. 43; *R. v. Sheffield Corpn.* (1871), L. R. 6 Q. B. 652.

763. — Expenses incurred prior to rate.]—

A motion against a municipal corpn. & its officers for an injunction to prevent: (a) the application by them of the money already collected by a borough rate for costs, debts, or expenses incurred prior to the making of the rate; (b) from taking any steps to enforce payment of sums not yet under the rate; & (3) from making any new or additional rate for the purposes of paying thereout any expenses incurred prior to the making of the rate, refused under the circumstances.—*A.-G. v. Lichfield Corpn.* (1848), 11 Beav. 120; 17 L. J. Ch. 472; 50 E. R. 762.

764. — Costs of opposing bill in Parliament.]

—*A.-G. v. Wigan Corpn.*, No. 70, *ante*.

765. — Cost of opposing licensing appeals—

Municipal Corporations Act, 1882 (c. 50)—Borough Fund Act, 1872 (c. 91).]—A town council have no power under above Acts to pay out of the borough fund the expenses incurred by the chief constable in appearing by counsel at quarter sessions to oppose licensing appeals. An improper payment by the order of the town council may be called in question by injunction at the suit of the A.-G. on the relation of a person interested.—*TYNEMOUTH CORPN. v. A.-G.*, [1899] A. C. 293; 68 L. J. Q. B. 752; 80 L. T. 633; 63 J. P. 404; 15 T. L. R. 370; 43 Sol. Jo. 531, H. L.; *affg.* S. C. *sub nom.* *A.-G. v. TYNEMOUTH CORPN.*, [1898] 1 Q. B. 604, C. A.

Annotations:—*Mentd.* *Allsop v. Preston JJ.* (1899), 64 J. P. 25; *Evans v. Conway JJ.*, [1900] 2 Q. B. 224; *A.-G. v. De Winton*, [1906] 2 Ch. 106; *R. v. Woodhouse*, [1906] 2 K. B. 501; *Attwood v. Chapman*, [1914] 3 K. B. 275.

—*See, generally, CORPORATIONS, Vol. XIII., p. 362.*

766. To prevent breach of trust—Municipal Corporations Act, 1835 (c. 76).]—(1) The funds belonging to the municipal corpns. of boroughs named in schedules A. & B. of above Act became, upon the passing of that Act, subject to certain public trusts, to be exercised by the new council, only in the manner & for the purposes prescribed by the Act.

An appropriation of such funds, made by the old corpn., after the passing of the Act, but before the election of the new council, & having for its object to endow the churches & chapels of the established church within the borough with fixed stipends, for their several ministers, is not an appropriation warranted by the Act, & is therefore a breach of trust. The ordinary jurisdiction of the ct. over such a transaction, by means of an information seeking to have the funds recalled, & the appropriation rescinded, as

being a breach of trust, is not ousted by the special remedies provided in certain cases by sect. 97 of above Act. *Semble*: those remedies would not be applicable in any case in a transaction of this description.

(2) Where property is devoted to trusts which are to arise at a future time, & be exercised by trustees who are not yet in *esse*, any intermediate act done by the holders of such property, inconsistent with the security of the property, or the performance of the trusts when they shall arise, will be set aside; & if the trusts are of a public nature, the ct. will entertain this jurisdiction upon an information by the A.-G., notwithstanding that the trustees, after they have come into *esse*, themselves decline to interfere.—*A.-G. v. ASPINALL* (1837), 2 My. & Cr. 613; 1 J. P. 4; 1 Jur. 812; 40 E. R. 778; *sub nom.* *A.-G. v. LIVERPOOL CORPN.*, *A.-G. v. ASPINALL*, 7 L. J. Ch. 51, L. C.

Annotations:—*As to* (1) *Consd.* *A.-G. v. Poole Corpn.* (1838), 4 My. & Cr. 17; *R. v. Liverpool Corpn.* (1839), 9 Ad. & El. 435. *Expld.* *A.-G. v. Wilson* (1840), Cr. & Ph. 1. *Consd.* *Parr v. A.-G.* (1842), 8 Cl. & Fin. 409. *Expld. & Apld.* *Stevens v. Chown*, *Stevens v. Clark*, [1901] 1 Ch. 894. *Refd.* *A.-G. v. Wilson* (1837), 9 Sim. 30; *Gloucester Corpn. v. Wood* (1844), 9 Jur. 673; *Armitstead v. Durham* (1848), 11 Beav. 556; *A.-G. v. Newcastle-upon-Tyne Corpn. & N. E. Ry.* (1889), 23 Q. B. D. 492. *As to* (2) *Refd.* *A.-G. v. Wilson* (1840), Cr. & Ph. 1; *A.-G. v. Avon Corpn.* (1863), 33 Beav. 67; *A.-G. v. De Winton*, [1906] 2 Ch. 106. *Generally, Mentd.* *Holdsworth v. Clifton Dartmouth Hardness Corpn.* (1840), 11 Ad. & El. 490; *Arnold v. Gravesend Corpn.* (1856), 2 K. & J. 574.

767. — —.]—PARR v. A.-G., No. 761, *ante*.

768. To restrain disposal of corporate property.]

—*Primâ facie* a municipal corpn. has full power to dispose of all its property, like a private individual & it lies on the person alleging the contrary to establish a trust. Demurrer allowed to a bill by a member of a municipal corpn. to restrain them from selling their estates, & for an account of the estates sold, his alleged right being in his corporate & not his individual capacity.—*EVAN v. AVON CORPN.* (1860), 29 Beav. 144; 30 L. J. Ch. 165; 3 L. T. 347; 6 Jur. N. S. 1361; 9 W. R. 84; 54 E. R. 581.

Annotations:—*Refd.* *McCormac v. Queen's University* (1867), 15 W. R. 733; *Watson v. Hythe B. C.* (1906), 70 J. P. 153.

769. Grant of lease at undervalue—Municipal Corporations Act, 1835 (c. 76), s. 95.]—*A.-G. v. GREAT YARMOUTH CORPN.* (1855), 21 Beav. 625; 25 L. T. O. S. 5; 3 W. R. 309; 52 E. R. 1001.

770. — Municipal Corporations Act, 1882 (c. 50), ss. 108, 109.]—By above sects. a municipal corpn. cannot sell any corporate land without the approval of the Treasury; but may, with such approval, dispose of any corporate land "by way of absolute sale . . . or otherwise in such manner & on such terms & conditions as the Treasury approve." In 1888 a municipal corpn. put up corporate land for sale by auction in fifteen lots subject to special conditions of sale; one of which provided that the purchaser of each lot

or otherwise unreasonable; but where it is only probable or possible that the contract is unprofitable to the corpn. the ct. will not, in the absence of *mala fides*, interfere with the exercise of its discretion by a municipal authority.—*A.-G. v. WELLINGTON CORPN.*, [1924] N. Z. L. R. 818.—N.Z.

c. *To restrain illegal payments out of corporate funds—Breach of trust.]*—Where on the petition of pltf. & other ratepayers, a corpn. had passed a bye-law for the construction of a drain, & the assessment of the lands to be benefited thereby, part of which pltf. owned,

but the drain had not been completed, though a reasonable time had elapsed, & a portion of the moneys assessed had been applied upon another drain:—*Held*: pltf. was entitled to an injunction to restrain further misapplication of the moneys assessed, & to account thereof, for the bye-law created a trust which had been violated.—*SMITH v. RALEIGH TOWNSHIP* (1883), 3 O. R. 405.—CAN.

d. —.]—A municipal corpn. having appropriated \$5,200, to defray the cost of constructing a bridge over navigable water, part of a public

harbour within the city limits, did not obtain the sanction of the Dominion Govt. to the work, & proceeded to execute it in such a way as to interfere with navigation. Upon information by the A.-G. of Canada, an injunction was granted restraining the continuance of the work. This action was then brought by pltf. individually as a ratepayer to restrain the corpn. from expending any part of the \$5,200 in payment for the work:—*Held*: an injunction should be granted restraining the application of the money to any further construction of

should erect thereon a dwelling house & should not erect thereon any building other than such house. None of the lots were then sold. In June, 1888, pltf. agreed with the corpn. to purchase two of the lots, subject to the conditions. The approval of the Treasury to the sale, required by the Act, was obtained; & in Nov. 1888, the lots were conveyed to pltf., two of the Lords of the Treasury being parties to the conveyance. When the approval of the Treasury was obtained they were not informed that there was a general building scheme the effect of which would be to give pltf. rights in relation to other land of the corpn. No approval of the special conditions were ever given by the Treasury. In May, 1893, the corpn. agreed to sell to the other defts., the trustees of a Presbyterian church, two other lots, for the purpose of their erecting a church thereon. On motion by pltf. for an injunction to restrain the corpn. & the trustees from erecting or permitting to be erected on the land so sold to them, any church or building other than a dwelling house:—*Held*: though if the vendors had been private individuals & not a municipal corpn. pltf. would have been entitled to an injunction yet as pltf.'s right against the trustees depended upon a disposition of corporate land on conditions which had not been approved by the Treasury, the motion must be refused.—*DAVIS v. LEICESTER CORPN.*, [1894] 2 Ch. 208; 63 L. J. Ch. 440; 70 L. T. 599; 42 W. R. 610; 10 T. L. R. 385; 38 Sol. Jo. 362; 7 R. 609, C. A.

Annotations:—*Reid*. Lambeth Corpn. v. South London Electric Supply Corpn. (1907), 96 L. T. 440; Canterbury Corpn. v. Cooper (1908), 99 L. T. 612. *Mentd*. Holford v. Acton U. D. C., [1898] 2 Ch. 240.

the bridge, but refused as to payment for work *bond fide* done upon that part of it already completed.—*ELWORTHY v. VICTORIA CITY CORPN.* (1896), 5 B. C. R. 123.—CAN.

e. —.—.]—When a municipal council proposes to make a payment of money beyond its powers, any ratepayer may bring an action for an injunction to prevent such payment, without the intervention of the A.-G.—*DAVIS v. CITY OF WINNIPEG* (1914), 28 W. L. R. 93.—CAN.

772 i. *To restrain raising illegal rate.*]—Where for the purpose of erecting a market house a municipal council would require to levy a rate exceeding the two cents in the dollar allowed to be imposed by Municipal Act, 1866, s. 225:—*Held*: a ratepayer was entitled to an injunction restraining the erection of the building by the council.—*WILKIE v. CLINTON VILLAGE CORPN.* (1871), 18 Gr. 557.—CAN.

772 ii. —.—.]—A warrant to levy the rates upon property exempt from taxation is illegal & void, & a writ of injunction is a proper remedy to enjoin a corpn. to desist from all proceedings to enforce the same.—*CENTRAL VERMONT RY. CO. v. ST. JOHN'S TOWN* (1886), 14 S. C. R. 288; *affd.* 14 App. Cas. 590.—CAN.

i. *To restrain levy of rates & taxes.*]—*HORMASJI KARSETJI v. PEDDER* (1875), 12 Bom. 199.—IND.

g. *To restrain forfeiture of lands—Illegal assessment roll—Refusal to pay taxes.*]—The county of H. made a triennial assessment roll in 1875, & in 1876, without declaring that it was an amendment of the roll of 1875, the corpn. made an increased assessment. Appls. assessed upon both rolls took proceedings to have the new roll declared invalid, null & void, & for a writ of prohibition against the sale of their lands for delinquent taxes:—*Held*: the roll of 1876, not being a triennial assessment roll, or an amendment of such a roll, was illegal & null,

& appls. were entitled to an injunction to restrain the corpn. from selling their lands.—*COTE v. MORGAN* (1881), 7 S. C. R. 1.—CAN.

h. *To restrain expenditure—Where ratepayers misled as to its objects.*]—Where the manner in which a bye-law for raising money for the construction of a school is submitted to the ratepayers in such a way as to mislead to the belief, on the part of at least some of them, that the proposed school is to be erected on a new site, a ratepayer, who because of such belief, has voted for the bye-law, is entitled to restrain the district from spending any of the money so voted on the erection of the school on the old site.—*ROBERTSON v. SPRINGBANK S. D. No. 50 OF SASKATCHEWAN TRUSTEES*, [1917] 3 W. W. R. 331; 10 Sask. L. R. 267; 36 D. L. R. 777.—CAN.

k. —.—.] *Where not for public benefit.*]—*Held*: pltf., certain individual ratepayers of deft. municipality, although not injuriously affected more than other ratepayers, were entitled to maintain an action for an injunction restraining deft. municipality from expending moneys on a roadway which was not for the public benefit.—*DODS v. MUNICIPALITY OF MINITONAS*, [1919] 1 W. W. R. 717.—CAN.

l. *To restrain interference with highway.*]—A municipal corpn. has the right to have it declared, as against a private person, whether or not certain land is a public highway, & whether such person has the right to possess, occupy, & obstruct the same. In an action brought by the municipal corpn. for the purpose, a declaration may be made according to the facts, & deft. enjoined from possessing or occupying the land so as to obstruct the use of it as a public highway.—*TORONTO CITY v. LORSCH* (1893), 24 O. R. 227.—CAN.

m. *To restrain interference with flow of water.*]—*CUMMINGS v. DUNDAS* (1907), 9 O. W. R. 107; 13 O. L. R. 384.—CAN.

771. *To restrain making new rate—For payment of expenses previously incurred.*]—A.-G. v. *LICHFIELD CORPN.*, No. 763, *ante*.

772. *To restrain raising illegal rate.*]—A.-G. v. *WIGAN CORPN.*, No. 70, *ante*.

773. *To restrain ultra vires acts—Unauthorized overdraft.*]—A.-G. v. *WEST HAM CORPN.*, [1910] 2 Ch. 560; 80 L. J. Ch. 105; 103 L. T. 394; 74 J. P. 406; 26 T. L. R. 683; 9 L. G. R. 433; *previous proceedings*, 74 J. P. 196, C. A.

774. —.—.] *Tramways outside district.*]—The corpn. of E., by their special Act, which incorporated Parts II. & III. of Tramways Act, 1870 (c. 78), & thus included sects. 34, 35, & 54 of that Act, were empowered to lay down, use & maintain certain tramways within the borough, & to enter into agreements with the owners of tramways in adjacent districts (*inter alia*) with respect to the construction, lease, working, use & management by the contracting parties of all or any of their respective tramways, but the term of any lease or working agreement was not to exceed forty-two years & the conditions thereof were to be subject to the approval of the Board of Trade. With such approval an agreement was, in 1902, made between the corpn. of E. & the corpn. of S., the owners of tramways in the county borough of S., adjacent to & on the east side of the borough of E., for the construction by the corpn. of S. of certain new tramways in the borough of E., & for the grant to them by the corpn. of E. of a lease for thirty-five years of the exclusive use of the same tramways, but the corpn. of S. were not to assign, sublet, or part with the benefit of the agreement or lease except with the consent of the corpn. of

n. *To restrain pollution of stream.*]—*CROWTHER v. COBOURG* (1912), 20 O. W. R. 844; 3 O. W. N. 490; 1 D. L. R. 40.—CAN.

o. *To restrain continuation of improperly constructed drainage works.*]—*MALOTT v. TOWNSHIP OF MERSEA* (1885), 9 O. R. 611.—CAN.

p. *To restrain encroachment on adjoining municipality.*]—*Held*: under 45 Vict. c. 29, s. 12 (O.), the corpn. of one municipality cannot erect or establish a small-pox hospital within the limits of another, either of a temporary or a permanent character, without the sanction of the corpn. of the latter. & an injunction was granted to restrain the same.—*ELIZABETHTOWN TOWNSHIP v. BROCKVILLE TOWN* (1885), 10 O. R. 372.—CAN.

q. *To restrain breach of contract—Where legislative authority sought & granted.*]—A. made an offer to defts. that "if the city will pledge itself by resolution of council to support a free library & provide a suitable site," he would furnish \$75,000 to erect free library building. Defts. obtained legislation enabling them to give the guarantee, & afterwards the council passed a resolution accepting the offer & giving the guarantee, which resolution was communicated to A., & the receipt thereof acknowledged by him. At a later meeting of the city council a resolution was passed to rescind all previous resolutions in relation to the matter:—*Held*: there was a binding contract between defts. & A., & the ct. would interfere by injunction, at the suit of the A.-G. upon the relation of a ratepayer, to restrain a breach of the contract. The passing of the statute gave a vested interest to every citizen.—*A.-G. v. HALIFAX* (1902), 23 O. L. T. 24.—CAN.

r. *To restrain illegal purchase of land.*]—The council of a city having by resolution proposed to enter into a contract of purchase of certain land

Sect. 4.—Corporate and unincorporate bodies: Subsect. 1, E

E., who were to maintain & repair the tramways. The corpn. of S. duly constructed these tramways, & in 1908 granted to a tramway co., the owners of tramways, beyond & extending to the western boundary of the borough of E., a revocable licence to run cars over a short portion of the tramways in that borough which adjoined the co.'s system. No consent to this licence was obtained either from the corpn. of E. or from the Board of Trade, the parties to the licence relying on the fact that they had, under their respective special Acts, powers of entering into working agreements with adjacent tramway owners similar in all material respects to those in the special Act of the corpn. of E., save that there was no provision requiring the approval of the Board of Trade. The corpn. of E. claimed a declaration that the corpn. of S. were not entitled to authorise the co. to use the portion of the tramway in the borough of E. & an injunction to restrain the co. from running tramcars along such portion & from otherwise using or trespassing upon the same:—*Held*: there was nothing in the Tramways Act, 1870 (c. 78), or in the special Act of the corpn. of E. which empowered them, without the consent of the Board of Trade, to authorise the co. to run cars over the tramways of the corpn. of E., & the

agreement of that corpn. with the corpn. of S. did not purport to confer upon the latter any greater powers than the corpn. of E. themselves had, & consequently the licence was *ultra vires*, & the corpn. of E. were entitled to the declaration & injunction claimed by them.—*SALFORD CORPN. v. ECCLES CORPN.*, [1912] A. C. 465; 81 L. J. Ch. 561; 106 L. T. 577; 76 J. P. 249; 28 T. L. R. 343; 56 Sol. Jo. 428; 10 L. G. R. 341, H. L.; *affg.* S. C. *sub nom.* *ECCLES CORPN. v. SOUTH LANCASHIRE TRAMWAYS CO.*, [1910] 2 Ch. 263, C. A.

Supply of electrical apparatus & fittings.

See *ELECTRIC LIGHTING*, Vol. XX., p. 199, Nos. 7–11.

775. To restrain enforcement of demolition order—Housing & Town Planning Act, 1909 (c. 44).—Pltf. was the owner of certain houses in R., as to which the housing committee of the corpn. on Feb. 23, 1914, on the report of the medical officer of health, & after hearing pltf.'s solr. recommended that a closing order should be made, & that the medical officer of health should prepare specifications of what was necessary to make the houses fit for habitation, which was accordingly done. The order was made on Mar. 4. Pltf. appealed to the Local Government Board, & the appeal was heard on May 5. At the hearing the town clerk stated that on the order becoming operative the council were willing to place at the

to be paid for in five yearly instalments, notwithstanding Municipal Act, c. 100, s. 396, this action was brought by a ratepayer & a motion made for an injunction to prevent the proposed purchase:—*Held*: a suit or an injunction was proper in such a case.—*SHRIMPTON v. WINNIPEG* (1900), 20 C. L. T. 248; 13 Man. L. R. 211.—CAN.

t. To restrain ultra vires acts—Purchase of land.—On a motion for injunction by W., a ratepayer, against a town corpn. to restrain them from paying money for a site for a post office:—*Held*: injunction granted, the proposed purchase being *ultra vires*.—*WALLACE v. TOWN OF ORANGEVILLE* (1884), 5 O. R. 37.—CAN.

a. — Powers under bye-laws.—A municipal corpn. passed a bye-law & it was approved by the electors. The bye-law provided for construction of sidewalks five feet wide along certain streets & to raise money by way of debentures to pay for the same. The city engineer was placed in charge of matters of grade, etc. The work was to have been completed in 1904. In 1905, objection being raised as to the validity of the bye-law the council passed two other bye-laws which were not submitted to the people. They adopted the city engineer's plans & reduced the sidewalk to only four feet:—*Held*: these two bye-laws were *ultra vires* as the council had not the power to extend the time allowed in the first bye-law for the construction of the walks, nor to vary the width & purpose of them. Injunction granted to restrain the money being raised on debentures.—*CLEARY v. TOWN OF WINDSOR* (1905), 6 O. W. R. 192; 10 O. L. R. 333.—CAN.

b. To restrain exercise of discretionary powers.—Acts within the discretionary powers of a municipal council are not subject to judicial control, except where fraud is imputed & shown, or there is a manifest invasion of private rights. Injunction to restrain the corpn. from proceeding with a contract awarded to other than the lowest tenderer refused, & action dismissed.—*HAGGERTY v. VICTORIA CITY* (1895), 4 B. C. R. 163.—CAN.

c. ——Where a public body has received by statute a discretionary power to levy & is laid under an

obligation to collect a rate, an injunction cannot be granted by a ct. so as to deprive such public body of the power of exercising its discretion or to prohibit it from discharging the obligation.—*MADRAS MUNICIPAL COMRS. v. BARANSON* (1881), 1 L. R. 3 Mad. 201.—IND.

d. To restrain improvident arrangement.—*PARSONS v. LONDON & ROYAL BANK* (1911), 19 O. W. R. 878; 2 O. W. N. 1483; 25 O. L. R. 172.—CAN.

e. ——Where a corpn. being desirous of widening a street entered into an arrangement to buy the leasehold interests in several pieces of land from different persons, when the non-completion of one purchase would render the completion of the rest of no value:—*Held*: it was an improvident arrangement, & the ct. would interfere by injunction.—*SOLICITOR-GENERAL v. DUNEDIN CORPN.* (1875), 1 J. R. N. S. 1.—N.Z.

f. To restrain payments of wages—Where question of policy for council—& not ultra vires.—It is not *ultra vires* or in itself unreasonable for the council of a corpn. to provide by resolution that contractors on corpn. works should agree to pay their labourers or other workmen not less than a stated minimum rate of wages, & that such minimum rate should be paid to all labouring men to be employed on any contracts for corporation work, or on any new construction work undertaken by the corpn., although competent workmen might be hired at a lower rate of wages. In this case it was shown that deft.'s council had acted on such a resolution for three years, & evidence was given to show that the rate provided was not more than a fair living rate of wages in the city, & that the council was actuated by the belief that it was not in the interest of the city to have a number of its citizens employed at less than a fair living wage. No evidence was given to show that deft.'s council had so acted through any fraudulent or improper motive:—*Held*: the matter in dispute appeared to be a question of policy in the government of the city as to the expediency of which the ratepayers & not the ct. should pronounce, & pltf.'s motion for an injunction to restrain defts. from continuing

to act on the resolution complained of should be dismissed.—*KELLY v. CITY OF WINNIPEG* (1898), 12 Man. L. R. 87.—CAN.

g. To restrain sale by tender—Resolution of council to accept lower tender—For insufficient reasons.—*PHILLIPS v. CITY OF BELLEVILLE* (1905), 6 O. W. R. 129; 10 O. L. R. 178.—CAN.

h. To restrain injury to land—Acts by individual on agreement with council—Agreement ultra vires.—*TAYLOR v. GAGE* (1913), 5 O. W. N. 489; 30 O. L. R. 75.—CAN.

k. To restrain wrongful exercise of powers under bye-law.—By R. S. O. 1887, c. 184, s. 550, the council of every township is authorised to pass bye-laws for searching for & taking such timber, gravel, etc., as may be necessary for keeping in repair any road or highway within the municipality. The meaning of this sect. is, that the council may, as necessity arises for their doing so, exercise the right to take gravel, etc., from any particular parcel or parcels of land, having first declared the necessity to exist & chosen & described the land from which the material is to be taken, by a bye-law; & therefore, a bye-law purporting to be passed under this sect., which authorised & empowered the pathmasters & other employees of the corpn. to enter upon any land within the municipality when necessary to do so, save & except orchards, gardens, & pleasure grounds, & search for & take any timber, gravel, etc., was upon its face illegal, because it purported to confer upon its officers wider & more extensive powers than the statute authorised:—*Held*: pltf. was entitled without quashing the bye-law to an injunction to restrain the rights they claimed under this bye-law, by entering upon his lands.—*ROSE v. WEST WAWANOSH TOWNSHIP* (1890), 19 O. R. 294.—CAN.

l. ——Where a municipal corpn. passes a bye-law for the construction of a particular kind of road, the owners of property assessed for the cost of construction have a right to restrain the corpn. from proceeding to construct a different kind of road.—*ARBUTHNOT v. VICTORIA CITY* (1913), 15 B. C. R. 209.—CAN.

m. To restrain passing illegal bye-ct. has jurisdiction to

owner's disposal all information & particulars in their possession to assist her in making the houses fit for habitation. The order became operative on July 2 by the Local Government Board dismissing the appeal. No application was made by or on behalf of the owner for such assistance, & on Mar. 15, 1915, the committee, after hearing the solr., recommended that a demolition order should be made, which was made accordingly on May 3, & served on May 6. The following day her solr. wrote that she was willing to put the property in proper repair, & on May 20 he wrote again that the architect had gone into the matter, & instructions had been given to the builder to prepare specifications & tender, & asked the council whether they would see if they met their requirements. That letter was answered on May 28 to the effect that when a demolition order had been made there was no option but to see it carried out, & that any works executed would be done with full knowledge that when the time came to put the order in execution the premises would be pulled down. On July 15 the town clerk wrote again that the medical officer of health had advised that the property could not be rendered fit & that it would be demolished. On July 16 pltf.'s solr. wrote to arrange an interview between

the architect & the medical officer of health. On July 19 the town clerk replied acknowledging the receipt of the specifications and saying that until the committee had again considered the matter the medical officer of health was not prepared to meet the architect. The committee met on July 26 & without considering the suggested method of repair reported that the house could not be rendered fit. The matter was mentioned to the council & the owner informed that the premises must come down. The writ was then issued & an injunction claimed to restrain the corpn. from enforcing the demolition order:—*Held*: defts. having taken up the attitude that whether the premises were rebuilt or not they must be pulled down, & that it was useless to submit plans & discuss the matter on the ground that they were entitled *ex p.* to decide that they could not be rendered fit, it could not be said that there had been a proper exercise of the discretion under sub-sect. 3 of above Act, & pltf. was therefore entitled to an injunction to restrain them from acting on the demolition order until they had heard & determined pltf.'s application for postponement, as above indicated.—*BROADBENT v. ROTHERHAM CORPN.*, [1917] 2 Ch. 31; 86 L. J. Ch. 501; 117 L. T. 120; 81 J. P. 193; 61 Sol. Jo. 460; 15

restrain a corpn. from obtaining the vote of the ratepayers in favour of a bye-law, which if passed would be illegal without legislative sanction, & which sanction such vote was intended to aid in obtaining in an informal & unauthorised manner.—*HELM v. PORT HOPE TOWN CORPN.* (1875), 22 Gr. 273.—CAN.

n. *To restrain passing of bye-law.*—*LONDON CITY v. TOWN OF NEW-MARKET* (1912), 20 O. W. R. 929; 3 O. W. N. 565; 1 D. L. R. 244; 2 D. L. R. 244.—CAN.

o. *To restrain plebiscite on unauthorised bye-law.*—There is nothing in the Municipal Act permitting a municipal council to take a plebiscite, & there is no express prohibition against doing so. Taking a vote of the electors upon questions or upon authorised bye-laws is open to grave objections. Where a council sought to take such a vote on the question of a money grant in aid of a sanatorium, which they had not power to make, with a view to inform the Legislature of the result, &, if favourable, to use the result as an argument in attempting to obtain for the council legislative authority to make the grant, they were restrained by injunction from so doing.—*KING v. CITY OF TORONTO* (1902), 23 C. L. T. 92; 5 O. L. R. 163; 1 O. W. R. 843.—CAN.

p. *To restrain submitting bye-law to vote—Other remedy available.*—The failure to publish the notice of the voting on a local option bye-law required by Liquor Licence Act, 1902, c. 66, is good ground for an application under Municipal Act to quash the bye-law if afterwards carried & passed by the council at the third reading, but an injunction to prevent the council from submitting the bye-law to the vote of the electors will not be granted by reason only of the failure to publish such notice, because of the existence of another adequate remedy in case the bye-law should be carried, viz., an application to quash it.—*LITTLE v. MCCARTNEY, JOHNSTON v. WRIGHT* (1908), 18 Man. L. R. 323; 9 W. L. R. 448.—CAN.

q. *To restrain enforcement of bye-law—Acquiescence.*—Where parties complained of the illegality of a municipal bye-law or resolution, permit a term of the cts. of common law to pass without moving to quash it, the ct. will refuse an injunction to restrain the muni-

cipality from enforcing the bye-law.—*CARROLL v. PERTH* (1863), 10 Gr. 64.—CAN.

r. ———.—Where parties complaining of the illegality of a municipal bye-law or resolution, permit a term of the cts. of common law to pass without moving to quash it, the ct. will refuse an injunction to restrain the municipality from enforcing the bye-law.—*GRIER v. ST. VINCENT* (1866), 12 Gr. 330.—CAN.

t. ———.—*Held*: bye-law had been passed improperly, not in the public interest, & the corpn. was enjoined from proceeding under it.—*PELIS v. BOSWELL* (1888), 8 O. R. 680.—CAN.

u. *To restrain acts under illegal bye-law or resolution.*—*TRADERS TRUST CO. v. VILLAGE OF KRYDOR & KRYZANOWSKI*, [1920] 3 W. W. R. 344.—CAN.

v. *To restrain sale of property—Mala fides.*—Any attempt on the part of a municipal council to exercise in bad faith the power to sell, incident to the power to purchase, public property would be a proper subject for injunction.—*NEW GLASGOW TOWN v. BROWN* (1907), 41 N. S. R. 542.—CAN.

w. *To restrain disposal of corporate property—Where bound by trust.*—*A.-G. v. CASHEL CORPN.* (1843), 3 Dr. & War. 294.—IR.

x. *Permission to erect buildings—Restraint of rescission.*—Pltf. desiring to establish a dry-cleaning plant upon certain premises in a city, entered into negotiations with the owners for the purchase thereof, & it was arranged that the owners should apply to the city corpn. for the usual permit. The application was approved by a committee of the city council, & the committee's recommendation was adopted by resolution of the council. Six months later, after pltf. had completed the purchase of the property & taken steps to erect her buildings, the Board of Control, in a report to the council, recommended the rescission of the former recommendation & resolution:—*Held*: pltf. was entitled at that stage to an injunction restraining the corpn. & council from rescinding the recommendation & resolution.—*CHEEKSWORTH v. CITY OF TORONTO* (1921), 49 O. L. R. 68; 58 D. L. R. 665; 19 O. W. N. 441.—CAN.

y. *To restrain removal of buildings*

—*Present site established by statute.*—*LUNENBURG MUNICIPALITY v. A.-G. OF NOVA SCOTIA* (1892), 20 S. C. R. 596.—CAN.

z. *To restrain infringement of bridge toll franchise.*—By 44 & 45 Vict. (Q.), c. 90, s. 3, a statutory privilege to construct a toll bridge across the C. river in the parish of St. G., was granted to resp. After the bridge had been used for several years, applt. municipality passed a bye-law to erect a free bridge across the C. river in close proximity to the toll bridge in existence. Resp. thereupon by petition for injunction prayed that applt. municipality be restrained from proceeding to the erection of a bridge:—*Held*: the erection of the free bridge would be an infringement of resp.'s franchise of a toll bridge, & the injunction should be granted.—*AUBERT-GALLION CORPN. v. ROY* (1892), 21 S. C. R. 456.—CAN.

aa. *To restrain expulsion of councillor—From council meeting.*—There is no provision in the Municipal Corpn. Act, 1908, granting power to a mayor or borough council to expel or suspend a member of the council. An injunction will issue at the suit of a borough councillor to restrain the mayor & other councillors from depriving the said councillor of his right to be present at meetings of the council.—*WILKIE v. KIELY* (1914), 33 N. Z. L. R. 816.—N.Z.

ab. *To restrain assumption of municipal office.*—*FAIRBANKS v. DOUGLAS* (1888), 5 Man. L. R. 41.—CAN

ac. *To restrain participation in council meetings—Alderman disqualified.*—An injunction is a competent & appropriate remedy for a complaint that an alderman is on the facts, alleged, disentitled by statute to sit & vote, where the prayer is to restrain him from so doing.—*COUGHLAN & MAYO v. VICTORIA CITY CORPN.* (1893), 3 B. C. R. 57.—CAN.

ad. *To restrain examination of municipal documents—Except as authorised by statute.*—An inhabitant or person, in regard to the affairs of a municipality has no right of examination or inquiry except such as is expressly or by implication given by statute.—*JOURNAL PRINTING CO. v. McVERRY* (1915), 33 O. L. R. 166; 7

INJUNCTION.

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L. G. R. 467; *subsequent proceedings* (1918), 87 L. J. Ch. 308.

Annotation:—*Mentd.* Broadbent v. Rotherham Corpn. (No. 2) (1918), 87 L. J. Ch. 308.

C. Local Authorities.

776. General rule.]—Principles of the ct.'s jurisdiction over public functionaries.

The limits within which this ct. interferes with the acts of a body of public functionaries, constituted like the Poor Law Comrs., are perfectly clear & unambiguous. So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this ct. will not interfere (*LORD COTTENHAM, C.*).—*FREWIN v. LEWIS* (1838), 4 My. & Cr. 249; 2 Jur. 175; 41 E. R. 98, L. C.

Annotations:—*Folld.* Oldaker v. Hunt (1855), 6 De G. M. & G. 376. *Apld.* A.-G. v. Manchester (Bp.) (1867), L. R. 3 Eq. 436. *Mentd.* A.-G. v. Compton (1842), 1 Y. & C. Ch. Cas. 417; *Pim v. Wilson* (1848), 17 L. J. Ch. 428.

777. Resignation of members.]—A bill having been filed against a local board of health alleging that they were committing a nuisance & praying for an injunction to restrain them, all the members of the board resigned. There being no defence to the suit, the injunction was granted in the terms of the first paragraph of the prayer of the bill.—*HARDINGE v. SOUTHBOROUGH LOCAL BOARD* (1875), 32 L. T. 250.

778. To restrain exercise of powers—Purchaser of land without funds in hand—Commissioners under local Act.]—The comrs. appointed under the local Acts of Parliament for improving the town of Cambridge have, upon the true construction of those acts, a continuing right to exercise from time to time the power thereby vested in them, of taking property for the purposes of the Acts, & of referring the assessment of the price to a jury, so long as may be required for carrying into full effect the purposes contemplated by the acts.

A person whose property is required by the comrs. for the purposes of the Acts is not entitled to restrain them, by injunction, from taking the steps prescribed by the Acts for obtaining possession of the property, until they shall have shown a sufficient fund in hand to satisfy the price which may be awarded to him, or until they shall have shown the means by which they propose to procure it.—*SALMON v. RANDALL* (1838), 3 My. & Cr. 439; 40 E. R. 996; *sub nom.* *SALMON v. CAMBRIDGE PAVING & LIGHTING COMRS.*, 2 J. P. 455, L. C.

Annotations:—*Consd.* Cohen v. Wilkinson (1849), 12 Beav. 125. *Mentd.* Salisbury v. G. N. Ry. (1852), 21 L. J. Q. B. 185; *Haynes v. Haynes* (1861), 1 Drew & Sm. 428.

779. — Construction of sewer — Interference with rights of landowners.]—Under Public Health Act, 1848 (c. 63), ss. 45, 46, 145, providing that the local boards may make necessary sewers through or under any lands whatever, & cause them to be emptied into such places as may be fit & necessary, provided that nothing in the Act shall authorise the boards to use, injure, or interfere with any

watercourse, stream, river, etc., in which the owner of any lands may be interested, without the consent of such owner:—*Held*: (1) persons having a right to watering-places in a river adjoining their lands, for the use of their cattle, are interested in the river within the meaning of the proviso, but would not be able to maintain an action for an interference with their rights, unless they were injured by such interference; (2) works of a local board of health, producing an outfall of the sewage of a town above such a watering-place, was such an interference as to cause injury to the landowners, but whether this was established or not, it ought, if not consented to by them, to be restrained by injunction, being the act of a public body exceeding its powers.—*OLDAKER v. HUNT* (1855), 6 De G. M. & G. 376; 3 Eq. Rep. 671; 25 L. T. O. S. 26; 19 J. P. 179; 1 Jur. N. S. 785; 3 W. R. 297; 46 E. R. 1279, L. JJ.

780. — — Abstraction of water.]—The ct. will not restrain the Metropolitan Board of Works, or a district board, from making a sewer within the scope of their powers, although the consequence may be to drain water springs rising in a field contiguous to the pleasure grounds attached to a dwelling house, & collected by the owner into a pond or piece of ornamental water made in the grounds & thence diverted in an ornamental stream flowing through the grounds.—*STANTON v. WOOLRYCH, STANTON v. METROPOLITAN BOARD OF WORKS & LEWISHAM DISTRICT BOARD OF WORKS* (1857), 23 Beav. 225; 26 L. J. Ch. 300; 28 L. T. O. S. 333; 21 J. P. 180; 3 Jur. N. S. 257; 5 W. R. 305; 53 E. R. 88.

Annotations:—*Refd.* Milward v. Redditch L. B. of Health (1873), 21 W. R. 429. *Mentd.* New River Co. v. Johnson (1860), 29 L. J. M. C. 93; *R. v. Metropolitan Board of Works* (1863), 32 L. J. Q. B. 105.

781. — Nuisance — Of temporary nature.]—A public body, acting under parliamentary powers, are not authorised to construct their works in such a way as to create a nuisance, but the ct. is unwilling to grant a mandatory injunction even to restrain a nuisance improperly created, especially where the nuisance is only of a temporary nature.—*A.-G. v. METROPOLITAN BOARD OF WORKS* (1863), 1 Hem. & M. 298; 2 New Rep. 312; 9 L. T. 139; 27 J. P. 597; 11 W. R. 820; 71 E. R. 130.

Annotations:—*Expld.* Price's Patent Candle Co. v. L. C. C. (1908), 99 L. T. 571. *Refd.* A.-G. (River Thames Conservators) v. Kingston-on-Thames Corpn. (1865), 12 L. T. 665; *A.-G. v. Colney Hatch Lunatic Asylum* (1868), 19 L. T. 44; *Vernon v. St. James, Westminster, Vestry* (1880), 16 Ch. D. 449; *Charles v. Finchley L. B.* (1883), 52 L. J. Ch. 554.

782. — Causing inconvenience to individuals.]—The ct. will not restrain the proper local authorities from exercising powers given them by Act of Parliament merely because inconvenience may be thereby caused to individuals if the inconvenience is such as must have been necessarily in the contemplation of Parliament when the Act was passed.—*BIDDULPH v. ST. GEORGE'S VESTRY* (1863), 3 De G. J. & Sm. 493; 2 New Rep. 212; 33 L. J. Ch. 411; 8 L. T. 558;

O. W. N. 633, 796; 21 D. L. R. 81.—**CAN.**

*m. Injunction against corporation — Notice of.]—*MAHAMAHOPADYAYA RANGACHARIAR v. MUNICIPAL COUNCIL OF MADRAS (1902), 1 L. R. 29

PART X. SECT. 4, SUB-SECT. 1.—C.

*To restrain holding council and — Where venue irregular.]—*The

ct. will not grant an injunction to restrain the council of a shire from holding its meetings at a place improperly appointed for that purpose, at any rate so long as the funds of the municipality are not dealt with there.—*A.-G. v. HUNTLY (SHIRE)* (1887), 13 V. L. R. 66.—**AUS.**

*o. To restrain execution of contract — Action by minority of council.]—*The council of a shire placed upon the

estimate of expenditure, an item of £1,100 for a bridge & shire hall. The actual revenue proved much less than that estimated, & the shire being actually in debt for liabilities already incurred, the council, by a majority of one, entered into a contract for erecting a shire hall at a cost of £628. Upon motion for an injunction upon an information at the relation of a ratepayer, with the consent of the dissident minority of the council to

27 J. P. 579; 9 Jur. N. S. 953; 11 W. R. 739; 46 E. R. 726, L. JJ.

Annotations:—*Consd.* Vernon v. St. James, Westminster Vestry (1880), 16 Ch. D. 449. *Refd.* Moggy v. Bocken (1888), 5 T. L. R. 22; Pethick v. Plymouth Corp'n. (1894), 70 L. T. 304; Mudge v. Penge U. C. (1916), 86 L. J. Ch. 126; Roberts v. Hopwood, [1925] A. C. 578.

783. To compel exercise of powers.]—A vestry sanctioned the drainage of certain houses by means of cesspools with overflow pipes connecting with main pipes. Sewage passed into the main pipes, & from thence into a watercourse, & caused a nuisance within the district of an adjoining local board. The vestry had power to take proceedings under Nuisances Removal Act, 1855 (c. 121), & Metropolis Local Management Act, 1855 (c. 120), with respect to this nuisance, & the local board also had power to proceed under Public Health Act, 1875 (c. 55). In an action by the local board against the vestry for an injunction to restrain the nuisance:—*Held*: it was not a proper ground for granting an injunction against a local board that they were not properly exercising their powers or performing their duties.—*A.-G. v. CLERKENWELL VESTRY*, [1891] 3 Ch. 527; 60 L. J. Ch. 788; 65 L. T. 312; 40 W. R. 185.

Annotations:—*Refd.* Yorkshire West Riding Council v. Holmfirth Urban S. A., [1894] 2 Q. B. 842; Eastwood v. Honley U. C., [1900] 1 Ch. 781. *Mentd.* Re M'Intosh & Pontypridd Improvement Co. (1891), 8 T. L. R. 128; Stretton's Derby Brewery Co. v. Derby Corp'n., [1894] 1 Ch. 431; Brown v. Dunstable Corp'n., [1899] 2 Ch. 378; East Barnet Valley U. C. v. Stallard, [1909] 2 Ch. 555.

784. Misapplication of poor rate—Guardians.]—Where the guardians of the poor had been unsuccessful in obtaining a bill in Parliament, & were about to pay the expenses out of the money raised for the poor-rate, they were restrained by the ct.—*A.-G. v. SOUTHAMPTON GUARDIANS* (1849), 17 Sim. 6; 3 New Mag. Cas. 212; 18 L. J. Ch. 393; 13 L. T. O. S. 503; 13 Jur. 669; 60 E. R. 1028.

Annotation:—*Folld.* A.-G. v. Merthyr Tydfil Grdns., [1900] 1 Ch. 516.

785. ———.]—The High Ct. has jurisdiction to restrain guardians from applying the poor rates improperly.—*A.-G. v. MERTHYR TYDFIL UNION*, [1900] 1 Ch. 516; 69 L. J. Ch. 299; 82 L. T. 662; 64 J. P. 276; 48 W. R. 403; 16 T. L. R. 251; 44 Sol. Jo. 294, C. A.

Annotations:—*Refd.* A.-G. v. Tottenham U. D. C. (1909), 8 L. G. R. 95; A.-G. v. East Barnet Valley U. D. C. (1911), 75 J. P. 484. *Mentd.* A.-G. v. Bedwellty Union Grdns. (1900), 44 Sol. Jo. 328; Poplar Union v. Martin (1904), 91 L. T. 550; R. v. L. G. Board, *Ex p.* Arlidge, [1914] 1 K. B. 160; A.-G. v. Poplar Grdns. (1924), 40 T. L. R. 752; Lewisham Union Grdns. v. Nice, [1924] 1 K. B. 618.

786. Excess of statutory powers — Change of sanitary conveniences.]—A district board of works acting under Metropolis Local Management Act, 1855 (c. 120), made an *ex p.* order on pltf. to turn into water-closets the privies attached to certain cottages belonging to him, & on his failing to do so, they proceeded to enter upon the premises for the purpose of doing it themselves. The order appeared to have been made, not with regard to the state of this particular property, but in consequence of a previous determination to substitute water-closets for privies throughout the district:—*Held*: the board were exceeding their statutory powers & ought to be restrained from entering on

pltf.'s property for the purpose of making the alteration.—*TINKLER v. WANDSWORTH DISTRICT BOARD OF WORKS* (1858), 2 De G. & J. 261; 27 L. J. Ch. 342; 31 L. T. O. S. 27; 22 J. P. 223; 4 Jur. N. S. 293; 6 W. R. 390; 44 E. R. 989, L. JJ.

Annotations:—*Folld.* Ashworth v. Hebden Bridge L. B. (1877), 47 L. J. Ch. 195. *Distd.* Carlton Main Colliery Co. v. Hemsworth R. D. C., [1922] 1 Ch. 521. *Refd.* Vernon v. St. James Westminster Vestry (1880), 16 Ch. D. 449; St. James & St. John Clerkenwell Vestry v. Feary (1890), 24 Q. B. D. 703; Bootle Corp'n. v. Owens (1902), 87 L. T. 74. *Mentd.* St. Luke's Vestry v. Lewis (1862), 1 B. & S. 865; Biddulph v. St. George, Hanover Square Vestry (1863), 8 L. T. 44; Robinson v. Sunderland Corp'n. (1898), 78 L. T. 194; Wood v. Widnes Corp'n. (1898), 67 L. J. Q. B. 254; Nicholl v. Epping U. C., [1899] 1 Ch. 844.

787. To restrain entry on land — Sewage disposal.]—A local board of health has no power, under the Public Health Act, 1848 (c. 63), to enter upon land without the consent of the owner for the purpose of making reservoirs & deposit-beds for retaining the sewage; & the ct. granted an injunction to restrain such a proceeding.—*SUTTON v. NORWICH CORPN.* (1858), 27 L. J. Ch. 739; 31 L. T. O. S. 389; 22 J. P. 353; 6 W. R. 432.

Annotation:—*Mentd.* Newcastle-on-Tyne Corp'n. v. Houseman, Same v. Francis, Same v. Jackson, Same v. Coote (1898), 63 J. P. 85.

See, further, SEWERS & DRAINS.

788. Interference with watercourse — Abstraction of water.]—(1) Although a landowner will not in general be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if, in so doing, he draws off the water flowing in a defined surface channel through the adjoining land.

(2) Where a local board of health are interfering with a watercourse in a manner not authorised by Local Government Act, 1858 (c. 98), s. 68, art. 3, they will be restrained from so doing, & the person injured will not be left to his remedy under the compensation clause of Public Health Act, 1848 (c. 63), s. 144.

It was said that this would be a mandatory injunction but that objection loses its force in a case where the complaint was made immediately before the damage was done, & where it was met by a written notice on the parts of those who were about to do the works that no such damage would be done or would accrue (*LORD HATHERLEY, C.*).—*GRAND JUNCTION CANAL CO. v. SHUGAR* (1871), 6 Ch. App. 483; 24 L. T. 402; 35 J. P. 660; 19 W. R. 569, L. C.

Annotations:—*As to* (1) *Distd.* Bradford Corp'n. v. Pickles, [1894] 3 Ch. 53; Salt Union v. Brunner, Mond, [1906] 2 K. B. 822; English v. Metropolitan Water Board, [1907] 1 K. B. 588. *Refd.* Jorleson v. Sutton Southcoates & Drypool Gas Co., [1899] 2 Ch. 217.

Compare No. 780, *ante*.

See, further, WATERS AND WATERCOURSES.

789. Application to Parliament to sell common land—Metropolitan Commons Act, 1886 (c. 122).]—After the passing of the above Act pltf., a part owner, & the other co-owners, of a manor, the waste of which became, under the above statute, a metropolitan common with the Board of Works as its local authority, sold & conveyed the manor, with the knowledge of the Board, for a sum of £10,200, to two trustees, who afterwards sold & conveyed the same to the Board of Works. By

restrain the council from expending any of the shire funds in the erection of the hall:—*Held*: the dissentient minority had no rights to assume a discriminating discretion as to which particular expenditure should be stopped & the contract having been entered into, the ct. would not subject the shire to liability for damages, by

stopping its execution.—*A.-G. v. DARELIN (SHIRE)* (1871), 2 V. R. 88.—**AUS**

p. To restrain erection of works—*Statutory authority—Nuisance.*—The Board of Water Supply & Sewerage is liable to an injunction if the works, which it is by statute authorised to construct, cause a nuisance, even

though no negligence be proved against the board.—*A.-G. v. WATER SUPPLY & SEWERAGE BOARD* (1916), 16 S. R. N. S. W. 437.—**AUS.**

To restrain proposed expenditure—Costs of unsuccessful promotion bill.—The magistrates of a burgh in fixing the water rates for the current year, included in their estimate of

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the former conveyance, pltf., being the owner of house property near the common, stipulated that if, within five years from the date of the deed, the common should not be enclosed & dedicated to the public, having no part of it sold or let on building leases, he, pltf., should re-purchase his share of the manor on giving the same price for it as he was then receiving. The Board of Works, with notice of this stipulation memorialised the Inclosure Comrs. to prepare & certify a scheme of local management; & the Comrs., on the suggestion of the Board, published a scheme, whereby it was proposed to give the Board power to sell or let on building leases a small outlying portion of the common, for the purpose of recouping to the Board their expenses of & attending the inclosure. Upon bill to restrain the Board from promoting the scheme, or any scheme inconsistent with the stipulation:—*Held*: (1) the Board of Works were bound by the stipulation in the conveyance by pltf.; (2) pltf.'s right, under the stipulation, to sue in equity was not affected by the circumstances that the scheme, in order to become operative, must be submitted to Parliament; & injunction granted as prayed.—*TELFORD v. METROPOLITAN BOARD OF WORKS* (1872), L. R. 13 Eq. 574; 41 L. J. Ch. 589; 26 L. T. 150; 36 J. P. 628; 20 W. R. 481.

790. To restrain board from enforcing order—Pending case stated.]—Orders having been obtained by a local board from the justices, for payment by A. & L. & others, of a rate levied for defraying the expense of paving a certain street, an agreement was come to that the order against L., should not be enforced for three months, in order to enable a case to be stated for the opinion of the Ct. of Q. B., on a point of law. An understanding was, at the same time, come to, that the order against A. should abide the decision in L.'s case. L., instead of taking the case to the Q. B., went before the Quarter Sessions, & the order against him was quashed on a technical ground. A., was not informed of the course taken by L., & the three months having expired within which she could have appealed, the local board obtained an order against her for payment of the rate. On motion by A. to restrain the board from enforcing the order, until she had had an opportunity of stating a case for the opinion of the Q. B.:—*Held*: the ct. had power to restrain the local board from enforcing the order, & on A. undertaking to consent to a case for the opinion of the Q. B., & to pay the amount of the rate into ct., injunction was granted.—*ASHWORTH v. HEBDEN BRIDGE LOCAL BOARD* (1877), 47 L. J. Ch. 195; 37 L. T. 496.

Annotation:—*Mentd.* *Tottenham L. B. of Health v. Rowell* (1880), 49 L. J. Ch. 147.

791. Discharge of road water into private ground.]—Pltf. was the owner of a house & land on the slope of a hill up which ran a high road, & on his land there was a chalk dell. The road was, some time prior to the formation of deft. board, a turnpike road, & some time during the existence of the turnpike trust the surface water of the road was conducted into the dell through pipes,

which discharged the water into a "dumb well" or shaft, sunk in the chalk, from which it percolated through the subsoil:—*Held*: the dumb well was not a "drain or watercourse" within the meaning of Highway Act, 1835 (c. 50), s. 67; defts had shown no right to use it as part of their drainage system; & pltf. was entitled to an injunction to restrain them from so using it.—*CROFT v. RICKMANSWORTH HIGHWAY BOARD* (1888), 39 Ch. D. 272; 58 L. J. Ch. 14; 60 L. T. 34; 4 T. L. R. 706, C. A.

Annotations:—*Reid.* *Croysdale v. Sunbury-on-Thames U. C.*, [1898] 2 Ch. 515. *Mentd.* *Meader v. West Cowes L. B.*, [1892] 3 Ch. 18; *A.-G. v. Copeland*, [1902] 1 K. B. 690.

See, further, SEWERS & DRAINS.

792. Carrying water mains through private land.]—By Public Health Act, 1875 (c. 55), ss. 16, 54, urban local authorities are empowered to carry water mains through, across or under certain roads, streets cellars & vaults &, after giving "notice to the owner or occupier, if, on the report of the surveyor it appears necessary, into, through or under any lands situate within their district." In Dec. 1887, the surveyor of defts. an urban local authority died. On Jan. 11, 1888, defts. by resolution appointed P. a civil engineer in their employment "surveyor to the board until a further permanent surveyor be appointed." On Mar. 21, 1888, P. reported to defts. that it was "desirable & advisable" that their water-main should be carried in a particular direction from one point to another & that it would be "necessary" to lay it through land belonging to pltf. which was within the district. This report was signed "your surveyor P." Four days after its date Y. was duly appointed a surveyor to defts. & P. who was a candidate for the office was retained in their service as waterworks engineer. The report of Mar. 21 was considered & adopted by the board on Apr. 11, 1888, & in the following month a notice in pursuance thereof was served on pltf. that defts. intended to carry their main through a part of his lands. Upon motion made in an action by pltf. for an injunction to restrain defts. from so doing:—*Held*: the word "necessary" must be construed as meaning "necessary for the efficient discharge of the duty in the way most for the benefit of the public"; upon the words of sect. 16 of the Act the person to determine the necessity was the surveyor; & if the ct. found that he had exercised his judgment & come to a conclusion in good faith the ct. ought not to interfere, even although other courses were shown to be practicable by which the entry on private lands might be avoided; "the surveyor" mentioned in sect. 16 must in the case of an urban authority be the fit & proper person duly appointed to be surveyor under sect. 189 of the Act & no other; & P. was not "the surveyor" of defts. within sects. 16 & 189; & as the report on which the proceedings of the defts. was founded was not the report of "the surveyor" pltf. was entitled to an interlocutory injunction.—*LEWIS v. WESTON-SUPER-MARE LOCAL BOARD* (1888), 40 Ch. D. 55; 58 L. J. Ch. 39; 59 L. T. 769; 37 W. R. 121; 5 T. L. R. 1.

Annotations:—*Folld.* *Stroud v. Wandsworth Board of Works*, [1894] 1 Q. B. 64. *Reid.* *Jones v. Conway & Colwyn Bay Joint Water Supply Board*, [1893] 2 Ch. 603;

expenditure to be paid out of the rates a sum representing half of the expenses incurred by them in the unsuccessful promotion of a provisional order & private bill. In an action of suspension & interdict against them, by certain individual rate payers in the burgh a plea of no title or interest to sue l.—*FARQUHAR & GILL v.*

ABERDEEN MAGISTRATES, [1912] S. C. 1294.—*SCOT.*

r. To restrain ultra vires act—Act done at Crown's request.]—On being asked by the local military authorities, but without any formal requisition District Water Trustees, in addition

to supplying military camps with water carried out the ordinary plumbing work connected with the distribution of water throughout the camps, although under their statutes they were not empowered to do work of that description. In an action of interdict brought against them by certain Edinburgh plumbers, defendants founded on (1) a

Robinson v. Sunderland Corpn., [1899] 1 Q. B. 751 ; Kendal v. Lewisham B. C. (1903), 67 J. P. 236 ; Roberts v. Hopwood, [1925] A. C. 578.

See, further, WATER SUPPLY.

793. To restrain holding election—Conservators of commons.]—PURVES v. WIMBLEDON & PUTNEY COMMONS CONSERVATORS (1890), 62 L. T. 529.

794. To restrain proceeding with notice to treat—Owners right of presumption.]—A board of works contracted to sell to a purchaser such part of the land occupied by two houses as was not required to carry out a scheme for widening a street. A resolution was then passed by the board adjudging that it was necessary to acquire the whole of the two houses, & notice to treat for the same was given to the owner pursuant to Metropolitan Paving Act, 1817 (c. xxix):—*Held*: the adjudication was wrong & *ultra vires*, as the board must have been influenced by the existence of the prior contract for sale, which deprived the owner of his right of pre-emption under sect. 96 of the Act; & a perpetual injunction must be granted to restrain them from proceeding with their notice to treat.—FERNLEY v. LIMEHOUSE BOARD OF WORKS (1899), 68 L. J. Ch. 344 ; 43 Sol. Jo. 332 ; *sub nom.* FEARNLEY v. LIMEHOUSE BOARD OF WORKS, 80 L. T. 351 ; 63 J. P. 310.

795. To restrain construction of tramway—Not shown on deposited plans.]—The piece of line in question is not a "junction" & is not authorised by sect. 7 [of the local Act]. If that is so, then it can only be constructed under sect. 12, with the proviso with which the corpn. has not complied. The result is that the tramway was not constructed in accordance with the powers of the Act, & there must be an injunction against the corpn. compelling them to remove so much of the tramway as was not delineated upon the deposited plans (JOYCE, J.).—WILKINSON & MARSHALL v. NEWCASTLE-UPON-TYNE CORPN. (1902), 18 T. L. R. 332.

See, further, TRAMWAYS & LIGHT RAILWAYS.

796. To restrain payment of unsanctioned loan.]—Defts. in 1903 obtained the sanction of the Local Government Board to a loan for the erection of municipal buildings. They spent, over & above the amount of the loan, a further sum of £18,350, which was borrowed from their bankers by way of overdraft. In 1907 defts. applied to the Local Government Board for leave to borrow the amount thus overspent, but as to £4,910, a portion thereof, sanction was refused. In Oct. 1908, defts. proposed to levy a general district rate to enable them to pay the £4,910, but were restrained by the ct. from doing so until the trial of this action. Before action brought, defts. had paid a sum of £855 for interest on their bank overdraft, & they proposed to pay a further sum of £900 for interest. The most recent of the items composing the £4,910 had been expended more than a year before the date of the proposed rate:—*Held*: the loan of the sum of £4,910 to defts. from the bank by way of overdraft, without the sanction of the Local Government Board, was illegal ; defts. must be restrained from applying any part of the general district fund or rate or any other public fund or rate under their control in repayment of the loan or any part thereof ; defts. were not entitled to

make any payment of interest upon money borrowed without the sanction of the Local Government Board, whether such borrowing was by means of overdraft or otherwise the payment by defts. of the £855 was unlawful & ought to be disallowed by the auditor on auditing defts.' accounts, but this declaration was in no way to affect the power of the Local Government Board to remit such disallowed payment, though unlawfully made, under any statute enabling them so to do ; defts. must be perpetually restrained from making any further payments of interest upon money borrowed without the sanction of the Local Government Board or other statutory sanction, whether such borrowing be by way of overdraft or otherwise.—A.-G. (ON RELATION OF TREMAIN) v. TOTTENHAM URBAN DISTRICT COUNCIL (1909), 73 J. P. 437 ; 8 L. G. R. 95.

797. Removal of electric standard—Highway not repairable by public.]—Pltf. was the owner & occupier of a hotel which fronted on a street. The hotel was erected on land which, at the time when the hotel was erected, was bounded by an old parish road. It was set back 4 or 5 feet from the boundary of the road, a pavement being laid in front by pltf.'s predecessor in title, his father, upon his own land. Defts., a local authority, having obtained a provisional order, duly confirmed, for the supply of electrical energy, which empowered & required them to lay distributing mains in the street on which the hotel fronted, subsequently obtained the sanction of the Board of Trade to a supply by means of overhead mains in that street. For the purposes of that supply, but without the consent either of pltf. or of the Board of Trade, they erected a standard on the pavement in front of, & close to, the hotel, & fixed it below the soil into the footings of the hotel wall. The paved strip of land had never been acquired by defts. ; it had become a highway as having been dedicated by pltf.'s father to the use of the public, but it was not repairable by the inhabitants at large. It remained the property of pltf., who, although not legally liable to repair the pavement, had done so from time to time. Pltf., having brought an action for a mandatory injunction to compel defts. to remove the standard:—*Held*: pltf. was entitled to a mandatory injunction for the removal of the standard.—ANDREWS v. ABERTILLY URBAN COUNCIL, [1911] 2 Ch. 398 ; 80 L. J. Ch. 724 ; 105 L. T. 81 ; 75 J. P. 449 ; 55 Sol. Jo. 347 ; 9 L. G. R. 1009, C. A.

798. To restrain making illegal rate—Expenses of festivities.]—In Apr. 1911, the Local Government Board, in pursuance of their statutory powers, & in anticipation of public local celebrations on the occasion of the coronation of King George V., issued a general order to all local authorities whereby they sanctioned beforehand "any reasonable expenses" that might be incurred by any local authority in connection with any local public celebration on the occasion of the coronation of King George V., & on May 2 deft. council passed a resolution that a sum not exceeding three farthings in the pound should be expended out of the rates in carrying out the coronation festivities in the district. The three farthings

provision in the Defence of the Realm regulations under which any water authority, if so required by the Army Council, was bound to supply water & carry out such works & render such services as might be necessary for procuring the supply ; (2) a Royal Proclamation enjoining on the king's subjects the duty of obeying all

instructions & regulations issued by, *inter alios*, any officer of the army:—*Held*: the action of defenders was *ultra vires*, in spite of the fact that they had undertaken the work at the request of the military authorities & with the sole motive of furthering the public interest ; & interdict granted.—GRIEVE v. EDINBURGH & DISTRICT WATER

TRUSTEES, [1918] S. C. 700.—SCOT.

i. Irregular appointment of teachers—Cancellation enforced.]—Where an education board appointed two teachers to a new school district without consulting the school committee of the district, as required by Education Act, 1904:—*Held*: the proper

Sect. 4.—Corporate and unincorporate bodies: Sub-sect. 1, C., D. & E.; sub-sect. 2, A.]

rate would produce about £240. The A.-G., at the relation of certain ratepayers, brought an action against the local authority to restrain them from paying the £240 out of the rates on the ground that such payment would be *ultra vires* & illegal, & applied for an *interim* injunction pending the trial of the action:—*Held*: it was not a case for an interlocutory injunction.—*A.-G. v. EAST BARNET VALLEY URBAN DISTRICT COUNCIL* (1911), 75 J. P. 484; 9 L. G. R. 913.

799. To restrain council pulling down new buildings—Unreasonable bye-law.]—Pltfs. made an alteration to their school building which consisted, in part, of an addition to the front of the house of a projection three stories high, with a room on each floor. This constituted a new domestic building within the meaning of the local bye-laws made before 1907, one of which provides that a person erecting a new domestic building “(a) . . . shall provide . . . in the rear an open space exclusively belonging to such building. . . . (b) Shall cause such open space to extend laterally throughout the entire width of such buildings. . . .” Defts. who were the local authority, threatened to pull down the new building because the above bye-law was not complied with. In an action for an injunction to restrain them from so doing:—*Held*: the bye-law was bad as being unreasonable as it unjustifiably interfered with the rights of property owners for no sufficient reason, or no reason at all, & pltfs. were entitled to an injunction.—*REPTON SCHOOL (GOVERNORS) v. REPTON RURAL COUNCIL*, [1918] 1 K. B. 26; 87 L. J. K. B. 289; 118 L. T. 157; 82 J. P. 101; 15 L. G. R. 938; *on appeal*, [1918] 2 K. B. 133, C. A.

Annotations:—*Consd.* Sutton Harbour Improvement Co. v. Foster (1920), 123 L. T. 549; *A.-G. v. Denby*, [1925] Ch. 596.

See, further, PUBLIC HEALTH.

To restrain trading in electric apparatus.]—*See* ELECTRIC LIGHTING, Vol. XX., p. 199, Nos. 7–11.

To restrain nuisance arising from user of works.]—*See* ELECTRIC LIGHTING, Vol. XX., pp. 209, 210, No. 67–71.

D. Ecclesiastical Corporation.

800. To restrain presentation to living—By archbishop or bishop.]—*EDENBOROUGH v. CANTERBURY (ARCHBP.) CARTER v. LONDON (BP.)* (1826), 2 Russ. 93; 38 E. R. 271, L. C.

Annotations:—*Mentd.* R. v. Hammersmith (Vicar & Churchwardens) (1852), 3 B. & S. 504, n.; *Saunders v. Saunders* (1857), 5 W. R. 479; *Turner v. Collins* (1871), L. R. 12 Eq. 438; *Andrews v. Barnes* (1888), 39 Ch. D. 133.

—**By bishop.]**—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 384, No. 2076.

—**By trustees.]**—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 403, Nos. 2336, 2337.

801. To restrain vicar & churchwardens acting upon faculty not yet granted.]—In 1782, a subscription was raised for the purpose of providing more church accommodation than then existed for the inhabitants of a parish, & a chapel was formed on the first floor of a building belonging to a grammar school. A curate was licensed to this chapel by the bishop of the diocese, & the curacy was constituted a perpetual curacy & benefice under Queen Anne's Bounty Act, 1714 (c. 10),

s. 4. Pews in this chapel were allotted to the subscribers, & the pewholders sold & transferred their seats by entries in the chapel-book. In 1846 the building was pulled down & a new chapel was erected on the site, & duly consecrated in 1848. Those persons who had been holders of pews in the old chapel had pews allotted to them in the new chapel in substitution therefor. These pews, & others which were substituted for them upon the re-pewing & repairing of the chapel under a faculty granted in 1867, were exclusively used by the persons to whom they were allotted & their successors in title down to the commencement of the action, & were dealt with by them by way of assignment & devise. The vicar & churchwardens of the parish having applied for a faculty to enable them to remove the pews, pltf., in whom the rights of the previous holders of three of the pews were vested, brought an action against them, claiming a declaration that he was entitled to the three pews, & an injunction to restrain defts. from interfering with them. There was no evidence of the pews having ever been repaired by pltf. or his predecessors in title:—*Held*: the action ought not to have been entertained, for it was an abuse of the process of the ct. to ask for an injunction to restrain defts. from acting under a faculty which had not yet been granted; but the Q. B. Div. having dealt with the matter, the ct. entertained the appeal.—*PROUD v. PRICE* (1893), 63 L. J. Q. B. 61; 69 L. T. 664; 42 W. R. 102; 10 T. L. R. 21; 9 R. 40, C. A.

Annotation:—*Mentd.* Stileman-Gibbard v. Wilkinson, [1897] 1 Q. B. 749.

E. Charitable Corporations.

See, generally, CHARITIES, Vol. VIII., pp. 385–388.

802. To restrain governors of charity—Management of charity.]—The general controlling power of the ct. over charities does not extend to a charity regulated by governors under a charter, unless they have also the management of the revenues, & abuse their trust, which will not be presumed, but must be apparent or made out by evidence. The Foundling Hospital is an institution of this kind; therefore on motion injunction to restrain the governors from building round it refused, breach of trust or probability of it not being made out.—*A.-G. v. FOUNDLING HOSPITAL (GOVERNORS)* (1793), 2 Ves. 42; 4 Bro. C. C. 165; 29 E. R. 833.

Annotations:—*Reid.* *Re* Chertsey Market, *Ex p.* Walthow (1819), 6 Price, 261; *Soltau v. De Held* (1851), 2 Sim. N. S. 133.

803. ———.]—The internal management of a charity the exclusive subject of visitatorial jurisdiction; but under a trust as to the revenue abuse by misapplication controlled in this ct.—*Ex p.* BERKHAMPTSTEAD FREE SCHOOL (1813), 2 Ves. & B. 134; 35 E. R. 270.

Annotations:—*Reid.* *A.-G. v. Browne's Hospital* (1849), 17 Sim. 137; *A.-G. v. St. Cross Hospital* (1853), 17 Beav. 435; *Re* Chelmsford Grammar School (1855), 3 Eq. Rep. 517. *Mentd.* *A.-G. v. Smythies* (1836), 2 My. & Cr. 135.

804. ———.]—London University conferred upon pltf. a gold medal, as being the candidate who had obtained the highest number of marks in the examination of 1861 for the LL.D. degree. Two years afterwards, it was discovered by the Senate of the University, that, according to the construction put by the Senate on the

remedy of the school committee was to move the ct. for an injunction to compel the board to cancel the appointments. Injunction

restraining the board from retaining the two teachers permanently but allowing the board to appoint them temporarily for three months, this

being within its discretion.—*LESSINGTON v. WELLINGTON EDUCATION BOARD* (1906), 26 N. Z. L. R. 244. N.Z.

regulations for the LL.D. examination, the examiners had miscarried in the mode which they had adopted in ascertaining the highest number of marks; & the Senate thereupon determined to confer a second gold medal upon the candidate to whom according to their view the medal ought to have been awarded. Pltf. filed his bill, alleging in effect that before becoming a candidate he made inquiry of the registrar of the University, & had been informed by him that the examination would be conducted upon the principle & the marks ascertained in the mode upon & in which they were in fact subsequently conducted & ascertained, & that he had become a candidate & paid his examination fee upon that footing, & praying that the University might be restrained from awarding such other medal:—*Held*: the ct. had no jurisdiction to entertain the suit, the matter being one solely within the jurisdiction of the visitor; & even if the matter was one which might, in its nature, fall within the cognisance of the ct., pltf. had not alleged any sufficient ground of equity.—*THOMSON v. LONDON UNIVERSITY* (1864), 33 L. J. Ch. 625; 10 L. T. 402; 10 Jur. N. S. 669; 12 W. R. 733.

Annotation:—*Refd.* *Rooke v. Dawson* (1895), 43 W. R. 313.

805. To enforce charitable trusts.]—In cases of charitable trusts the ct. has authority to see them properly performed notwithstanding there may be a special or general visitor.—*A.-G. v. ST. CROSS HOSPITAL* (1853), 17 Beav. 435; 1 Eq. Rep. 585; 22 L. J. Ch. 793; 22 L. T. O. S. 188; 1 W. R. 525; 51 E. R. 1103.

806. —.]—The jurisdiction of the ct. to enforce a trust attaches equally upon ecclesiastical property affected thereby as it would upon lay property similarly circumstanced.—*A.-G. v. ST. JOHN'S HOSPITAL, BEDFORD* (1865), 2 De G. J. & Sm. 621; 34 L. J. Ch. 441; 12 L. T. 714; 11 Jur. N. S. 629; 13 W. R. 955; 46 E. R. 516, L. JJ.

Annotation:—*Refd.* *Re Thompson's Settlement. Trusts, Thompson v. Alexander*, [1905] 1 Ch. 229.

See, also, CHARITIES, Vol. VIII., p. 388, Nos. 2071 *et seq.*

Governors of cathedral grammar school—To restrain dismissal of headmaster.]—*See* EDUCATION, Vol. XIX., p. 609, No. 342.

SUB-SECT. 2.—UNINCORPORATE BODIES.

A. In General.

807. Voluntary associations — Expulsion of member—Trade union.]—The foundation of the jurisdiction of the ct. to prevent a member of a voluntary assocn. from being improperly expelled is the right of property vested in such member of which he is deprived.

The rules of a trade union provided that the money arising from the subscriptions of its

members should be applicable in various ways for their benefit. They also purported to regulate the affairs of that trade, & provided that any journeyman binding his son in a "foul shop," being a shop in which non-union men were employed, should be fined, & not be entitled to any benefit until such fine had been paid. Pltf., a member of the union, who was alleged to have broken the rule as to apprenticeship, & who, having refused to pay the fine, had been expelled from the union, brought his action against the committee & trustees of the union claiming to be entitled to participate in its benefits, & that defts. might be restrained from excluding him from such participation:—*Held*: as the action was brought to enforce an agreement between members of a trade union "to provide benefits to members," within Trade Union Act, 1871 (c. 31), s. 4, which the ct. was not by that sect. enabled to enforce; & as, apart from the Act, the union was an illegal assocn., pltf. was not entitled to any relief.—*RIGBY v. CONNOL* (1880), 14 Ch. D. 482; 49 L. J. Ch. 328; 42 L. T. 139; 28 W. R. 650.

Annotations:—*Apld.* *Duke v. Littleboy* (1880), 49 L. J. Ch. 802. *Distd.* *Wolfe v. Matthews* (1882), 21 Ch. D. 194. *Consd.* *Baird v. Wells* (1890), 44 Ch. D. 661. *Fold.* *Chamberlain's Wharf v. Smith*, [1900] 2 Ch. 605; *Mullett v. United French Polishers' London Soc.* (1904), 91 L. T. 133. *N.F.* *Yorkshire Miners' Assocn. v. Howden*, [1905] A. C. 256. *Consd.* *Amalgamated Soc. of Carpenters, Cabinet Makers & Joiners v. Braithwaite, General Union of Operative Carpenters & Joiners v. Ashley*, [1922] 2 A. C. 440. *Refd.* *Millican v. Sullivan* (1888), 4 T. L. R. 203; *Winder v. Kingston-upon-Hull Corpn., Governor & Guardians* (1888), 58 L. T. 583; *Swaine v. Wilson* (1889), 24 Q. B. D. 252; *Old v. Robson* (1890), 59 L. J. M. C. 41; *Cullen v. Elwin* (1904), 90 L. T. 840; *Steele v. South Wales Miners' Federation*, [1907] 1 K. B. 361; *Cope v. Crossingham*, [1908] 2 Ch. 624; *Cassel v. Inglis*, [1916] 2 Ch. 211. *Mentd.* *Ryan v. Mutual Tontine Westminster Chambers Assocn.* (1892), 62 L. J. Ch. 252; *Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants*, [1901] A. C. 426; *Amalgamated Soc. of Ry. Servants v. Osborne*, [1910] A. C. 87; *A.-G. v. Swan*, [1922] 1 K. B. 682.

See, further, TRADE AND TRADE UNIONS.

808. — Re-election of member—Stock Exchange.]—The proprietors of the Stock Exchange are a voluntary association regulated by a deed of settlement, & the members are the persons from time to time admitted to attend, & in their own right to transact business at, the Stock Exchange in accordance with the deed.

In Mar. 1917, pltf., a naturalised British subject of German birth, who had been a member of the Stock Exchange since 1895, applied for re-election. Certain members, who had formed an organisation called the Stock Exchange Anti-German Union, lodged an objection under r. 35 [of the Stock Exchange Rules] against the re-election of pltf., on the ground of enemy birth. At the invitation of the committee pltf., showed cause against the objection by letter & at an interview, & he stated numerous facts in proof of his loyalty with a view to displacing the objection. The committee, however, refused his application. Pltf. brought an action to impugn the decision of the committee on the ground that it was arbitrary & capricious

PART X. SECT. 4, SUB-SECT. 2.—A.

a. General rule.]—Act. of law will not interfere with the rules of a voluntary assocn., unless to protect some civil right or interest which is said to be infringed by their operation.—*FORBES v. EDEN* (1867), L. R. 1 Sc. & Div. 568.—*SCOT.*

b. Voluntary associations — Expulsion of member—Sports club.]—To give jurisdiction to a ct. to interfere by way of injunction to restrain expulsion of a member of a club or assocn., it must appear that he has some right of property therein. The right to use the club or assocn. rooms,

property & effects, on payment of a subscription, without any right to participate in assets, if distribution ensued, is merely a personal one. The only remedy in such case, if the expulsion is wrongful or injurious, is by action for damages. Where, therefore, an injunction was granted restraining a hockey assocn. from expelling a member, whereby he would be debarred from playing in a specified game, there being no allegation or proof of his having paid any subscription, or that he had any right of property in the assocn., injunction was set aside & action therefor dismissed with costs.—*Rowe v. Hewitt* (1906),

12 O. L. R. 13; 7 O. W. R. 543.—*CAN.*

c. — — — Notice of meeting withheld.]—Note of suspension & interdict refused where the interdict was craved against the members of an acting committee of an assocn., on the allegation by complainant, that he had been illegally excluded from the meetings of the committee, by being refused notice of such meetings.—*CARGILL v. FORREST* (1851), 1 Stu. M. & P. 91.—*SCOT.*

d. — — — Suspension of member—Turf Club.]—*TRENOWETH v. COX* (1911), 13 W. A. L. R. 205.—*AUS.*

e. — — — Synagogue.]—Where

& based on irrelevant considerations. The committee by their defence alleged that they did not re-elect pltf. because they did not deem him eligible to be a member of the Stock Exchange for the year in question & for no other reason:—*Held*: assuming the committee owed any duty to the members as regards re-election, the proper inference from the facts was that the refusal of the committee had proceeded solely on the ground of enemy birth, as to which pltf. had been heard; they had *bond fide* exercised the discretion conferred upon them by the deed of settlement & the rules, & were not shown to have acted arbitrarily or capriciously; & therefore the ct. had no jurisdiction to interfere with their decision.—*WEINBERGER v. INGLIS*, [1919] A. C. 606; 88 L. J. Ch. 287; 121 L. T. 65; 35 T. L. R. 399; 63 Sol. Jo. 461, H. L.

Restraint of expulsion of members.]—See CLUBS, Vol. VIII., pp. 509, 511, 512, Nos. 24, 30-33, 37-47.

809. Enforcement of rules — Wrongful application of funds.]—GRAND UNITED ORDER OF ODD-FELLOWS v. VILLAGE PRIDE LODGE (1894), Diprose & Gammon Friendly Society Cases, 303.
See, also, FRIENDLY SOCIETIES, Vol. XXV., pp. 296, 322, Nos. 56, 242.

810. Jurisdiction of court—Acts affecting rights of property.]—Where a libel had been published, & the person libelled elected to seek his remedy by action for damages, & to the declaration in such action, deftd. pleaded as a justification the truth of the facts constituting the libel, & filed against pltf. in the action a bill, stating that the transactions in question took place in a distant colony, & that

was in the position of a registered purchaser for valuable consideration without notice & the relief sought by the counterclaim could not be granted as against him; the right to an injunction followed upon his ownership of the land, but neither he nor his co-pltfs. were entitled to damages.—**FARAH v. GLEN LAKE MINING CO.** (1907), 17 O. L. R. 1; 11 O. W. R. 1020.—**CAN.**

810 i. Jurisdiction of court—Acts affecting rights of property.—In an action to restrain defts. from trespassing or mining upon or removing ore from a small parcel of land in a mining district, defts. disputed plts.' title & asserted title in themselves as assignees of the mining claim of one C., comprising the parcel in dispute. Defts. also counterclaimed, alleging inadvertence, omission, or mistake, & claiming a declaration that the letters patent obtained by plts. did not give them the title to the parcel in dispute, or that, if they did, the letters patent should be repealed, in so far as the parcel in question was concerned, & an injunction & damages. Upon the

in the land in question *pendente*
did so for value & without notice
or counterclaim, &
titles Act, under which
title was registered. pltt. E.

81011. -.]—An interdict may be competently applied for, on reasonable grounds of suspicion that an illegal act is intended to be done.—**MONCRIEFF v. ARNOTT** (1828), 6 Sh. (Ct. of Sess.) 530; 3 Fac. Coll. 552.—**SCOT.**

810 iii. ———.]—A tenant, with the view of scaring the game off his farm, was in the habit of sending muzzled dogs over it, to hunt the game away, & also employed a number of men to perambulate the farm, who discharged fire-arms loaded with blank cartridges in the close vicinity of the game, for the like purpose of driving them off. He also set snares for rabbits, which were alleged to be calculated to destroy game:—*Held*: these proceedings were illegal, & interdict granted at the landlord's instance against their adoption, notwithstanding that there was a great increase beyond the average quantity of game.—*WEMYSS v. GULLAND* (1847), 10 Exch. 144, 11 Exch. 144, 12 Exch. 144, 13 Exch. 144, 14 Exch. 144, 15 Exch. 144, 16 Exch. 144, 17 Exch. 144, 18 Exch. 144, 19 Exch. 144, 20 Exch. 144, 21 Exch. 144, 22 Exch. 144, 23 Exch. 144, 24 Exch. 144, 25 Exch. 144, 26 Exch. 144, 27 Exch. 144, 28 Exch. 144, 29 Exch. 144, 30 Exch. 144, 31 Exch. 144, 32 Exch. 144, 33 Exch. 144, 34 Exch. 144, 35 Exch. 144, 36 Exch. 144, 37 Exch. 144, 38 Exch. 144, 39 Exch. 144, 40 Exch. 144, 41 Exch. 144, 42 Exch. 144, 43 Exch. 144, 44 Exch. 144, 45 Exch. 144, 46 Exch. 144, 47 Exch. 144, 48 Exch. 144, 49 Exch. 144, 50 Exch. 144, 51 Exch. 144, 52 Exch. 144, 53 Exch. 144, 54 Exch. 144, 55 Exch. 144, 56 Exch. 144, 57 Exch. 144, 58 Exch. 144, 59 Exch. 144, 60 Exch. 144, 61 Exch. 144, 62 Exch. 144, 63 Exch. 144, 64 Exch. 144, 65 Exch. 144, 66 Exch. 144, 67 Exch. 144, 68 Exch. 144, 69 Exch. 144, 70 Exch. 144, 71 Exch. 144, 72 Exch. 144, 73 Exch. 144, 74 Exch. 144, 75 Exch. 144, 76 Exch. 144, 77 Exch. 144, 78 Exch. 144, 79 Exch. 144, 80 Exch. 144, 81 Exch. 144, 82 Exch. 144, 83 Exch. 144, 84 Exch. 144, 85 Exch. 144, 86 Exch. 144, 87 Exch. 144, 88 Exch. 144, 89 Exch. 144, 90 Exch. 144, 91 Exch. 144, 92 Exch. 144, 93 Exch. 144, 94 Exch. 144, 95 Exch. 144, 96 Exch. 144, 97 Exch. 144, 98 Exch. 144, 99 Exch. 144, 100 Exch. 144, 101 Exch. 144, 102 Exch. 144, 103 Exch. 144, 104 Exch. 144, 105 Exch. 144, 106 Exch. 144, 107 Exch. 144, 108 Exch. 144, 109 Exch. 144, 110 Exch. 144, 111 Exch. 144, 112 Exch. 144, 113 Exch. 144, 114 Exch. 144, 115 Exch. 144, 116 Exch. 144, 117 Exch. 144, 118 Exch. 144, 119 Exch. 144, 120 Exch. 144, 121 Exch. 144, 122 Exch. 144, 123 Exch. 144, 124 Exch. 144, 125 Exch. 144, 126 Exch. 144, 127 Exch. 144, 128 Exch. 144, 129 Exch. 144, 130 Exch. 144, 131 Exch. 144, 132 Exch. 144, 133 Exch. 144, 134 Exch. 144, 135 Exch. 144, 136 Exch. 144, 137 Exch. 144, 138 Exch. 144, 139 Exch. 144, 140 Exch. 144, 141 Exch. 144, 142 Exch. 144, 143 Exch. 144, 144 Exch. 144, 145 Exch. 144, 146 Exch. 144, 147 Exch. 144, 148 Exch. 144, 149 Exch. 144, 150 Exch. 144, 151 Exch. 144, 152 Exch. 144, 153 Exch. 144, 154 Exch. 144, 155 Exch. 144, 156 Exch. 144, 157 Exch. 144, 158 Exch. 144, 159 Exch. 144, 160 Exch. 144, 161 Exch. 144, 162 Exch. 144, 163 Exch. 144, 164 Exch. 144, 165 Exch. 144, 166 Exch. 144, 167 Exch. 144, 168 Exch. 144, 169 Exch. 144, 170 Exch. 144, 171 Exch. 144, 172 Exch. 144, 173 Exch. 144, 174 Exch. 144, 175 Exch. 144, 176 Exch. 144, 177 Exch. 144, 178 Exch. 144, 179 Exch. 144, 180 Exch. 144, 181 Exch. 144, 182 Exch. 144, 183 Exch. 144, 184 Exch. 144, 185 Exch. 144, 186 Exch. 144, 187 Exch. 144, 188 Exch. 144, 189 Exch. 144, 190 Exch. 144, 191 Exch. 144, 192 Exch. 144, 193 Exch. 144, 194 Exch. 144, 195 Exch. 144, 196 Exch. 144, 197 Exch. 144, 198 Exch. 144, 199 Exch. 144, 200 Exch. 144, 201 Exch. 144, 202 Exch. 144, 203 Exch. 144, 204 Exch. 144, 205 Exch. 144, 206 Exch. 144, 207 Exch. 144, 208 Exch. 144, 209 Exch. 144, 210 Exch. 144, 211 Exch. 144, 212 Exch. 144, 213 Exch. 144, 214 Exch. 144, 215 Exch. 144, 216 Exch. 144, 217 Exch. 144, 218 Exch. 144, 219 Exch. 144, 220 Exch. 144, 221 Exch. 144, 222 Exch. 144, 223 Exch. 144, 224 Exch. 144, 225 Exch. 144, 226 Exch. 144, 227 Exch. 144, 228 Exch. 144, 229 Exch. 144, 230 Exch. 144, 231 Exch. 144, 232 Exch. 144, 233 Exch. 144, 234 Exch. 144, 235 Exch. 144, 236 Exch. 144, 237 Exch. 144, 238 Exch. 144, 239 Exch. 144, 240 Exch. 144, 241 Exch. 144, 242 Exch. 144, 243 Exch. 144, 244 Exch. 144, 245 Exch. 144, 246 Exch. 144, 247 Exch. 144, 248 Exch. 144, 249 Exch. 144, 250 Exch. 144, 251 Exch. 144, 252 Exch. 144, 253 Exch. 144, 254 Exch. 144, 255 Exch. 144, 256 Exch. 144, 257 Exch. 144, 258 Exch. 144, 259 Exch. 144, 260 Exch. 144, 261 Exch. 144, 262 Exch. 144, 263 Exch. 144, 264 Exch. 144, 265 Exch. 144, 266 Exch. 144, 267 Exch. 144, 268 Exch. 144, 269 Exch. 144, 270 Exch. 144, 271 Exch. 144, 272 Exch. 144, 273 Exch. 144, 274 Exch. 144, 275 Exch. 144, 276 Exch. 144, 277 Exch. 144, 278 Exch. 144, 279 Exch. 144, 280 Exch. 144, 281 Exch. 144, 282 Exch. 144, 283 Exch. 144, 284 Exch. 144, 285 Exch. 144, 286 Exch. 144, 287 Exch. 144, 288 Exch. 144, 289 Exch. 144, 290 Exch. 144, 291 Exch. 144, 292 Exch. 144, 293 Exch. 144, 294 Exch. 144, 295 Exch. 144, 296 Exch. 144, 297 Exch. 144, 298 Exch. 144, 299 Exch. 144, 300 Exch. 144, 301 Exch. 144, 302 Exch. 144, 303 Exch. 144, 304 Exch. 144, 305 Exch. 144, 306 Exch. 144, 307 Exch. 144, 308 Exch. 144, 309 Exch. 144, 310 Exch. 144, 311 Exch. 144, 312 Exch. 144, 313 Exch. 144, 314 Exch. 144, 315 Exch. 144, 316 Exch. 144, 317 Exch. 144, 318 Exch. 144, 319 Exch. 144, 320 Exch. 144, 321 Exch. 144, 322 Exch. 144, 323 Exch. 144, 324 Exch. 144, 325 Exch. 144, 326 Exch. 144, 327 Exch. 144, 328 Exch. 144, 329 Exch. 144, 330 Exch. 144, 331 Exch. 144, 332 Exch. 144, 333 Exch. 144, 334 Exch. 144, 335 Exch. 144, 336 Exch. 144, 337 Exch. 144, 338 Exch. 144, 339 Exch. 144, 340 Exch. 144, 341 Exch. 144, 342 Exch. 144, 343 Exch. 144, 344 Exch. 144

810 iv.

-.]-An aerated water

A ct. of equity has no criminal jurisdiction, but it lends its assistance to a man who has in the view of the law a right of property, & who makes out that an action at law will not be a sufficient remedy & protection against intruding upon his publication (LORD LYNDHURST, C.).—MACAULAY *v.* SHACKELL (1827), 1 Bli. N. S. 96; 4 E. R. 809, H. L.

Annotations :—**Consd.** Springhead Spinning Co. v. Riley (1808), L. R. 6 Eq. 551. **Reid.** Bartlett v. Lewis (1862), 12 C. B. N. S. 249; The Mary (otherwise Alexandra) (1868), 38 L. J. Adm. 29; Hill v. Campbell (1875), L. R. 10 C. P. 222. **Mentd.** Stewart v. Nugent (1836), 1 Keen. 201; R. v. Upton St. Leonards (1847), 2 New. Pract. Cas. 272; Metropolitan Saloon Omnibus Co. v. Hawkins (1859), 4 H. & N. 146; Stern v. Sevastopulo (1863), 14 C. B. N. S. 737; Arnold & Butler v. Bottomley, [1908] 2 K. B. 151.

811. -.]—(1) The principle upon which this ct. interferes by injunction, in cases both of public & private nuisance, is the inadequacy of the remedy at common law ; & it is on the ground of injury to property that this jurisdiction rests.

(2) A gas co. was incorporated by Act of Parliament for the purpose of supplying the town of S. with gas. Some years afterwards another co. was formed, & registered under the Joint Stock Companies Registration Act, 1844 (c. 110), for a like purpose, & commenced opening up the streets & highways of S. to lay down their pipes, etc., some of the inhabitants approving & some disapproving of the works. Upon an information & bill by the incorporated co., this ct. refused an injunction to restrain the new co. from continuing their works, the nuisance or damage being trivial.

(3) I confess, however, that, looking at the principles on which as I apprehend, this ct. interferes, it does not appear to me that there can be any sound distinction between cases of private & public nuisances. It is not on the ground of any criminal offence committed, or for the purpose of

manufacturer sought to interdict a draysalter from putting paraffin oil into bottles belonging to the pursuer. The pursuer averred that bottles belonging to him, & marked with his name, were lent by him to his customers in the course of his trade, & were brought to defender by persons coming to purchase paraffin oil, & that, at their request, defender put paraffin oil into the bottles, in the knowledge that the bottles were the property of pursuer & that pursuer objected to such a practice since it injured them for use in his business :—*Held* : pursuer had relevantly averred participation by defender in a wrongful use of the pursuer's property, which, if proved, would form a good ground for interdict against him ; & proof allowed.—*WILSON v. SHEPHERD*, [1913] S. C. 300.—*SCOT*.

1. ——— *Penalty provided by statute.*]—Pltf. by injunction sought to prevent the completion of a warehouse which deft. was erecting on ground leased by him from a railway co., being part of their right of way adjoining the lawn of a property owned & occupied by pltf. as a dwelling in W. It was being constructed of wood in contravention of the fire limit bye-law of the city:—*Held*: pltf. had no right to enforce the fire limit bye-law by injunction, as it was a bye-law passed for the protection of the general public & providing for a penalty in case of its infringement, & there was no evidence to show that the risk --

giving a better remedy in the case of a criminal offence, that this ct. is or can be called on to interfere. It is on the ground of injury to property that the jurisdiction of this ct. must rest; & taking it to rest upon that ground, the only distinction which seems to me to exist between cases of public nuisance & private nuisance is this: that in cases of private nuisance the injury is to individual property, & in cases of public nuisance the injury is to the property of mankind (TURNER, L.J.).

(4) One point suggested against the informant & plffs. is that of acquiescence or laches. I think no such point established. Early & speedily after the first announcement of defts.' project, plffs. protested against it openly & publicly, & they have uniformly declared & asserted their opposition to it. Whether this suit was instituted soon enough to entitle the informant & plffs. to an interlocutory order for an injunction may be disputable, but it was commenced, I think, soon enough to warrant them in asking for a decree. . . . The expenditure of defts. has taken place under full notice that it was objected to, & that endeavours were, & would be, in active operation to render it fruitless & useless (KNIGHT BRUCE, L.J.).

(5) That delay will affect the Attorney-General as much as a private individual I am not prepared to say; but, in my opinion it is a circumstance to be considered in determining the question whether this Court shall interfere (TURNER, L.J.).—A.-G. v. SHEFFIELD GAS CONSUMERS Co. (1853), 3 De G. M. & G. 304; 22 L. J. Ch. 811; 21 L. T. O. S. 49; 17 Jur. 677; 1 W. R. 185; 43 E. R. 119; *sub nom.* SHEFFIELD UNITED GAS Co. v. SHEFFIELD GAS CONSUMERS Co., A.-G. v. SHEFFIELD GAS CONSUMERS Co., 7 Ry. & Can. Cas. 650, L. C. & L. JJ.

Annotations:—*As to* (1) *Consd.* A.-G. v. Gee (1870), L. R. 10 Eq. 131; A.-G. v. Preston Corpn. (1896), 13 T. L. R. 14; *Reid.* Garton v. Guildford, Godalming & Woking Joint Hospital Board (1899), 43 Sol. Jo. 205; St. Mary, Battersea, Vestry v. County of London & Brush Provincial Electric Lighting Co. (1899), 80 L. T. 31. *As to* (2) *Appld.* Drake v. West (1853), 22 L. J. Ch. 375. *Consd.* Broadbent v. Imperial Gas Co. (1857), 7 De G. M. & G. 436; Swaine v. G. N. Ry. (1864), 4 De G. J. & Sm. 211; A.-G. v. Kingston-on-Thames Corpn. (1865), 34 L. J. Ch. 481. *Appld.* Goldsmid v. Tunbridge Wells Improvement Comrs. (1866), 1 Ch. App. 349; Cooke v. Forbes (1867), L. R. 5 Eq. 166. *Foll.* A.-G. v. Cambridge Consumers Gas Co. (1868), 4 Ch. App. 71. *Consd.* A.-G. v. Lonsdale (1868), L. R. 7 Eq. 377. *Distd.* Smith v. Mid. Ry. & L. & Y. Ry. (1877), 37 L. T. 224. *Reid.* Biddulph v. St. George's Vestry (1863), 3 De G. J. & Sm. 493; Sutton v. S. E. Ry. (1865), L. R. 1 Exch. 32; Lillywhite v. Trimmer (1867), 36 L. J. Ch. 525; Luscombe v. Steer (1867), 17 L. T. 229; Pudsey Coal Gas Co. v. Bradford Corpn. (1873), 21 W. R. 286; A.-G. & Dommes v. Basingstoke Corpn. (1876), 45

fire to pltf.'s property would be specially increased by the construction of the warehouse.—MCBEAN v. WYLLIE (1902), 22 C. L. T. 270; 14 Man. L. R. 135.—CAN.

g. Interference with private rights.—The remedy afforded by decree of perpetual silence is applicable not only to cases where a claim has been made, or an action threatened, publicly, but also to cases where by demand or threatened action a disturbance of, or interference with, the quiet enjoyment of another's rights to his prejudice has been occasioned. The remedy will only be granted with great discretion & with a due regard to the circumstances of the parties.—BROWN v. SIMON (1905), T. S. 311.—S. AF.

h. To restrain erection of building—*Alleged violation of Act of Parliament.*—Defts. were erecting a building resting on stone foundation walls, & consisting of a wooden frame, with brick filling four inches thick between the studding, & the whole encased

with brick four inches thick. In a suit to restrain defts. from proceeding with the erection of the building, as being a violation of 35 Vict. c. 56:—*Held*: the injunction should be granted.—ST. JOHN CITY CORPN. v. GANONG (1877), N. B. Dig. 656.—CAN.

k. Transmission of indecent publication.—The ct. will not grant an injunction to cause the transmission through the post of an indecent publication.—EVANS v. O'CONNOR (1891), 12 N. S. W. L. R. (Eq.) 54.—AUS.

l. Lottery.—The ct. will not grant an injunction to restrain the promotion or conduct of a lottery.—A.-G. v. MERCANTILE INVESTMENTS, LTD. (1920), 21 S. R. N. S. W. 183; 38 N. S. W. W. N. 31.—AUS.

m. Illegal trading.—The ct. will restrain any person from continuing to contravene a statute at the instance of any one who is sustaining damage from such contravention. A trader

L. J. Ch. 726; Fritz v. Hobson (1880), 14 Ch. D. 542; Preston Corpn. v. Fullwood Local Board (1885), 53 L. T. 718; Fanshawe v. London & Provincial Dairy Co. (1888), 4 T. L. R. 694; Reinhardt v. Mentastl (1889), 42 Ch. D. 685; A.-G. v. Brighton & Hove Co-operative Supply Assocn., [1900] 1 Ch. 276. *As to* (5) *Consd.* Friend v. Dennett (1861), 5 L. T. 73; A.-G. v. Wimbledon House Estate Co., [1904] 2 Ch. 34; A.-G. v. Scott, [1905] 2 K. B. 160. *Foll.* A.-G. v. Grand Junction Canal Co., [1909] 2 Ch. 505. *Reid.* Pentney v. Lynn Paving Comrs. (1865), 12 L. T. 818.

812. ———.]—AUSTRIA (EMPEROR) v. DAY & KOSSUTH, No. 888, *post*.

813. ——— *Acts tending to destruction of property.*—Defts. who were officers of a trades union, gave notice to workmen by means of placards & advertisements, that they were not to hire themselves to plffs., pending a dispute between the union & plffs. The bill prayed an injunction to restrain the issuing of the placards & advertisements, alleging that by means thereof defts. had, in fact, intimidated & prevented workmen from hiring themselves to plffs., & plffs. were thereby prevented from continuing their business, & the value of their property was seriously injured & materially diminished:—*Held*: the acts of defts., as alleged by the bill, amounted to crime, & the ct. would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property.—SPRINGHEAD SPINNING Co. v. RILEY (1868), L. R. 6 Eq. 551; 37 L. J. Ch. 889; 19 L. T. 64; 32 J. P. 531; 16 W. R. 1138.

Annotations:—*Foll.* Dixon v. Holden (1869), L. R. 7 Eq. 488. *Consd.* Mulkern v. Ward (1872), L. R. 13 Eq. 619. *Overd.* Prudential Assce. v. Knott (1875), 10 Ch. App. 142. *Consd.* Thorley's Cattle Food Co. v. Massam (1877), 6 Ch. D. 582. *Distd.* Temperton v. Russell, [1893] 1 Q. B. 435. *Distd.* Dockrell v. Dougall (1898), 78 L. T. 840.

814. ———.]—Ct. has jurisdiction to restrain the publication of any document tending to the destruction of property whether consisting of money or of professional reputation by which property is acquired. Publication of a notice stating that pltf. was a partner in a bkpt. firm restrained.—DIXON v. HOLDEN (1869), L. R. 7 Eq. 488; 20 L. T. 357; 33 J. P. 612; 17 W. R. 482.

Annotations:—*Consd.* & *Distd.* Mulkern v. Ward (1872), L. R. 13 Eq. 619. *Consd.* Rollins v. Hinks (1872), L. R. 13 Eq. 355. *Overd.* Prudential Assce. v. Knott (1875), 10 Ch. App. 142. *Distd.* Thorley's Cattle Food Co. v. Massam (1877), 6 Ch. D. 582. *Consd.* White v. Mellin, [1895] A. C. 154. *Reid.* Day v. Brownrigg (1878), 10 Ch. D. 294; R. v. London Corpn. (1886), 16 Q. B. D. 772; Walter v. Ashton, [1902] 2 Ch. 282.

815. ———.]—Ct. has no jurisdiction to restrain the publication of a libel as such even if it is injurious to property.—PRUDENTIAL ASSURANCE Co. v. KNOTT (1875), 10 Ch. App. 142; 44

who is sustaining damage through the illegal trading of another, which illegal trading is expressly prohibited by statute, suffers an infringement of his rights which entitles him to obtain an order interdicting the continuance of such illegal trading.—PATZ v. GREEN & Co. (1907), T. S. 427.—S. AF.

n. Protection of interests—Whether pecuniary or otherwise.—The right of the ct. to grant an interdict is not restricted to cases of vindication of pecuniary interests only, but extends to cases of the protection of other rights, the interference with which will work an injury to the party applying for which no other relief would constitute adequate reparation.—BURGERS v. JOUBERT (1866), 1 R. 351.—S. AF.

o. Shadowing an individual by detective.—The shadowing of a person by private detectives in such a manner as to attract public attention is an *injuria* & the ct. will restrain the person responsible for continuing such

Sect. 5.—Criminal or illegal acts. Sects. 6 & 7.]

L. J. Ch. 192; 31 L. T. 866; 23 W. R. 249, L. C. & L. JJ.

Annotations:—**Consd.** & **Distd.** Thorley's Cattle Food Co. v. Massam (1877), 6 Ch. D. 582. **Consd.** Thomas v. Williams (1880), 14 Ch. D. 864; White v. Mellin, [1895] A. C. 154; Walter v. Ashton, [1902] 2 Ch. 282. **Refd.** R. v. London (Lord Mayor) (1886), 16 Q. B. D. 772; Temperton v. Russell, [1893] 1 Q. B. 435; Dyson v. A.-G., [1911] 1 K. B. 410.

See, further, LIBEL & SLANDER.

SECT. 6.—DIRECTORS, OFFICERS AND MEMBERS OF COMPANIES.

816. To restrain removal as director.]—A director of a co. can, if qualified, sustain an action in his own name against the other directors, on the ground of individual injury to himself, for an injunction to restrain them from wrongfully excluding him from acting as a director.—**PULBROOK v. RICHMOND CONSOLIDATED MINING CO.** (1878), 9 Ch. D. 610; 48 L. J. Ch. 65; 27 W. R. 377.

Annotations:—**Folld.** Munster v. Cammell (1882), 51 L. J. Ch. 731. **Consd.** Harben v. Phillips (1883), 23 Ch. D. 14. **Refd.** Bainbridge v. Smith (1889), 41 Ch. D. 462; Dashwood v. Cornish (1897), 13 T. L. R. 337; Sutton v. English & Colonial Produce Co., [1902] 2 Ch. 502. **Mentd.** Re Bainbridge, Reeves v. Bainbridge, [1889] W. N. 228; Cooper v. Griffin, [1892] 1 Q. B. 740; Howard v. Sadler, [1893] 1 Q. B. 1.

817. —.]—By a contract between the vendors of a brewery & a trustee for a limited co. which was to be formed for the purchase & carrying on of the brewery, it was agreed, among other things, that B., one of the vendors, should be a managing director for a specified time, & that on his retirement or death his son, pltf., should be managing director for a term therein mentioned, & that B. should provide a qualification for his son as managing director. By the arts. of assocn., which adopted the contract, it was provided that a director should vacate his office if he did not acquire a qualification within a month of his appointment or election, & that the qualification of a managing director should be the holding in his own right shares of the nominal value of £25,000. B. provided for pltf. shares to the amount of £5,000, & died in Aug. 1888. Pltf., who was one of his exors., & his co-exors. in Oct. 1888, transferred shares to the amount of £20,000 into pltf.'s name to complete his qualification as a managing director; but the estate had not been administered, & there was no evidence under what circumstances the shares were transferred to him or whether he was beneficially entitled to them.

annoyance. — **EPSTEIN v. EPSTEIN** (1906), T. H. 87.—**S. AF.**

p. Effect of acquiescence.]—Acquiescence cannot cure an illegality.—**NEWHOUSE v. NORTHERN LIGHT POWER & COAL CO.** (1914), 29 W. L. R. 249.—**CAN.**

PART X. SECT. 6.

q. To restrain infringement of patent—Officers made defendants with company.]—A bill was filed against a joint stock co. to restrain the infringement of a patent, to which certain officers of the co. were made parties, & the bill alleged that defts. were committing the act complained of, & prayed relief against defts. A demurrer on the ground that the officers were improperly made parties was overruled with costs, these officers being charged personally with committing the acts complained of, & relief being prayed against them.—

r. To restrain forcible possession of premises by claimant for presidency—Action by acting president.]—Where there are conflicting claimants to the position of president of a co., & one takes forcible possession of the co.'s premises, the other claimant, at all events when he is at the time the acting president, can bring an action to restrain him in the name of the co., though it be uncertain who is the rightful president.—**TORONTO BREWING & MALTING CO. v. BLAKE** (1883), 2 O. R. 175.—**CAN.**

t. To restrain president elected by directors from acting.]—Pltf. had been elected president of P. Co. at the annual meeting, & subsequently by vote of the directors removed & deft. elected in his stead. Then this motion was made to restrain deft. from acting or assuming to act as president of the co., until the next annual meeting:—**Held**: the motion should stand for hearing as a bye-law of the co. seemed to give the directors power to remove

The board of directors refused to recognise pltf. as a director on the ground that he had not sufficient qualification, & he brought an action to restrain them from excluding him, & moved for an *interim* injunction:—**Held**: in the absence of evidence as to the beneficial interest in the shares transferred to pltf. the ct. could not decide whether he was the holder of the shares "in his own right" within the meaning of the articles, until the estate had been administered. Afterwards, an extraordinary meeting of the shareholders having, at the instance of the ct., been held & a resolution having been passed that even if pltf. was duly qualified they did not desire him to act as a managing director, the ct. declined to interfere with the decision of the shareholders, & refused the injunction.—**BAINBRIDGE v. SMITH** (1889), 41 Ch. D. 462; 60 L. T. 879; 37 W. R. 594; 5 T. L. R. 375, C. A.

Annotations:—**Consd.** Cuff v. London & County Land & Building Co., [1912] 1 Ch. 440. **Distd.** British Murac Syndicate v. Alperton Rubber Co., [1915] 2 Ch. 186. **Refd.** Sutton v. English & Colonial Produce Co., [1902] 2 Ch. 502; Salmon v. Quin & Axtens, [1909] 1 Ch. 311; Cory v. Reindeer S.S. (1915), 31 T. L. R. 530. **Mentd.** Re Bainbridge, Reeves v. Bainbridge, [1889] W. N. 228; Cooper v. Griffin, [1892] 1 Q. B. 740; Howard v. Sadler, [1893] 1 Q. B. 1; Boschoek Proprietary Co. v. Fuke, [1906] 1 Ch. 148.

See, also, No. 741, ante.

818. Secretary—To restrain infringement of patent.]—**WELSBACH INCANDESCENT GAS LIGHT CO., LTD. v. DAYLIGHT INCANDESCENT MANTLE CO., LTD.**, No. 743, ante.

819. Signatories to memorandum—To restrain registration.]—**SOCIÉTÉ ANONYME DES ANCIENS ETABLISSEMENTS PANHARD ET LEVASSOR v. PANHARD LEVASSOR MOTOR CO., LTD.**, No. 744, ante.

Injunctions against companies.]—See Sect. 4, sub-sect. 1, A., ante.

SECT. 7.—DISCLOSURE OF CONFIDENTIAL INFORMATION.

820. Jurisdiction of court—On what founded—Breach of trust.]—Injunction to restrain a deft. from communicating certain recipes for veterinary medicines & vending them granted, on the ground that he had obtained a knowledge of the mode of preparing them by a breach of trust.—**YOVATT v. WINYARD** (1820), 1 Jac. & W. 394; 37 E. R. 425, L. C.

Annotations:—**Consd.** Dietrichsen v. Cabburn (1846), 1 Coop. temp. Cott. 72; Morison v. Moat (1851), 9 Hare, 241; Robb v. Green, [1895] 2 Q. B. 315. **Refd.** Amber Size & Chemical Co. v. Menzel, [1913] 2 Ch. 239.

officers of the co.—**STEINDLER v. MACLAREN** (1909), 14 O. W. R. 647.—**CAN.**

a. To restrain ultra vires acts of directors.]—The ct. will not restrain acts done by the directors in the exercise of their discretion in managing the affairs of their co., unless the acts complained of are illegal, as *ultra vires*.—**KEHOE v. WATERFORD & LIMERICK RY. CO.** (1888), 21 L. R. Ir. 221.—**IR.**

PART X. SECT. 7.

b. When injunction granted—Confidential employment—Solicitor & stenographer.]—Documents consisting of notes or drafts of private letters dictated by a member of a firm of solrs. to a stenographer in the course of business in the office were surreptitiously taken by him & given to another person who, knowing how they had been obtained, proposed to publish them & to use them as evidence in a criminal prosecution or parliamentary inquiry he alleged he intended to bring

821. —.]—*MORISON v. MOAT*, No. 825, *post*.

822. —.]—*MERRYWEATHER v. MOORE*, No. 837, *post*.

823. —.]—*GILBERT v. STAR NEWS-PAPER CO., LTD.* (1894), 11 T. L. R. 4; 39 Sol. Jo. 9.

824. —.]—*Fraud*.]—Where an agent or clerk gets knowledge of the affairs of his employer, & takes copies of his books, the ct. will restrain him from disclosing the information so obtained to the injury of his employer on the ground of fraud.—*TIPPING v. CLARKE* (1847), 8 L. T. O. S. 554.

825. —.]—*Breach of contract*.]—An injunction granted to restrain the use of a secret in the compounding of a medicine, not being the subject of a patent, & to restrain the sale of such medicine by a deft., who acquired a knowledge of the secret in violation of the contract of the party by whom it was communicated, & in breach of trust & confidence.—*MORISON v. MOAT* (1851), 9 Hare, 241; 20 L. J. Ch. 513; 18 L. T. O. S. 28; 15 Jur. 787; 68 E. R. 492; *affd.* (1852), 21 L. J. Ch. 248, L. JJ.

Annotations:—*Distd.* *Reuter's Telegram Co. v. Byron* (1874), 43 L. J. Ch. 661. *Apld.* *Tuck v. Priester* (1887), 19 Q. B. D. 629. *Consd.* *Lamb v. Evans*, [1893] 1 Ch. 218; *Robb v. Green*, [1895] 2 Q. B. 315; *Trego v. Hunt*, [1895] 1 Ch. 462; *Amber Size & Chemical Co. v. Menzel*, [1913] 2 Ch. 239; *Ashburton v. Pape*, [1913] 2 Ch. 469. *Refd.* *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345; *Alpertion Rubber Co. v. Manning* (1917), 86 L. J. Ch. 377.

826. —.]—*Pltfs.*, a telegram co. in L., made an arrangement with defts., being two individuals in A., for the transmission of messages in which certain words were used as short expressions of the names & addresses of the principal customers, & defts. were described as *pltfs.*' agents. In a little time the parties quarrelled & one of defts. came to England to carry on an independent business with his partner in A. & sent circulars to *pltfs.*' customers mentioning that he had their cyphers. On motion to restrain him from using the cyphers:—*Held*: there was nothing confidential in the cyphers, & he was entitled to use them.—*REUTER'S TELEGRAM CO. v. BYRON* (1874), 43 L. J. Ch. 661.

Annotations:—*Consd.* *Merryweather v. Moore*, [1892] 2 Ch. 518. *Dbtd.* *Lamb v. Evans*, [1893] 1 Ch. 218. *Refd.* *Robb v. Green*, [1895] 2 Q. B. 1.

827. —.]—*Pltfs.* employed deft., who was a printer in Berlin, to make for them copies of a drawing of which they had the copyright. Dft. executed the order, & also without *pltfs.*' knowledge or consent, made other copies & imported them into England. After this *pltfs.* registered their copyright under Fine Arts Copy-

right Act, 1862 (c. 68), & after the registration deft. sold in England some of the copies which he had imported:—*Held*: there was an implied contract that deft. should not make any copies of the drawing other than those ordered by *pltfs.*, & that, independently of the statute, *pltfs.* were entitled to an injunction & damages by reason of deft.'s breach of contract.—*TUCK & SONS v. PRIESTER* (1887), 19 Q. B. D. 629; 56 L. J. Q. B. 553; 52 J. P. 213; 36 W. R. 93; 3 T. L. R. 826, C. A.

Annotations:—*Apld.* *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345. *Consd.* *Robb v. Green*, [1895] 2 Q. B. 1. *Apld.* *Amber Size & Chemical Co. v. Menzel*, [1913] 2 Ch. 239. *Consd.* *Alpertion Rubber Co. v. Manning* (1917), 86 L. J. Ch. 377. *Mentd.* *Troitzsch v. Rees* (1887), 3 T. L. R. 773; *Fishburn v. Hollingshead*, [1891] 2 Ch. 371; *Hildesheimer v. Faulkner*, [1901] 2 Ch. 552; *Nicholls v. Parker* (1901), 17 T. L. R. 482; *Graves v. Gorrie*, [1903] A. C. 496; *Bowden v. Amalgamated Pictorials*, [1911] 1 Ch. 386; *Barker Motion Photography v. Hulton* (1912), 28 T. L. R. 496; *Forbes v. Samuel*, [1913] 3 K. B. 706; *A.-G. v. Brown*, [1920] 1 K. B. 773; *Remington v. Larchin*, [1921] 3 K. B. 404; *Harrison v. Wythemoor Colliery Co.*, [1922] 2 K. B. 674; *Nichol v. Fearby*, *Nichol v. Robinson*, [1923] 1 K. B. 480; *Lapish v. Braithwaite* (1924), 93 L. J. K. B. 1123.

828. —.]—*MERRYWEATHER v. MOORE*, No. 837, *post*.

829. —.]—Dft., being employed by *pltf.* as manager of his business, surreptitiously copied from his master's order-book a list of the names & addresses of the customers, with the intention of using it for the purpose of soliciting orders from them after he had left *pltf.*'s service & set up a similar business on his own account. Subsequently, his service with *pltf.* having terminated he did so use the list:—*Held*: it was an implied term of the contract of service that deft. would observe good faith towards his master during the existence of the confidential relation between them, & deft.'s conduct was a breach of that contract in respect of which *pltf.* was entitled to damages & an injunction.—*ROBB v. GREEN*, [1895] 2 Q. B. 315; 64 L. J. Q. B. 593; 73 L. T. 15; 59 J. P. 695; 44 W. R. 25; 11 T. L. R. 517; 39 Sol. Jo. 653; 14 R. 580, C. A.

Annotations:—*Consd.* *Louis v. Smelle* (1895), 73 L. T. 226; *Barr v. Craven* (1903), 89 L. T. 574. *Apld.* *Kirchner v. Gruban*, [1909] 1 Ch. 413. *Consd.* *Measures v. Measures*, [1910] 1 Ch. 336. *Apld.* *Amber Size & Chemical Co. v. Menzel*, [1913] 2 Ch. 239. *Refd.* *Worthington Pumping Engine Co. v. Moore* (1902), 19 T. L. R. 84; *London Electric Supply Corp. v. Westminster Electric Supply Corp.* (1913), 11 L. G. R. 1046.

830. —.]—*KIRCHNER & CO. v. GRUBAN*, No. 715, *ante*.

See, further, MASTER & SERVANT.

831. When injunction granted—*Confidential employment*.]—Injunction granted to restrain the

about, although they contained nothing which could have been used as evidence against any one:—*Held*: the property in the documents was in *pltfs.* & their possession having been obtained by a breach of contract *pltfs.* were entitled to a perpetual injunction restraining their publication.—*LARD-LAW v. LEAR* (1899), 30 O. R. 26.—CAN.

c. —.]—An *interim* injunction granted restraining deft., a former employee of *pltf.*, from using advertising lists or information obtained from *pltf.*—*YORK PUBLISHING CO. v. COULTER & WAYSIDE PUBLISHERS, LTD.* (1913), 24 O. W. R. 384; 4 O. W. N. 1091; 10 D. L. R. 824.—CAN.

d. —.]—*Professional searcher of records*.]—A professional searcher of records who was employed to make searches in public records of entries relating to persons of a certain name, searched the records & made notes, of which he supplied a transcript to his employer. He was paid according to

the amount of the work done. The work lasted for several years, & after it was completed the employer brought an action against the searcher concluding for delivery of his original notes on the ground that he, pursuer, had paid for them & that they were his property. Alternatively & on the assumption that the notes were the property of defender, he craved interdict against defender communicating the notes to any person without pursuer's consent. He averred that the employment was confidential & it was proved that on one occasion defender had used the notes to facilitate researches which he was making for another client. The ct. assailed defender, holding that, in the absence of express stipulation to the contrary, the notes remained the property of the searcher, & that there was no evidence of any such actual or apprehended invasion of a legal right as to justify the ct. in granting the interdict craved.—*CRAWFORD (EARL) v. PATON*,

[1911] S. C. 1017.—SCOT.

e. —.]—*Counsel & client*.]—The ct. will restrain, by injunction, counsel from divulging the secrets of a former client.—*CARTER v. PALMER* (1839), 1 I. Eq. R. 289, 302; 1 Dr. & Wal. 722; *affd.* 8 Cl. & Fin. 657.—IR.

f. —.]—*To restrain publication of testimonials in mutilated form*.]—It is not every breach or violation of good faith or departure from honourable dealing which can call forth the powers of equity to make redress; there must be disclosed some case of civil property which the ct. is bound to protect before the publication of private papers will be enjoined. *Pltf.*, an expert, was a superintendent of defts.' manufactory of pipe organs for several years, during which time two commendatory testimonials had been given, one that "the builders (defts.) & W. (*pltf.*) have every reason to congratulate themselves," & the other addressed to *pltf.* by name, wherein

7.—*Disclosure of confidential information.*
Sect. 8: Sub-sect. 1.]

disclosure of secrets come to deft.'s knowledge in the course of a confidential employment.—*EVITT v. PRICE* (1827), 1 Sim. 483; 57 E. R. 659.

832. ——— *Veterinary doctor's assistant.]*—*YOVATT v. WINYARD*, No. 820, *ante*.

833. ——— *Solicitor & client.]*—(1) Motion to restrain a solr. from giving evidence of confidential matters, refused, the propriety of his being examined being left to the consideration of the ct. before which he might appear as a witness.

(2) *Semble*: a solr. who has been discharged, may upon proof of misconduct be restrained from communicating information that came to him confidentially from his client.—*BEER v. WARD*, *WARD v. BEER* (1821), Jac. 77; 37 E. R. 779.

Annotations:—*As to* (1) *Consd.* *Ramsbotham v. Senior* (1869), L. R. 8 Eq. 575. *As to* (2) *Consd.* *Rakusen v. Ellis*, *Munday & Clarke*, [1912] 1 Ch. 831. *Reid. Re Holmes*, *Re Electric Power Co.* (1877), 25 W. R. 603.

834. ——— *].*—*LEWIS v. SMITH*, No. 1571, *post*.

See, further, SOLICITORS.

835. ——— *Clerk taking copies of books.]*—*TIPPING v. CLARKE*, No. 824, *ante*.

836. ——— *Trade secret.]*—*MORISON v. MOAT*, No. 825, *ante*.

837. ——— *Draughtsman.]*—A draughtsman in the employ of a firm of manufacturers of fire-engines, a few days before leaving his employers' service, prepared a table of the several dimensions of various types of fire-engines made by the firm, which he took away with him. Upon motion, on behalf of the firm, for an *interim* injunction, to restrain the publication or use of this table:—*Held*: a confidence that the servant would use the opportunities of gaining information which his service gave him for the purpose of that service alone arose out of the mere fact of the employment: & abuse of this confidence was shown by the preparation of the table at a time when, by the termination of the employment, it could be of no advantage to the employer. Injunction granted.—*MERRYWEATHER v. MOORE*, [1892] 2 Ch. 518; 61 L. J. Ch. 505; 66 L. T. 719; 40 W. R. 540; 8 T. L. R. 539; 36 Sol. Jo. 488.

Annotations:—*Consd.* *Measures v. Measures*, [1910] 1 Ch. 336. *Reid. Lamb v. Evans* (1892), 2 R. 189; *Robb v. Green*, [1895] 2 Q. B. 1.

838. ——— *].*—A servant in a confidential position who has expressly or impliedly

contracted that he will not disclose his master's secrets can be restrained from so doing.

The works manager of a co. manufacturing rubber goods & rubber compounds was entrusted with the care of a book of formulæ of secret processes for the purpose of carrying out his duties. On leaving the co.'s employment he took this book away with him & shortly afterwards entered the employ of a rival co. It was ordered that he should deliver up the book of formulæ & all copies or extracts therefrom to the co.—*ALPERTON RUBBER CO. v. MANNING* (1917), 86 L. J. Ch. 377; 116 L. T. 499; 33 T. L. R. 205.

839. ——— *Secret process.]*—An ex-servant who has been confidentially employed in the manufacture of an article under a secret process is under an implied obligation to his late master not to use or disclose any knowledge or information as to that secret process acquired by him during his employment. The principle applies to information acquired & retained in the servant's memory as well as to information committed to writing & existing in a tangible form.

Where the ct. is satisfied that there is a secret process & that the ex-servant has learnt a material part of it during his employment & has made an improper use of the knowledge so obtained it can grant an injunction although the actual details of the secret process are not disclosed to the ct. at the trial.—*AMBER SIZE & CHEMICAL CO., LTD. v. MENZEL*, [1913] 2 Ch. 239; 82 L. J. Ch. 573; 109 L. T. 520; 29 T. L. R. 590; 57 Sol. Jo. 627; 30 R. P. C. 433.

Annotation:—*Apld.* *Alperton Rubber Co. v. Manning* (1917), 86 L. J. Ch. 377.

840. ——— *Salesman taking lists of customers.]*—*ROBB v. GREEN*, No. 829, *ante*.

——— *Contract of agency.]*—*See AGENCY*, Vol. I., pp. 462, 463, Nos. 1491–1497.

841. ——— *Information obtained in course of proceedings.]*—Pltf. obtaining information from the production of documents in deft.'s possession is not at liberty to make it public, & an injunction will, if necessary, be granted to restrain him. Pltf., having published statements relative to the matters in question, was, as a condition for making an order for production of documents, required to undertake, "not to make public or communicate to any stranger the contents of such documents."—*WILLIAMS v. PRINCE OF WALES LIFE, ETC., CO.*

he was congratulated on having "solved the problem of a thoroughly satisfactory electro-pneumatic action." After he had left defts.' employ & started business for himself, defts. published an advertising pamphlet containing the testimonials, omitting all reference to pltf. or to his name. In an action for an injunction to restrain the publication of the testimonials in a mutilated form:—*Held*: as between the superintendent & the co. whose agent or employee he was, the testimonials were the property in possession of the co., who had the right to control their publication & that right continued after pltf. left their employment, in the absence of any restriction, imposed by the writers.—*WARREN v. KARN CO.* (1907), 10 O. W. R. 516; 15 O. L. R. 115.—*CAN.*

g. ——— *Information obtained from private collection of documents—Misrepresentation as to character of proposed work.]*—Where a person obtains possession of or access to property of another, by misrepresentation or by concealment of facts which he was bound to disclose, he will be restrained from making use of that property.

Deft., as the result of a judgment obtained possession from defts. in that, action of his manuscript "Life of M." which had originally been prepared for publication as a volume in the series called "The Makers of Canada," & proposed to publish it. When deft. was preparing to write the life for the series, pltf., who was the grandson of M., allowed deft. free access to his collection of books & papers called "the M. Collection," & deft. made extracts therefrom & copies thereof & obtained information therefrom which he used as part of the material for his book:—*Held*: deft. had made use of the books & papers otherwise than in accord with the representation made by him to pltf. & the understanding between him & pltf., which was, that he was to write a favourable or sympathetic account of the life & character of the subject, whereas the manuscript proposed to be published disclosed an opposite purpose & result; therefore, pltf. was entitled to have delivered to him all the extracts from & copies of documents in the collection made by deft., & to have deft. restrained from publishing any book containing any of the extracts or copies or information

obtained from the collection.—*LINDSEY v. LE SUEUR* (1913), 27 O. L. R. 588; 4 O. W. N. 570; 11 D. L. R. 411.—*CAN.*

h. ——— *Letters of deceased person.]*—Injunction granted on the application of the exor., to restrain deft. from publishing letters, the property of testator.—*GRANARD v. DUNKIN* (1809), 1 Ball. & B. 207.—*IR.*

k. ——— *Report of proceedings before synod.]*—The ct. refused to interdict the publication of a report of proceedings before the synod of a dissenting church regarding a charge against one of their members, he not alleging that the report was not a true report of the proceedings, or that it was libellous.—*CRAIG v. COLLIER* (1828), 6 Sh. (Ct. of Sess.) 1147; 3 Fac. Coll. 1139.—*SCOT.*

l. ——— *Documents printed by Crown in course of trial.]*—The Crown having printed certain letters & other documents for the sake of convenience in a trial for murder, the ct. granted interdict against a newspaper publishing any of the documents other than those which should be read to the

(1857), 23 Beav. 338 ; 3 Jur. N. S. 55 ; 53 E. R. 133.

Annotations :—*Reid*. Marshall v. Watson (1858), 25 Beav. 501 ; Hoare v. Bremridge (1872), 27 L. T. 593.

842. — Shareholders inspecting company's books.—The books & papers of a co. are the property of its shareholders, who are entitled to inspect them, though there is a secrecy clause in the arts. of assocn., & though in the course of inspection they will become acquainted with matters which should be kept secret. But it is their duty not to divulge such information so acquired ; & the ct. will restrain them by injunction from so doing, & will punish them should they offend.—*Re* BIRMINGHAM BANKING CO., *Ex p.* BRINSLEY, *Re* JOINT STOCK DISCOUNT CO., *Ex p.* BUCHAN (1866), 36 L. J. Ch. 150 ; 15 L. T. 203.

Annotations :—*Reid*. *Re* Glamorganshire Banking Co., Morgan's Case (1884), 28 Ch. D. 620 ; *Re* North Brazilian Sugar Factories Co. (1887), 57 L. J. Ch. 110.

—.]—*See, also*, COPYRIGHT, Vol. XIII., p. 179, Nos. 147–149 ; & generally, MASTER & SERVANT.

843. Hearing in camera.—An appeal from an injunction to restrain deft. from disclosing confidential information was ordered to be heard in private without the consent of deft., pltf. stating that a public hearing would defeat the object of the action, & make success on the appeal useless to him.—MELLOR v. THOMPSON (1885), 31 Ch. D. 55 ; 55 L. J. Ch. 942 ; 54 L. T. 219, C. A.

Annotations :—*Consd.* Malan v. Young (1889), 6 T. L. R. 38 ; *Re* Martindale, [1894] 3 Ch. 193. *Distd.* Scott v. Scott, [1913] A. C. 417. *Mentd.* Weld-Blundell v. Stephens, [1919] 1 K. B. 520.

See, also, No. 136, *ante*.

844. Restraint of third parties — To whom disclosure made.—GILBERT v. STAR NEWSPAPER CO., LTD. (1894), 11 T. L. R. 4 ; 39 Sol. Jo. 9.

See, also, No. 825, *ante*, No. 1571, *post*.

SECT. 8.—DISPOSITION OF PROPERTY.

SUB-SECT. 1.—IN GENERAL.

845. Plaintiff must show ownership — Goods in danger of being lost.—Persons who come into this ct. to prevent the disposition of goods [diamonds], etc., must show a specific right in the property, & that the same are in danger of being lost (LORD HARDWICKE, C.).—XIMENES v. FRANCO (1751), 1 Dick. 149 ; 21 E. R. 226, L. C.

846. Title claimed by plaintiff — Diamonds.—Deft., before he had prayed time to answer, or was in contempt, was restrained from selling diamonds, to which pltf. by his bill, claimed a title.—TONNINS v. PROUT (1766), 1 Dick. 387 ; 21 E. R. 320, L. C.

847. Property in dispute — Party out of jurisdiction.—An injunction to restrain a deft. from parting with the property in question in the cause

may be granted, notwithstanding a principal party interested is out of the jurisdiction.—MALCOLM v. SCOTT (1843), 3 Hare, 39 ; 8 Jur. 283 ; 67 E. R. 288 ; *subsequent proceedings* (1850), 3 Mac. & G. 29, L. C.

Annotations :—*Mentd.* M'Mahon v. Burchell (1846), 2 Ph. 127 ; Kirwan v. Daniel (1847), 16 L. J. Ch. 191 ; Field v. Megaw (1869), L. R. 4 C. P. 660.

848. —.] — GLADSTONE v. MUSURUS BEY, No. 606, *ante*.

849. Owners own property.—An application for an injunction was refused where it was sought to restrain a deft. from parting with goods sold pending an action for the price until inspection ; a person, it was said, cannot be ordered not to part with his own property. Inspection must be ordered on summons.—FOWLER v. LEWY (1875), 1 Char. Cham. Cas. 14 ; *sub nom.* ANON., Bitt. Prac. Cas. 39.

850. — Owner a debtor.—In an action by a creditor to enforce against the separate estate of a married woman a general engagement entered into with her on the credit of that estate, the ct. will not before the creditor has established his right by obtaining a judgment, restrain the married woman from dealing with her separate estate.

You cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property (JAMES, L.J.).—ROBINSON v. PICKERING (1881), 16 Ch. D. 660 ; 50 L. J. Ch. 527 ; 44 L. T. 165 ; 29 W. R. 385, C. A.

Annotation :—*Reid*. Cummins v. Perkins (1898), 68 L. J. Ch. 57.

851. Right dependent on construction of doubtful statute—No irreparable mischief apprehended.—A.-G. v. LIVERPOOL CORPN., No. 1431, *post*.

852. Chattel acquired under abuse of fiduciary relationship.—The jurisdiction to protect by injunction the possession, & to decree the delivery up, of specific chattels, is not confined to chattels, the loss or injury of which would not be adequately compensated by damages, but extends to all cases in which the party in possession of the chattels has acquired such possession, through an alleged abuse of power on the part of one standing in a fiduciary relation to pltf.—WOOD v. ROWCLIFFE (1847), 2 Ph. 382 ; 17 L. J. Ch. 83 ; 10 L. T. O. S. 281 ; 11 Jur. 915 ; 41 E. R. 990, L. C. ; *subsequent proceedings* (1851), 6 Exch. 407.

Annotations :—*Mentd.* Carrington v. Pell (1849), 3 De G. & Sm. 512 ; Daniell v. Daniell (1849), 3 De G. & Sm. 337 ; Farina v. Silverlock (1857), 5 W. R. 827 ; Gobind Chunder Sein v. Ryan (1861), 15 Moo. P. C. C. 230 ; Lamb v. Attenborough (1862), 1 B. & S. 831 ; Baines v. Swainson (1863), 4 B. & S. 270 ; Cole v. North Western Bank (1875), L. R. 10 C. P. 354.

853. Threatened destruction of chattel.—A ship belonging to defts., registered in the port of London, sustained serious damage on her voyage

jury.—SMITH v. SCOTCH THISTLE PUBLISHERS (1857), 29 Sc. Jur. 438.—SCOT.

m. — Private correspondence between husband & wife & third parties.—It is a question of circumstances whether the ct. will grant an interdict against the publication of private letters by the receiver. A person having informed certain of his wife's relations that he intended to publish for circulation among his friends a private correspondence between himself & his wife & them, they presented a petition for interdict against the publication. The ct. after examining the letters refused to grant interdict.—WHITE v. DICKSON (1881), 8 R. (Ct. of Sess.) 896 ; 18 Sc. L. R. 651.—SCOT.

n. — Letters allowed to pass out of possession—Without restriction as to

circulation.—Appets. moved for an interdict restraining resps. from publishing certain private letters which had passed between appets. themselves & had been produced at a judicial inquiry by a third party into whose possession they had come. It was not alleged by appets. that the publication of the letters would entail irreparable damage to them :—*Held* : the application must be refused. Where the writer of a letter has allowed it to pass out of his possession without restriction as to its circulation, he has no right on which to found an application to restrain the publication of such letter.—NELSON & MEURANT v. QUIN & CO. (1874), Buch. 46.—S. AF.

PART X. SECT. 8, SUB-SECT. 1.

849 i. Owner's own property.—On a

motion for injunction to stay the wrongful selling of property by the legal owner, pltf.'s affidavits alleged that the principal deft. had sold, or pretended to sell, to his son, who was also a deft., but by mistake no injunction was asked against him. No threat of any further sale was alleged. Deft. filed no affidavit in answer :—*Held* : the allegations were sufficient, & an injunction was granted.—BOARDMAN v. WROUGHTON (1869), 16 Gr. 384.—CAN.

o. Damages adequate remedy.—A threatened sale of a specific chattel which, if carried out, could have been compensated in damages, is not a proper case in which to grant an injunction restraining the sale.—BRADLEY v. BARBER (1899), 30 O. R. 443.—CAN.

Sect. 8.—Disposition of property: Sub-sects. 1, 2, 3 & 4.]

to New Zealand, & on her arrival there was surveyed & pronounced not seaworthy. The master was unable, either by loan or bottomry, to raise money for her repair, & he at length sold the ship to pltfs., & on receiving payment of the purchase-money by a bill of exchange in London, executed to them a bill of sale of the ship. Pltfs. repaired the ship & sent her to England with a cargo. Defts. refused to ratify the sale or consent to the registry of the ship in pltfs.' name &, on the arrival of the ship in the port of London, defts. put several men on board to take possession of the ship & cargo for them. Pltfs. thereupon applied for an injunction to restrain defts. from interfering with the ship or removing her out of the jurisdiction, & for a manager & receiver of the ship & cargo:—*Held*: pltfs. had no equitable, as distinct from a legal, title to the ship, & inasmuch as their title, if they had acquired any, was a purely legal one, & the case of interference, if wrongful, was, therefore, a mere trespass, the ct. would not interfere in favour of pltfs.' by injunction. Pltfs., according to the case made on the motion, if they failed at the hearing to establish their right to the ship, would be entitled to equitable relief in respect of the bill of exchange given for the purchase-money; & they were entitled to have the trial of the legal right put in a course for determination, & to have the property protected in the meantime.

Semble: in such a case, independently of the relief in respect of the bill of exchange, if engagements had been contracted of which the conduct of defts. would prevent the fulfilment, & if there could be no adequate compensation to pltfs. in damages, or if defts. were about to carry away or destroy the property, the ct. might interfere by injunction.—*RIDGWAY v. ROBERTS* (1844), 4 Hare, 106; 67 E. R. 580.

SUB-SECT. 2.—CHATELS OF PECULIAR VALUE.

854. Damages inadequate remedy — Family pictures, etc.]—A purchase by a married woman from her husband, through the medium of trustees for her separate use & appointment, may be sustained against creditors, if *bonâ fide*, though the husband is indebted at the time; & even though the object is to preserve from his creditors for the family the subject of the purchase; in this instance ancient family pictures, furniture, & other articles, of a peculiar nature & value. The circumstances of the comparative value of the consideration, the continued possession, according to the title, by the relation of the parties, the degree of notoriety, the want of an inventory, the satisfaction of some debts out of the property, etc., though circumstances of evidence, are not conclusive, as to the nature of the transaction. Injunction upon the jurisdiction to protect the enjoyment of a specific chattel, not properly the subject of compensation by damages.—*ARUNDELL (LADY) v. PHIPPS & TAUNTON* (1804), 10 Ves. 139; 32 E. R. 797. L. C.

855. — Artist's own paintings — Value fixed by artist.]—*DOWLING v. BETJEMANN*, No. 267, *ante*.

PART X. SECT. 8, SUB-SECT. 2.

p. General rule.]—The ct. will protect the specific possession of chattels only in case they are of peculiar value.—*GROVES v. MORLEY*

q. —.]—*PENMAN v. SOMERVILLE* (1875), 22 Gr. 178.—*CAN.*

r. Saw-logs.]—Saw-logs cannot be intended *primâ facie* to be of "peculiar value," without any evidence that they are so; but they are

856. Peculiar value acquired from use.]—Where specific chattels are necessary for carrying on a particular trade, & a right is asserted by those who have acquired a lien upon them to sell them, the ct. has jurisdiction to restrain, by injunction, a threatened sale, where an injury would ensue from such sale to the trader or other person whose right would be interrupted & whose position in life would be injured by a sale.—*NORTH v. GREAT NORTHERN RY. CO.* (1860), 2 Giff. 64; 29 L. J. Ch. 301; 1 L. T. 510; 6 Jur. N. S. 244; 66 E. R. 28.

857. Heirlooms.]—*ARUNDELL (LADY) v. PHIPPS & TAUNTON*, No. 854, *ante*.

858. —.]—*MACCLESFIELD (EARL) v. DAVIS* (1814), 3 Ves. & B. 16; 35 E. R. 385, L. C.

SUB-SECT. 3.—STOCKS, SHARES, ETC.

859. Stock—Restraint of transfer by husband—At suit of wife.]—Injunction upon bill by wife against her husband, restraining him from selling, assigning, or in any manner disposing of, stocks standing in the names of the wife's grandfather, & great-grandfather, & which the husband was entitled to in her right, in the event of her attaining the age of twenty-five years, subject to prior life interests.—*ELLIS v. ELLIS* (1793), 2 Coop. temp. Cott. 234; 47 E. R. 1146, L. C.

860. — Restraint of transfer by administrator.]—French stock, which, there was reason to believe, belonged to a bkpt., was transferred into the name of his wife; she transferred it into the name of B., & died, having previously appointed to B. certain sums in the English stocks, which she had a power of disposing of; & B., who generally resided in France, took out administration to her in England: in a suit by the assignee of the bkpt. to recover the French stock, an injunction was granted to restrain the transfer of the English stock.—*STEAD v. CLAY* (1828), 4 Russ. 550; 6 L. J. O. S. Ch. 138; 38 E. R. 913, L. C.

Annotations:—**Expld.** *Vaughan v. Vanderstegen* (1854), 2 Eq. Rep. 1229. **Mentd.** *Atchison v. Le Mann* (1854), 23 L. T. O. S. 302.

861. — Contemplated transfer to wrong persons—Mistake—Affidavit by plaintiff.]—Where a transfer is about to be made of stock to wrong persons through mistake, the ct. will not grant an injunction *ex p.* against defts. to restrain the transfer, unless pltf. swears that he believes deft. will avail himself of the error, & will refuse to make a re-transfer.—*ARKWRIGHT v. GRYLES* (1844), 13 L. J. Ch. 303.

862. — Transfer under suspicious circumstances.]—An old woman was induced, without consideration, to transfer her stock into the name of another, who, by his answer, swore that there had been a gift of it to him, subject to a trust for the transferror, for life. An injunction to restrain the transfer & receipt of the dividends was continued.—*CUSTANCE v. CUNNINGHAM* (1851), 13 Beav. 363; 51 E. R. 140.

863. — Applicant must show interest.]—*Re ASHTON* (1900), 44 Sol. Jo. 429.

Stock, etc., in court—Stop orders.]—*See EXECUTION*, Vol. XXI., pp. 658 *et seq.*

Stock in books of company.]—*See EXECUTION*, Vol. XXI., pp. 662–664, Nos. 2426–2447.

As to power of Bank of England to prevent

more likely to be of peculiar value than most other descriptions of chattels, & specific relief may be given with respect to them in more instances than almost any other sort of chattel property.—*FLINT v. CORBY* (1853), 4 Gr. 45.—*CAN.*

transfer of stock.]—See BANKERS, Vol. III., pp. 123 *et seq.*

As to restraint of payment of government annuities or pensions.]—See Sub-sect. 4, *post.*

864. Shares—Restraint pending trial.]—The arts. of assocn. of a co. provided that the co. should have a first & paramount lien upon the shares of each member for his debts to the co., & that for the purpose of enforcing the lien, the directors might, on default in payment of a debt, sell the shares & execute a transfer of the shares sold to the purchaser.

The shareholder undertaking, on four days' notice by the co., to pay to them the sum due from him, upon their transferring their lien to his nominee, an injunction was granted restraining the co. until the trial of the action or further order, from selling or transferring the shares.—*EVERITT v. AUTOMATIC WEIGHING MACHINE CO.*, [1892] 3 Ch. 506; 62 L. J. Ch. 241; 67 L. T. 349; 36 Sol. Jo. 732; 3 R. 34.

Annotation:—*Mentd.* *Hopkinson v. Mortimer*, Harley, [1917] 1 Ch. 646.

—.]—See, also, COMPANIES, Vol. IX., pp. 385, 386, Nos. 2436–2438; Vol. X., p. 1145, No. 8094.

— In ship.]—See SHIPPING.

SUB-SECT. 4.—IN PARTICULAR CASES.

865. Artist's picture.]—*DOWLING v. BETJEMANN*, No. 267, *ante.*

866. Assets of intestate—Dying abroad—Injunction to restrain removal from this country.]—Where assets of one dying intestate at Cape Coast, out of Her Majesty's dominions, are transmitted to this country by a party claiming to be legal representative there, as judicial assessor under letters patent from the Crown, with instructions to the agent here to realise & regard the proceeds as the intestate's property, this ct. will, at the instance of the administrator in England, interfere by injunction to prevent the assets being taken out of this country, & will appoint a receiver till the hearing, & will in the interim, if the parties desire it, direct inquiries at the Foreign Office as to the jurisdiction of the judicial assessor under 6 & 7 Vict. c. 94, s. 2.—*HERVEY v. FITZPATRICK* (1854), Kay, 421; 2 Eq. Rep. 444; 23 L. J. Ch. 564; 23 L. T. O. S. 10; 2 W. R. 338; 69 E. R. 178.

PART X. SECT. 8, SUB-SECT. 3.

864 i. Shares—Restraint pending trial.]—In an action by judgment creditors of deceased husband of deft. to set aside, under 13 Eliz. c. 5, assignments made by deceased to deft. of certain co. shares, with intent as alleged, to defeat creditors, pltf. moved for an *interim* injunction restraining deft. from disposing of the shares. The judgment recovered by pltf. was founded on an agreement of guarantee, which was in existence at the time of the impeached transfers of shares. Deft. asserted that the shares were her property, that her husband was a trustee for her, & that the transfers were made pursuant to her demand:—*Held*: as to a portion of the shares, which appeared to have been bought with deft.'s money, pltf. had not shown such a reasonable probability of their succeeding in the action as to justify the ct. in interfering with the property before trial, but as to other shares, there was probably a question whether the transfer was not an attempt at a gift, without such a delivery of possession as would be necessary to effectuate it, & as to these shares there were reasonable grounds for pltf.'s action; pltf. had not so

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delayed as to deprive them of the right to move; & although it did not appear that there was imminent danger that the shares in respect of which pltf. had made a case would be disposed of & lost to pltf. if the injunction was not granted, the circumstances were such that the discretion of the ct. should be exercised in granting an injunction in respect of these shares.—*TORONTO CARPET CO. v. WRIGHT* (1912), 21 W. L. R. 304; 22 Man. L. R. 294; 3 D. L. R. 725.—CAN.

PART X. SECT. 8, SUB-SECT. 4.

t. Property of debtor.]—The ct. will not restrain a debtor from dealing with his chattel property at the instance of a party representing himself to be a creditor, but who is not in a position to ask for a decree establishing his claim against deft.—*HEPBURN v. PATTON* (1879), 26 Gr. 597.—CAN.

a. Land subject to agreement for sale.]—The registered owner of a homestead grant, at the time when he had resided continuously upon it for a period of nine years & three years & had fulfilled all the conditions to entitle him to convert it into a conditional purchase, executed an instru-

Assets of company—Restraint against company.]—See COMPANIES, Vol. IX., p. 616, Nos. 4098, 4099; Vol. X., pp. 961, 1000, Nos. 6587, 6946–6948.

867. Commonable land—Sale under power—Doubt as to propriety of sale.]—An inclosure Act empowered comrs. to sell by private contract any part of the commonable lands fronting or adjoining the houses or gardens of the purchasers, & also empowered the comrs. to sell by auction such parts at the greatest distance from the houses of the respective proprietors, as the comrs. should think fit, for defraying the expenses of the Act, & the surplus of the produce of such sales was directed to be divided among the proprietors. On a bill by one proprietor on behalf of himself & the others, the comrs. were restrained by injunction from proceeding in an agreement made by them for the sale of a pond by private contract to a person who was not the owner of any property adjoining or fronting the pond, it appearing that the pond was of much public utility & was sold at an undervalue.—*HAWES v. JAMES* (1818), 1 Wils. Ch. 2; 37 E. R. 1, L. C.

868. Diamonds.]—*XIMENES v. FRANCO*, No. 845, *ante.*

869. —.]—*TONNINS v. PROUT*, No. 846, *ante.*

870. Documents—Of plaintiff in possession of defendant.]—Injunction granted before answer to restrain defts. from parting with documents in their possession belonging to pltf., & from preventing pltf. & her solr. from having access to the documents at all reasonable times & after reasonable notice.—*GOODALE v. GOODALE* (1848), 16 Sim. 316; 60 E. R. 896.

871. Family pictures.]—*ARUNDELL (LADY) v. PHIPPS & TAUNTON*, No. 854, *ante.*

872. Fund in hands of stakeholder.]—*GLADSTONE v. MUSURUS BEY*, No. 606, *ante.*

873. Goods subject to bill of sale—Injunction pending trial.]—Where a bkpt. on his own petition, & his assignee, advertise goods for sale, which are the subject of a bill of sale, the party to whom such bill is given, having satisfied a distress for rent & expenses, the ct. will interfere by injunction to restrain the assignee from selling, or disposing of, on the terms of his bringing an action to try the legal right forthwith, but will grant no injunction as against the bkpt.—*MAYERS v. FLAXMAN* (1862), 10 W. R. 399.

ment whereby he purported to sell to a purchaser his homestead grant as a freehold & agreed to complete ten years' term of residence on the land, to immediately apply for the conversion of the same to a conditional purchase under Crown Lands (Amendment) Act, 1908, & to execute the necessary transfer thereof to the purchaser. He also agreed to give possession to the purchaser on the day the instrument was executed. The vendor having repudiated the agreement, the purchaser, at a time when the vendor had completed the ten years' term of residence, brought an action against the vendor claiming an injunction restraining him from dealing with the land except in accordance with the agreement:—*Held*: the possession agreed to be given must be construed to mean such a possession as was consistent with a true residence by the vendor on the land as his home, there was no attempted evasion of the Crown Lands Acts, & the purchaser was entitled to an injunction & to a decree for specific performance.—*WALSH v. ALEXANDER* (1913), 16 C. L. R. 293.—AUS.

b. Property purchased with stolen money.]—Where money was stolen:

Sect. 8.—Disposition of property: Sub-sect. 4.
Sects. 9 & 10.]

874. —.] — **DICKENSON v. BROWN** (1887), 3 T. L. R. 350, C. A.

875. Heirlooms.]—ARUNDELL (LADY) v. PHIPPS & TAUNTON, No. 854, *ante*.

MACCLESFIELD (EARL) v. DAVIS (1814), 3 Ves. & B. 16; 35 E. R. 385, L. C.

877. Possession acquired by fraud—Of infant—Furniture in furnished house.]—In an action against an infant who had obtained a lease of a furnished house on an implied representation that he was of full age:—*Held*: the lease must be declared void, & possession given up, & deft. should be restrained by injunction from parting with the furniture; but he was not liable for use & occupation.—**LEMPRIERE v. LANGE** (1879), 12 Ch. D. 675; 41 L. T. 378; 27 W. R. 879.

Annotations:—**Consd.** **Woolf v. Woolf**, [1899] 1 Ch. 343. **Reid.** **Stocks v. Wilson**, [1913] 2 K. B. 235. **Mentd.** **Re Jones, Ex p. Jones** (1881), 18 Ch. D. 109; **Leslie v. Sheill**, [1914] 3 K. B. 607.

878. Property deposited in bank pending action.]—Proceedings had been taken in the Ch. Div. to set aside a devise to deft. on the ground that the execution of the will had been procured by deft.'s fraud, & such proceedings had ended in favour of deft. Pltf. then commenced an action for revocation of probate. The property in dispute had been deposited at a bank pending the chancery action, & the bankers informed pltf. that they should hand it over to deft. within a week, if not restrained by a competent authority. Pltf. was unable to effect service of notice of application for the appointment of an administrator *pendente lite*. On the *ex p.* application of pltf., the ct. granted an injunction restraining the bank from parting with the property pending the probate suit.—**MELUISH v. MILTON** (1876), 24 W. R. 679; 3 Char. Pr. Cas. 394.

879. Property of association—Sale by sole director.]—A bill, filed by pltf. on behalf of himself & the other shareholders, in an assocn. formed in England for carrying on mines abroad, stated that the property & also the management of the undertaking had been vested in two trustees, of whom deft. was the survivor; that no deed of settlement had been executed; that the evidence of proprietorship consisted in the possession of certain certificates, the holders of which were treated as shareholders, & that pltf. was the holder of some of the shares by virtue of the possession of such certificates; alleged an intention of deft. to sell the property & prayed an injunction & other relief. A demurrer on the ground of the illegal nature of the partnership, & the defective title of pltf. to a share in the property, & for want of parties, was

Held: the owner was entitled to leasehold property, furniture, & other chattels, purchased with the stolen money, & an injunction was granted to restrain parting therewith until the hearing.—**MERCHANTS' EXPRESS CO. v. MORTON** (1868), 15 Gr. 274.—**CAN.**

c. Execution sale.]—Injunction granted at the suit of the creditors of the D. Canal Co., who had a lien on the canal, against a sale thereof under "subsequent execution."

a
convey no title

of another.
not restrain

a person from selling land of another.—**MILLER v. ROBERTSON** (1904), 35 S. C. R. 80.—**CAN.**

f. Sale of lands at tax sale.]—**PHILLIPS v. CITY OF BELLEVILLE** (1905), 6 O. W. R. 129; 10 O. L. R. 178.—**CAN.**

g. Sale of hay raised by tenant—Land let for pasturing.]—Deft. agreed to rent a farm from pltf. "for pasturing purposes," by a memorandum containing no other stipulation as to the use of the place. Instead of using the entire farm for grazing purposes, deft. raised a crop of hay on part of the land, which he cut & stored in his barn, & endeavoured to sell:—*Held*: deft. was rightly enjoined from selling & removing from the farm any part of the hay.—**BRADLEY v. MCCLURE** (1908), 18 O. L. R. 503; 12 O. W. R. 215, 695.—**CAN.**

h. Sale under chattel mortgage.]—

overruled, the questions raised thereby being reserved to the hearing; &, on motion for an injunction, a case of danger to the property being shown, an injunction was granted, restraining deft. from dealing with the property otherwise than in the ordinary course of business.—**SHEPPARD v. OXENFORD** (1855), 1 K. & J. 491; 25 L. T. O. S. 90; 3 W. R. 397; 69 E. R. 552.

Annotation:—**Mentd.** **Re Great Cambrian Mining & Quarrying Co., Bowen's Case** (1856), 4 W. R. 800.

880. Property of debtor—In hands of second creditor.]—Where property of debtor comes into the hands of a second creditor, when the circumstances of the case & certain correspondence between the parties ought to have led to such second creditor to inquire into & investigate the claims of a former creditor, an injunction will be allowed to restrain the second creditor from dealing with the property in question, or appropriating it to his own use.—**ZULUETA v. SIEVEKING** (1848), 11 L. T. O. S. 449; *on appeal*, cited 15 Beav. p. 584, L. C.

Annotation:—**Reid.** **Zulueta v. Tyrle** (1851), 15 Beav. 577.

881. Property subject matter of suit.]—After bill filed but before subpoena served, deft. assigned the subject matter of the suit:—*Held*: the assignee was a necessary party, & the ct. would, if necessary, grant an injunction to restrain any further assignment.—**POWELL v. WRIGHT** (1844), 7 Beav. 444; 49 E. R. 1137.

882. Property subject of power—Alienation by exercise of power.]—By deed, a father & son settled certain real estate to the use of the father for life, & after his decease to the use of the son, if then living, in fee; & a power was reserved to the father & son of revoking the uses & appointing new uses. By a subsequent deed, the son being at the time insolvent, the father & son revoked the old uses in favour of the son, & appointed the estate to such uses as the father should appoint, & in default of appointment to the use of the son absolutely. The son was afterwards adjudicated bkpt., & a bill was filed by the creditor's assignees to set aside the latter deed as fraudulent. Upon a motion in the cause an injunction was granted, restraining the father until the hearing from exercising his power under the deed in favour of a purchaser for value, but without interfering with the exercise of his power in favour of volunteers.—**BEYFUS v. BULLOCK** (1869), L. R. 7 Eq. 391; 20 L. T. 166; 17 W. R. 526.

883. Securities—Sending securities abroad—Injunction against agent of foreign government.]—In a suit to restrain the agent of a foreign govt. from parting with securities which should have been deposited in this country pltf. had neglected to file a printed copy of the bill until long after the

A simple contract creditor, even suing in a class action, cannot invoke the aid of the ct. to restrain a chattel mtgee. from realising upon his security, without satisfying the ct. that the circumstances indicated some infraction of the statutes relating to preferences; & the ct. will not, upon such an application, take the account, nor restrain realisation by a solvent creditor, upon his mtge., except upon at least *prima facie* proof of invalidity.—**BASSI v. SULLIVAN** (1914), 32 O. L. R. 14; 18 D. L. R. 452; 7 O. W. N. 38; 26 O. W. R. 813.—**CAN.**

k. Money entrusted for safe-keeping.]—Injunction was granted preventing a bank from paying money deposited by deft. to her, as pltf. alleged that the money so deposited had been entrusted for safekeeping by pltf. to deft., & that the latter had appropriated it to her own use.—

expiration of the fourteen days allowed by 15 & 16 Vict. c. 86, s. 6, on the ground that negotiations were pending which they hoped would render the further prosecution of the suit unnecessary. The ct., on motion, exercised its discretionary power, & allowed a printed copy to be filed.

Though a foreign govt. cannot be sued in this country without its own consent, yet the agent of a foreign govt. may be restrained from transmitting to it securities, which the bill alleges should be deposited in this country.—*FOREIGN BONDHOLDERS CORPN. v. PASTOR* (1874), 23 W. R. 109.

884. Settled land—Injunction against tenant for life—Till trustees appointed against assignee in bankruptcy.]—J. by his will devised an estate to trustees upon trust to receive & pay the rents to his grandson for life, & after his decease to sell & to stand possessed of the moneys for all the grandson's children. The tenant for life was upwards of seventy years of age, & a widower. He had one child only, a daughter, & she & her husband in July, 1880, contracted to sell her reversion in the estate to pltf. Settled Land Act, 1882 (c. 38), came into operation in Jan. 1883, & the tenant for life at the end of that month advertised the estate for sale under the powers of the Act. Pltf. brought an action for an injunction to restrain the tenant for life from selling; & to restrain the other defts., devisees of the legal estate under the will of the survivor of trustees of J.'s will appointed by the ct., from executing any assurance of the estate, & on motion for that purpose:—*Held*: (1) the tenant for life had power under Settled Land Act, 1882 (c. 38), to sell the fee simple & inheritance of the property if he should comply with the provisions of the Act; (2) there were no trustees to whom he could, under sect. 45, give notice; & an injunction was granted to restrain him from selling until trustees had been properly appointed for the purposes of the Act.—*WHEELWRIGHT v. WALKER* (1883), 23 Ch. D. 752; 52 L. J. Ch. 274; 48 L. T. 70; 31 W. R. 363.

Annotations:—As to (1) *Refd.* *Re Dickin & Kelsall's Contract*, [1908] 1 Ch. 213. As to (2) *Refd.* *Mogridge v. Clapp*, [1892] 3 Ch. 382; *Re Fisher & Grazebrook's Contract*, [1898] 2 Ch. 660.

885. Ship's cargo.]—*DELAFIELD v. GUANA-BEUS* (1809), Daniell's Chancery Practice, Vol. II., 8th ed. p. 1407.

886. ——— Plaintiff must show title—Indemnity to master.]—Where a vessel has become unable to proceed on her voyage without repairs, the owner of goods shipped on board the vessel may obtain the assistance of the ct. to restrain the captain from selling the cargo. But before the ct. will grant such assistance, pltf. must show their title to the goods, & must settle with the captain for what is due to him, & must exonerate the captain from his contract to deliver the goods at their

place of destination, & from all liability on the bills of lading.—*RAYNE v. BENEDICT* (1841), 10 L. J. Ch. 297; 9 L. T. 301; 5 Jur. 598, L. C.; *subsequent proceedings*, 5 Jur. 1176.

887. Title deeds.]—*CONSTABLE v. ROGERS* (1844), 3 L. T. O. S. 261.

SECT. 9.—DISTRESS

See *BANKRUPTCY*, Vol. V., pp. 956, 957, 1089, 1094, Nos. 7842–7846, 8913, 8939; *DISTRESS*, Vol. XVIII., p. 394, Nos. 1360–1370.

SECT. 10.—MATTERS AFFECTING FOREIGN GOVERNMENTS.

888. Violation of political privileges.]—(1) Deft., K., a Hungarian refugee, caused to be manufactured in England a large quantity of notes, which though not made in imitation of any notes circulating in Hungary, purported to be receivable as money in every Hungarian State & public pay office, & to be guaranteed by the State of Hungary. Pltf., as King of Hungary, sued to have these notes delivered up & to restrain the manufacture of any such, alleging that the issue of such notes would injure the rights of pltf. by promoting revolution & disorder, would injure the State by the introduction of a spurious circulation, & would thereby also injure pltf.'s subjects:—*Held*: although the ct. has not any jurisdiction to restrain the commission of acts which only violate the political privileges of a foreign sovereign, the manufacture of these notes ought to be restrained.

(2) But it is said that the acts proposed to be done are not the subject of equitable jurisdiction, or that if they are, the jurisdiction ought not to be exercised until a trial at law shall have been had. To neither of these propositions can I give my assent. I agree that the jurisdiction of this ct. in a case of this nature rests upon injury to property actual or prospective, & that this ct. has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, & do not affect any rights of property (*TURNER, L.J.*).—*AUSTRIA (EMPEROR) v. DAY & KOSSUTH* (1861), 3 De G. F. & J. 217; 30 L. J. Ch. 690; 4 L. T. 494; 7 Jur. N. S. 639; 9 W. R. 712; 45 E. R. 861, L. C. & L. JJ.

Annotations:—As to (1) *Refd.* *U.S.A. v. McRae* (1867), L. R. 4 Eq. 327. As to (2) *Consd.* *Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551; *Stevens v. Chown*, *Stevens v. Clark*, [1901] 1 Ch. 894. *Refd.* *Pattison v. Gifford* (1874), L. R. 18 Eq. 259; *Prudential Assoc. v. Knott* (1875), 10 Ch. App. 142; *Re Riviere's Trade Mk.* (1884), 26 Ch. D. 48; *Slack v. Leeds Industrial Co-Op. Soc.*, [1923] 1 Ch. 431. *Generally*, *Mentd.* *Portugal (King) v. Russell* (1861), 31 L. J. Ch. 34; *A.-G. v. Sillem* (1863), 2 H. & C. 431; *Ainsworth v. Walsley* (1866),

BEAMISH v. LAWLOR (1915), 43 N. B. R. 426.—CAN.

l. Property of defendant in alimony action.]—Pltf. in an alimony action is not entitled to an injunction restraining deft. from disposing of his property until the trial.—*FERGUSON v. FERGUSON* (1916), 33 W. L. R. 923; 10 W. W. R. 113; 26 Man. L. R. 269.—CAN.

m. Injunction likely to be ineffective—Appointment of receiver.]—When the circumstances are such as to justify the granting of an injunction against the disposition of goods, & it appears that an injunction is likely to be ineffective, the ct. may go the further step of appointing a receiver to take actual possession of the goods.—*KAY v. RATZ*, [1918] 3 W. W. R. 885; 44 D. L. R. 145.—CAN.

n. Sale of wife's separate estate.]—Where A. filed a bill for an injunction against her husband, & B., his assignee, under the Insolvent Act, to prevent the latter from selling furniture seized by him, which she stated was her separate property; B. answered, & no equity being confessed:—*Held*: the injunction would be dissolved.—*MASSARENE v. DORAN* (1819), 2 Mol. 524.—IR.

o. Payment of money received in satisfaction of judgment.]—Where it appeared from circumstances not known to deft. at the time of the trial that pltf. ought not to have the benefit of a judgment, the Supreme Ct. granted an injunction to restrain an agent from paying over to his principal a sum of money received by him in satisfaction

of a judgment in favour of his principal.—*COWELL v. MCBRAIRIE* (1818), 1 Nfld. L. R. 138.—NFLD.

p. Executor selling his property.]—Notwithstanding the exor. had refused to produce before the master any books of account of an estate he had managed for years, the unsatisfactory character of his accounting, his absence from the colony, & his producing mtges. as assets of the estate made to himself, the ct. refused to grant an injunction to restrain the Receiver General from paying the exor. his pension or to restrain the exor. from selling his property, on the ground that bail might have been obtained from him under the process of *ne exeat regno*.—*Re PARKER'S ESTATE* (1864), 5 Nfld. L. R. NFLD.

Sect. 10.—Matters affecting foreign governments.**Sects. 11, 12, 13 & 14: Sub-sect. 1, A. & B.]**

L. R. 1 Eq. 518; *Mulkern v. Ward* (1872), L. R. 13 Eq. 619; *Hole v. Bradbury* (1879), 10 Ch. D. 886; *Levy v. Walker* (1879), 10 Ch. D. 436; *Foster v. Globe Venture Syndicate* (1900), 82 L. T. 253.

889. Manufacture of spurious foreign currency.]

—*AUSTRIA (EMPEROR) v. DAY & KOSSUTH*, No. 888, *ante*.

890. Enforcement of contracts — Against property of foreign government in England.]—An English ct. has no jurisdiction to enforce the contracts of a foreign govt. against the property of such govt. in England.—*SMITH v. WEGUELIN* (1869), L. R. 8 Eq. 198; 38 L. J. Ch. 465; 20 L. T. 724; 17 W. R. 904.

Annotation:—*Mentd. Goodwin v. Roberts* (1876), 1 App. Cas. 476.

891. Sale of state papers.]—The Ct. granted an interlocutory injunction pending the trial of the action to restrain defts. from selling certain Italian state papers forming a part of the Medici archives, but as regards certain historical documents, which, though they formed part of the archives, & though their exportation from Italy was prohibited by Italian law, were not state papers, the ct. refused an interlocutory injunction as it was improbable that at the trial the ct. would undertake the burden of ordering their return to Italy.—*ITALY (KING) & ITALIAN GOVERNMENT v. DE MEDICI TORNAQUINCI* (1918), 34 T. L. R. 623.

SECT. 11.—OPENING OF LETTERS.

892. Letters addressed to defendant's predecessor in business.]—Injunction granted restraining defts. from opening letters addressed to their predecessors in business from whom they had obtained exclusive licenses to work certain patents.—*SCHEILE v. BRAKELL* (1863), 11 W. R. 796.

893. Letters addressed to former employee—At former address.]—A. was manager of the Foreign Vineyard Assocn. of No. 190, Regent Street. He parted from his employers & set up a business of the same kind at No. 203, Regent Street. An *interim* injunction was granted against the Assocn. restraining them from opening, except in A.'s presence, letters simply addressed to A., No. 190, Regent Street. But the Postmaster-General was held to be justified in refusing to forward to No. 203 the letters addressed to pltf. at No. 190.—*STAPLETON v. FOREIGN VINEYARD ASSOCN., LTD., & H.M. POSTMASTER-GENERAL* (1864), 4 New Rep. 317; 11 L. T. 77; 28 J. P. 612; 12 W. R. 976.

Annotation:—*Consd. Hermann Loog v. Bean* (1884), 26 Ch. D. 306.

894. — Really belonging to plaintiff—Mandatory injunction.]—*HERMANN LOOG v. BEAN*, No. 264, *ante*.

895. Only one instance proved.]—A pltf. by his bill prayed an injunction to restrain deft. from falsely representing that the latter was carrying on business in succession to or in connection with

him; the bill averred general acts of misrepresentation, but one case only was made out in which deft. had opened a letter addressed to pltf., answered it in his own name, & endeavoured to obtain the custom which that letter offered to pltf.:—*Held*: though this raised a grave suspicion against deft., it was not sufficient in a suit framed as was this to entitle pltf. to an injunction.—*EDGINGTON v. EDGINGTON* (1864), 11 L. T. 299.

SECT. 12.—LIBEL OR SLANDER.

Injunction to restrain publication of libel.]—*See LIBEL & SLANDER.*

Injunction to restrain defamatory statements.]—*See LIBEL & SLANDER.*

Trade libel & slander of title.]—*See TRADE & TRADE UNIONS.*

Injunction to restrain libellous statements at elections.]—*See Corrupt Practices Act, 1895 (c. 40), s. 3; ELECTIONS, Vol. XX., pp. 99, 100, Nos. 786–795.*

SECT. 13.—MORTGAGES.

See MORTGAGE.

SECT. 14.—USE OF NAMES AND QUALIFICATIONS.**SUB-SECT. 1.—NAMES.****A. In General.**

See, generally, NAME & ARMS, CHANGE OF; TRADE MARKS.

896. Whether restrained — Family name taken by stranger.]—(1) In England the assumption of a name, the patronymic of a family, by a stranger, who had never before been called by that name, is not the subject of a civil action, as by the English law there is no right of property in a person to the use of a particular name, to the extent of enabling him to prevent the assumption of his name by another.

(2) *Aliter*, as to the exclusive use of a name in connection with a trade or business, which right is recognised, & a party assuming it colourably or otherwise, being an invasion of another's rights, is a fraud, for which a remedy lies either at law or in equity.—*DU BOULAY v. DU BOULAY* (1869), L. R. 2 P. C. 430; 6 Moo. P. C. C. N. S. 31; 38 L. J. P. C. 35; 22 L. T. 228; 17 W. R. 594; 16 E. R. 638, P. C.

Annotation:—*As to (1) Consd. Cowley v. Cowley*, [1901] A. C. 450.

897. — Use of husband's name—By divorced wife—Malice.]—Where the marriage of a commoner with a peer of the realm has been dissolved by decree at the instance of the wife, & she afterwards, on marrying a commoner, continues to use the title she acquired by her first marriage, she does not thereby, though having no legal right to the user, commit such a legal wrong against her

PART X. SECT. 14, SUB-SECT. 1.—A.

q. Whether restrained — Use of name of play.]—In a suit to restrain use by a deft. of the title of pltf.'s play, it is not necessary where there are not other plays in existence to which such name is properly attributable, to prove that the title has acquired a secondary or special meaning, so as to denote only the play of pltf.—*BROADHURST v. NICHOLS* (1903), 8 S. R. N. S. W. 147; 20 N. S. W. W. N. 70.—*AUS*

r. — — —.]—In Mar. 1906, pltf. produced a play under the title "The Fatal Wedding" with great success. In May, 1906, deft. advertised his intention of producing & did produce another play under the same title as pltf.'s or with slight variation therefrom:—*Held*: pltf. was entitled to an interlocutory injunction restraining deft. from advertising & producing a play under the title of "The Fatal Wedding" or any similar title.—*MEYNELL v. PEARCE*, [1906] V. L. R. 447.—*AUS*.

t. — Use of name of lodge.]—*GRAND LODGE OF ANCIENT ORDER OF UNITED WORKMEN v. SUPREME LODGE OF ANCIENT ORDER OF UNITED WORKMEN* (1907), 6 W. L. R. 445; 17 Man. L. R. 360.—*CAN*.

a. — Use of word with special meaning.]—The *vicharanukarta* of a number of temples held a *sanad* from Govt. in which two of such temples were named & the others included in the word "*vagaira*," meaning literally "*et cetera*." The *dharmakarta* of the

former husband or so affect his employment of the incorporeal hereditament he possesses in his title as to entitle him in the absence of malice to an injunction to restrain her use of the title.—**COWLEY (EARL) v. COWLEY (COUNTESS)**, [1901] A. C. 450; 70 L. J. P. 83; 85 L. T. 254; 50 W. R. 81; 17 T. L. R. 725, H. L.

Annotations:—**Refd.** *Re Greenwood, Goodhart v. Woodhead*, [1902] 2 Ch. 198; *Re Croxon (otherwise Croxton)*, *Croxon (otherwise Croxton) v. Ferrers* (1904), 89 L. T. 733; *Pryce v. Pioneer Press* (1925), 42 T. L. R. 29.

898. — Use of name in trade or business.—**DU BOULAY v. DU BOULAY**, No. 898, *ante*.

899. — Calling house by name of plaintiff's house.—(1) Pltfs. alleged in their statement of claim that their house had been called "Ashford Lodge" for sixty years, & the adjoining house belonging to deft. had been called "Ashford Villa" for forty years, & that deft. had recently altered the name of his house to that of pltfs.' house. Pltfs. alleged that this act of deft. had caused them great inconvenience & annoyance, & had materially diminished the value of their property, & they claimed an injunction to restrain deft. from continuing to use the name of their house:—**Held**: the alleged act of deft. in calling his house by the name of pltfs.' house was not a violation of any legal right of pltfs.; & there being no allegation of malicious intention, a demurrer to the statement of claim was allowed.

(2) *Semble*: no change has been made by sect. 25 (8) of above Act in the principle on which the ct. grants injunctions.—**DAY v. BROWNRIGG** (1878), 10 Ch. D. 294; 48 L. J. Ch. 173; 39 L. T. 553; 27 W. R. 217, C. A.

Annotations:—*As to* (1) **Consd.** *Street v. Union Bank of Spain & England* (1885), 30 Ch. D. 156. **Refd.** *Nicholson v. Buchanan* (1900), 19 R. P. C. 321; *Ewing v. Buttercup Margarine Co.*, [1917] 2 Ch. 1. *As to* (2) **Consd.** *North London Ry. v. G. N. Ry.* (1883), 11 Q. B. D. 30. **Refd.** *Quartz Hill Consolidated Gold Mining Co. v. Beall* (1882), 20 Ch. D. 501; *Bonnard v. Perryman*, [1891] 2 Ch. 269.

900. — Cypher telegraphic address.—The firm of Street & Co., advertising agents, of Cornhill, having for many years used the abbreviation "Street, London," as their short telegraphic address, deft. bank registered at the Post Office & used the same abbreviation as their telegraphic address:—**Held**: (1) no injunction could be

granted to restrain the bank from so doing; (2) defts. had done no injury at law, & the matter was simply one of inconvenience which the ct. had no jurisdiction to restrain.—**STREET v. UNION BANK OF SPAIN & ENGLAND** (1885), 30 Ch. D. 156; 55 L. J. Ch. 31; 53 L. T. 262; 33 W. R. 901; 1 T. L. R. 554.

Name of company.—*See COMPANIES*, Vol. IX., pp. 65, 70, Nos. 190–208, 238–243.

Unauthorised use of name in company prospectus.—*See COMPANIES*, Vol. IX., p. 144, No. 811.

B. In Advertisements.

See, generally, NAME & ARMS, CHANGE OF; TRADE MARKS.

901. Use of name to advertise commodity.—Injunction to prevent a chemist from selling a quack medicine under a false & colourable representation that it was a medicine of pltf. an eminent physician refused.—**CLARK v. FREEMAN** (1848), 11 Beav. 112; 17 L. J. Ch. 142; 11 L. T. O. S. 22; 12 Jur. 149; 50 E. R. 759.

Annotations:—**Consd.** *Albert (Prince) v. Strange* (1849), 1 Mac. & G. 25. **Expld.** *Austria (Emperor) v. Day* (1861), 3 De G. F. & J. 217; *Leather Cloth Co. v. American Leather Cloth Co.* (1863), 4 De G. J. & Sm. 137. **Dtd.** *Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551. **Consd.** *Dixon v. Holden* (1869), L. R. 7 Eq. 488; *Re Riviere's Trade Mk.* (1884), 26 Ch. D. 48. **Expld.** *Chappell v. Griffith* (1885), 53 L. T. 459. **Fold.** *Williams v. Hodgo* (1887), 4 T. L. R. 175. **Consd.** *Lee v. Gibbins* (1892), 67 L. T. 263; *Walter v. Ashton*, [1902] 2 Ch. 282. **Refd.** *Cox v. Cox* (1853), 11 Hare, 118; *Maxwell v. Hogg*, *Hogg v. Maxwell* (1867), 2 Ch. App. 307; *Mulkern v. Ward* (1872), L. R. 13 Eq. 619; *Prudential Assee. v. Knott* (1875), 10 Ch. App. 142; *Singer Manufacturing Co. v. Wilson* (1878), 26 W. R. 664; *Levy v. Walker* (1879), 10 Ch. D. 436; *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345; *Monson v. Tussaud*, *Monson v. Tussaud* (1894), 63 L. J. Q. B. 454; *Dockrell v. Dougall* (1899), 80 L. T. 556; *Clerk v. Motor Car Co.* (1905), Ltd. & Ford (1905), 49 Sol. Jo. 418.

902. ——The judge, on the authority of *Clark v. Freeman*, No. 901, *ante*, with which, however, he did not agree, refused an interim injunction to restrain defts. from using in their trade catalogue the name of pltf., a doctor, in connection with a certain surgical instrument.—**WILLIAMS v. HODGE & Co.** (1887), 4 T. L. R. 175.

903. ——**RANSOM v. OD CHEM CO.** (1896), 40 Sol. Jo. 846.

said two temples & of three minor ones only, having limited rights & duties & being in many respects subordinate to the *vicharanakarta*, had, in pursuance of immemorial custom, used a seal in connection with his office, which had never before borne more than a single figure, without legend. He had now made & used in the conduct of temple affairs a new seal, bearing the same figure, but with the legend "*Tirumalai Tirupati, vagaira devasthanam dharmakarta*" added to it. On the *vicharanakarta* suing for a declaration & for a perpetual injunction to restrain the use of a seal containing such words:—**Held**: although the legend might in a sense be accurate in representing what deft. actually was, & the *vicharanakarta* had no property in the word "*vagaira*," yet deft. should be restrained from using it upon the seal, since, from the manner in which that word had been used in the *sanad* of pltf.'s appointment to cover the thirty minor temples connected with the two main temples, a special meaning had become attached thereto when used in connection with the two principal temples; & since the object of the *dharmakarta* in using it was to assert an extension of his rights & to claim a position co-extensive with that of the *vicharanakarta*, which in fact he did not possess.—**RAMANUJA PEDDA JIYANGARLU v. RAMA KISORE DOSSJEE** (1898), I. L. R.

22 Mad. 189.—IND.

b. — Religious style, title & dignities.—**MADHUSUDAN PARVAT v. SHRI SHAHKARACHARYA** (1908), I. L. R. 33 Bom. 278.—IND.

c. — Use of generic name.—In an action for interdict to prevent defender using the words "Water of Ayr Stone" to describe stones other than those from pursuer's quarry, it was proved that the same kind of stone was to be found at various places in the same district, & that the name "Water of Ayr Stone" had never been used as a trade-name in commerce exclusively to denote stone from pursuer's quarry, but was the generic name of that particular kind of stone:—**Held**: pursuer was not entitled to the exclusive use of the name.—**MONTGOMERIE v. DONALD & Co.** (1884), 11 R. (Ct. of Sess.) 506; 21 Sc. L. R. 338.—SCOT.

PART X. SECT. 14, SUB-SECT. 1.—B.

901 i. Use of name to advertise commodity.—Pltf. co. was incorporated in Canada, under the name of the "Gramm Motor Truck Co.," in 1910, for the purpose of supplying motor trucks for the carriage of goods. "Gramm" was the name of a citizen of the United States who had planned the construction of a motor truck distinct from other like trucks called

by the names of their designers in the United States. Pltf. co. did not manufacture trucks, in the strict sense of the word, nor did they bring in machines from the United States, but they procured from an American co. with which Gramm was connected, called the "Gramm Motor Co. of Lima," & from other sources, separate parts, assembled them on their premises in Ontario, & put them on the market as finished products. The use of Gramm's name by pltf. co. was sanctioned by him. Pltf. co. developed many variations & improvements in the method of combination, advertised largely, & established a recognised business of selling motor trucks in Canada under the trade name "Gramm," & the word became associated with their business, their trucks being known as "Gramm Motor Trucks." Deft. co. started business in the town where pltf. co.'s place of business was, across the street from it, & gave themselves out as entitled to sell Gramm motors, justifying under an arrangement with the "Gramm-Bernstein Co.," doing business in the United States, & exhibiting "Gramm-Bernstein" motors in their own name:—**Held**: deft. co. should be enjoined from the use of the word "Gramm" in labelling & advertising their motors.—**GRAMM MOTOR TRUCK CO. v. FISHER MOTOR CO.** (1913), 5 O. W. N. 449; 30 O. L. R. 1.—CAN.

Sect. 14.—Use of names and qualifications: Sub-sect. 1, B.; sub-sect. 2. Sects. 15, 16, 17 & 18.]

904. —.]—A doctor, whose name has been used without his authority in an advertisement to puff the sale of a medicine, has no cause of action, either for damages or for an injunction, unless the publication is defamatory or injures him in his property, business or profession.—**DOCKRELL v. DOUGALL** (1899), 80 L. T. 556; 15 T. L. R. 333, C. A.

905. Use of firm name by ex-employee.]—Deft. P. was for many years a journeyman sewer at P. & Co.'s well-known tailors in London. He was never employed there as a cutter or fitter. He entered into partnership with deft. L., & started a tailor's business at Eastbourne. P. cannot be restrained from announcing to the public that he comes from P. & Co.'s, or from stating that he comes "with a reputation of fifteen years' successful experience with Messrs. P. & Co., Savile Row, London, W., & is therefore in a position to advise clients in the very latest styles, uniformity, & fit in fashionable & smart clothing." Such statements even if false are puffing assertions, which cannot be restrained at the suit of a private person, unless it appears that they tend to the passing off of one man's goods or business as another's, or amount to a holding out of pltf. as a partner, so exposing him to liability, or tend to disparage pltf.'s goods, & cause special damage.—**CUNDEY v. LERWELL & PIKE** (1908), 99 L. T. 273; 24 T. L. R. 584.

SUB-SECT. 2.—QUALIFICATIONS.

906. Use of letters implying membership—Of professional institution.]—**ROYAL INSTITUTE OF BRITISH ARCHITECTS v. HINDLE** (1925), 69 Sol. Jo. 367.

SECT. 15.—NUISANCE.

See NUISANCE.

SECT. 16.—OCCUPATION OF PREMISES.

907. Injunction to restrain disturbance.]—W. was appointed manager of a voluntary society for the purpose of selling certain books on the society's premises, with a right to reside in part of the premises & to carry on the trade of a bookseller on his own account, & to have six months' notice to quit. Differences having arisen between W. & the managing committee, they required him to quit possession, which he refused to do, & maintained himself in the premises by force:—**Held**: an injunction would be granted restraining W., until further order, (1) from acting as agent or manager of the society, or selling any of their books, etc., except under the order & with the permission of pltf., (2) from disturbing their possession.—**SPURGIN v. WHITE** (1860), 2 Giff. 473; 3 L. T. 609; 7 Jur. N. S. 15; 9 W. R. 266; 66 E. R. 198.

Annotation:—As to (2) **Folld. Collison v. Warren**, [1901] 1 Ch. 812.

905 i. Use of firm name by ex-employee.]—An interim injunction granted restraining deft., a former employee of pltf., from using a name as a trade name closely resembling that of pltf.—**YORK PUBLISHING CO. v. COULTER & WAYSIDE PUBLISHERS, LTD.** (1913), 24 O. W. R. 384; 4 O. W. N. 1091; 10 D. L. R. 824.—**CAN.**

PART X. SECT. 18.

912 i. Whether granted.]—Pltf. claimed to be entitled to bonds on the Ry., to be secured upon the B. Road in the event of its being transferred to deft. co. as a subvention in aid of the construction of Ry. Defts. were applying for legislation which should provide

908. —.]—An interlocutory injunction was, on deft.'s motion, granted to restrain pltf. from interfering with or disturbing deft. in his possession & occupation of a house.—**COLLISON v. WARREN**, [1901] 1 Ch. 812; 70 L. J. Ch. 382; 84 L. T. 482; 17 T. L. R. 362; 45 Sol. Jo. 377, C. A.

—**Husband & Wife.]**—See **HUSBAND & WIFE**, Vol. XXVII., pp. 258, 259, Nos. 2278–2282.

SECT. 17.—PARENT AND CHILD.

See, generally, **INFANTS**, pp. 131 *et seq.*

909. Grown up child visiting & remaining with parent.]—A son, aged thirty-five, strong in body, & by education capable of earning his living, insisted on visiting his father's house & staying there contrary to his father's wishes. The father was willing to maintain him elsewhere. In an action brought by the father against the son for an injunction restraining the son from entering or remaining, etc.:—**Held**: a case for granting an injunction had not been made out; it was inadvisable to put it in the power of a father to get his son committed to prison for coming to visit him.—**WATERHOUSE v. WATERHOUSE** (1905), 94 L. T. 133; 22 T. L. R. 195; 50 Sol. Jo. 169.

Annotation:—**Distd. Stevens v. Stevens** (1907), 24 T. L. R. 20.

910. —.]—The ct. will, in a very grave case, grant an injunction at the instance of a mother to restrain her son from breaking & entering into her dwelling-house.—**STEVENS v. STEVENS** (1907), 24 T. L. R. 20; 51 Sol. Jo. 825.

SECT. 18.—APPLICATIONS TO PARLIAMENT.

911. Whether granted—Right to apply incident to applicant.]—Injunction to restrain the Grand Junction Water Works co. from applying to Parliament for an Act authorising the co. to procure its supply of water by means of an aqueduct from the river Colne instead of the Thames, as authorised by the existing Acts under which it was incorporated, refused. A ct. of equity will not, at the instance of a shareholder, restrain a joint stock co., incorporated by Acts of Parliament which prescribe its constitution & objects, from applying in its corporate capacity to Parliament, & from using its corporate seal & resources to obtain the sanction of the legislature to the remodelling of its constitution, or to a material alteration & extension of its object & powers. The right of making such an application is incident to a joint stock co. of that description.—**WARE v. GRAND JUNCTION WATER WORKS CO.** (1831), 2 Russ. & M. 470; 9 L. J. O. S. Ch. 169; 39 E. R. 472, L. C.

Annotations:—**Consd. Simpson v. Denison** (1852), 10 Harc. 51; **Lancaster & Carlisle Ry. v. N. W. Ry.** (1856), 2 K. & J. 293. **Reid. Parker v. River Dunn Navigation Co.** (1847), 1 De G. & Sm. 192; **Cooper v. Powis** (1850), 3 De G. & Sm. 688; **Re London, Chatham & Dover Ry. Arrangement Act, Ex p. Hartridge & Allender** (1869), 5 Ch. App. 672, n.

912. —.]—**TELFORD v. METROPOLITAN BOARD OF WORKS**, No. 789, *ante*.

that in the event of the road not being operated to the satisfaction of the Governor-in-Council of the Province, it should become the property of the Province free from incumbrance. Pltf., contending that this would invalidate his bonds & was a breach of a compromise made with him, sought to restrain defts. from applying for such

913. Jurisdiction of court.]—No case has been cited, in which this ct. has interfered to restrain parties from petitioning Parliament, or applying to Parliament for any law which they supposed would be granted; unless a very strong authority is produced for that purpose I should be disinclined to assume that jurisdiction (LORD COTTERHAM, C.).—*A.-G. v. MANCHESTER & LEEDS RY. CO.* (1839), 1 Ry. & Can. Cas. 453; 3 Jur. 379, L. C.

*Annotations:—*Consd. *Lancaster & Carlisle Ry. v. N. W. Ry.* (1856), 2 K. & J. 293; *Steele v. North Met. Ry.* (1867), 2 Ch. App. 237. *Folld. Re London, Chatham & Dover Ry. Arrangement Act, Ex p. Hartridge & Allender* (1870), 5 Ch. App. 671. *Mentd. Tawney v. Lynn & Ely Ry.* (1847), 16 L. J. Ch. 282; *A.-G. v. Birmingham & Oxford Junction Ry., G. W. Ry. & Birmingham, Wolverhampton & Dudley Ry.* (1851), 16 Jur. 113.

914. —.]—A ct. of equity has jurisdiction, if a proper case connected with private property or interest be made, to restrain a party by injunction from petitioning against a bill in Parliament. The S. ry. co. being leased to the C. Co., entered into an agreement for the sale of their railway to the L. Co., & it was a term of the agreement, that the purchase should be completed three weeks after an Act had passed for permitting the L. to amalgamate with the C. ry. co. It did not appear that any definite agreement was concluded between the C. & the L. co., but it was understood that a bill should be presented by the C. co. for the amalgamation of the two cos. The bill was presented & passed the Commons without opposition, but in the Lords the L. co. presented a petition against the bill. The S. co., fearing that if this Act did not pass, they would lose the benefit of their contract, filed a bill against the two other cos., praying an injunction to restrain the L. co. from opposing the bill in Parliament, & also specific performance of the agreement:—*Held*: the S. co. had not made out such a case as to induce a ct. of equity to exercise its jurisdiction by injunction.—*STOCKTON & HARTLEPOOL RY. CO. v. LEEDS & THIRSK & CLARENCE RY. COS.* (1848), 2 Ph. 666; 5 Ry. & Can. Cas. 691; 12 L. T. O. S. 305; 12 Jur. 735; 41 E. R. 1101, L. C.

*Annotation:—*Consd. *Lancaster & Carlisle Ry. v. N. W. Ry.* (1856), 2 K. & J. 293.

915. —.]—The Ct. of Ch. will, in proper cases, grant an injunction to restrain parties from applying to Parliament for a private Act, or an Act respecting property; but it will not do so merely upon the ground that such Act would interfere with existing rights, whether they exist by the tenure of property or by virtue of contract.

A landowner withdrew his opposition to a bill before Parliament, on the faith of an agreement with the railway co., that they should in the next session of Parliament apply for an Act authorising the formation of a branch railway to certain works belonging to such landowner. The co. obtained an Act in the following session, but afterward gave notice of their intention to apply for another Act,

legislation:—*Held*: as the purpose of the concession was to secure the construction & continued operation of the road, & the proposed legislation contained a proviso that the trustees of the bondholders should have notice before any forfeiture of the road, that was all that they had a right to expect, & pltf. was not entitled to the injunction prayed for.—*GREGORY v. CANADA IMPROVEMENT CO.* (1879), R. E. D. 358.—CAN.

912 ii. —.]—*BROTHERS OF CHRISTIAN SCHOOLS CORPN. v. A.-G. OF NEW BRUNSWICK* (1881), N. B. Dig. 656.—CAN.

912 iii. —.]—An injunction should

be granted restraining the submission of a local option bye-law in pursuance of Liquor License Act, when the affidavit verifying the petition does not contain the names of petitioners.—*BROOK v. ROBSON & SIFTON* (1914), 29 W. L. R. 897; 25 Man. L. R. 64; 7 W. W. R. 544; 19 D. L. R. 197.—CAN.

912 iv. —.]—An injunction will not be granted to restrain a co. from applying to Parliament for an Act to enlarge their powers, or to sanction an agreement with any other co.; but will be granted to restrain them from using the co.'s funds to defray the expenses of prosecuting such an application,

authorising them to abandon that branch:—*Held*: there was no ground for granting an injunction to restrain the co. from applying for such an Act.—*HEATHCOTE v. NORTH STAFFORDSHIRE RY. CO.* (1850), 2 Mac. & G. 100; 6 Ry. & Can. Cas. 358; 2 H. & Tw. 332; 20 L. J. Ch. 82; 14 Jur. 859; 47 E. R. 1710, L. C.

*Annotations:—*Appld. *Lancaster & Carlisle Ry. v. N. W. Ry.* (1856), 2 K. & J. 293. *Consd. Steele v. North Met. Ry.* (1867), 2 Ch. App. 237. *Reid. R. v. L. & Y. Ry.* (1852), 1 E. & B. 228; *De Mattos v. Gibson* (1859), 4 De G. & J. 276; *Re London, Chatham & Dover Ry. Arrangement Act, Ex p. Hartridge & Allender* (1869), 5 Ch. App. 672, n.; *Fothergill v. Rowland* (1873), L. R. 17 Eq. 132; *Keith, Prowse v. National Telephone Co.*, [1894] 2 Ch. 147; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37.

916. —.]—In a railway co. there were two classes of shareholders. A general meeting authorised the directors to apply to Parliament for an Act, which would very materially alter the existing rights & interests of the two classes *inter se*. Upon the application of a shareholder of one of such two classes, for an injunction to restrain the application to Parliament, & the use of the corporate seal for that purpose, the ct. refused to restrain the application to Parliament, or the use of the corporate seal for that purpose.—*STEVENS v. SOUTH DEVON RY. CO.* (1851), 13 Beav. 48; 7 Ry. & Can. Cas. 696; 20 L. J. Ch. 491; 17 L. T. O. S. 46; 15 Jur. 235; 51 E. R. 18.

*Annotations:—*Reid. *Re London, Chatham & Dover Ry. Arrangement Act, Ex parte Hartridge & Allender* (1869), 5 Ch. App. 672, n.; *A.-G. v. Lambeth, Vestry* (1888), 4 T. L. R. 257. *Mentd. Fooks v. South Western Ry.* (1853), 1 Sm. & G. 142.

917. — Grounds for exercise.]—*LANCASTER & CARLISLE RY. CO. v. NORTH WESTERN RY. CO.*, No. 693, *ante*.

918. —.]—A railway co. agreed to purchase the land of a landowner, & had a clause to that effect inserted in their Act, whereupon he withdrew his opposition to the Act. They afterwards applied to Parliament for an Act to enable them to abandon the branch which affected the land in question, & to repeal that clause:—*Held*: the ct. would not restrain the co. from making the application. The ct. has power to restrain an application to Parliament, but it is difficult to conceive a case in which it will be done.—*STEELE v. NORTH METROPOLITAN RY. CO.* (1867), 2 Ch. App. 237; 36 L. J. Ch. 540; 16 L. T. 192; 31 J. P. 406; 15 W. R. 597, L. C.

919. —.]—Although there is no doubt that the Ct. of Ch., by virtue of its jurisdiction *in personam*, has power to restrain an improper application to Parliament for a private Act, yet it is difficult to conceive a case in which it would be right for the ct. to exercise that power. Injunction restraining directors from promoting a bill discharged.—*Re LONDON, CHATHAM & DOVER RAILWAY ARRANGEMENT ACT, Ex p. HARTRIDGE & ALLENDER* (1869), 5 Ch. App. 671; 17 W. R. 946; *sub nom. Re LONDON, CHATHAM & DOVER*

when a monopoly is likely to be thereby created.—*M'DONNELL v. MIDLAND GREAT WESTERN RAILWAY OF IRELAND CO., M'DONNELL v. GRAND CANAL CO.* (1853), 5 Ir. Jur. 185.—IR.

912 v. —.]—Cts. of law will not interfere with the undoubted rights of public corpus, to apply to Parliament for an extension or modification of their rights & powers. The ct. refused to interdict a municipality from applying to Parliament before the termination of a monopoly for a limited period, granted by the municipality to a waterworks co., for authority to construct waterworks for the benefit of the inhabitants.—*KIMBERLEY WATER-*

Sect. 18.—Applications to Parliament. Sects. 19–27.]

RAILWAY ARRANGEMENT ACT, 1867, *Ex p.* LONDON, CHATHAM & DOVER RY. CO., 20 L. T. 718, L. JJ.

920. Covenant not to apply to Parliament—Injunction to restrain breach.]—LANCASTER & CARLISLE RY. CO. v. NORTH WESTERN RY. CO., No. 693, *ante*.

SECT. 19.—PARTNERS.

See PARTNERSHIP.

SECT. 20.—PATENT RIGHTS.

See, generally, PATENTS.

SECT. 21.—PAYMENT OR RECEIPT OF PENSIONS, ETC.

921. Payment of government annuity—Injunction on summary motion—Court of Chancery Act, 1841 (c. 5), s. 4.]—Under the above sect. an injunction may be obtained in a summary way to restrain the payment of a govt. annuity.—WATTS v. WATTS (1871), 40 L. J. Ch. 388; 24 L. T. 120; *sub nom. Ex p.* WATTS, 19 W. R. 400.

Assignment of pensions, allowances, etc.]—*See* CHOSSES IN ACTION, Vol. VIII., pp. 438, 439, 440, 479, Nos. 153, 157, 158, 169, 479.

SECT. 22.—PUBLICATION PREJUDICIAL TO PENDING PROCEEDINGS.

Speeches, etc., tending to defeat the ends of justice; generally, *see* CONTEMPT OF COURT, Vol. XVI., pp. 19 *et seq.*

922. Publication of proceedings of court—General rule.]—Pltfs. having discovered, in 1855, that defts. were using terms & trade-marks appropriated by themselves, filed their bill to restrain them from so doing, & moved for an injunction accordingly. The judge refused the motion on the ground that after so long a delay, this ct. would not grant an injunction in the first instance, but directed it to stand over, with liberty to pltfs. to bring such action as they might be advised. Pltfs. commenced proceedings at law, but in the meantime published in the newspapers & circulated as handbills amongst the trade, a report of the hearing of the motion, in which it was stated that “it was established in evidence that pltfs. were the first persons in this country to use the words” in question. No evidence whatever was gone into upon that occasion; & on this ground, as well as because the report would have the effect of prepossessing the public mind, & obstructing the course of justice during the litigation, defts. moved for an injunction to restrain the publication. The motion having been refused,

was renewed before the Lords Justices:—*Held*: although the ct. possessed the power of preventing the publication of its proceedings pending litigation it could not undertake to restrain every report published in the columns of a newspaper, which might appear to be unfair in any respect. The motion was therefore refused, but the costs of the application were ordered to be costs in the cause.—BROOK v. EVANS (1860), 29 L. J. Ch. 616; 3 L. T. 571, L. JJ.

Annotations:—*Consd.* Dunn v. Bevan, Brodie v. Bevan, [1922] 1 Ch. 276. *Mentd.* Tichborne v. Tichborne (1870), 18 W. R. 621.

923. ———.]—Pending litigation the ct. will restrain the publication by any of the parties to the suit of *ex p.* garbled accounts, calculated to prejudice the case of their opponents, of any of the proceedings in ct. or before the examiner. The circumstance that such publication is by way of defence, & in answer to similar publications, by the other side, although it may excuse the party sought to be restrained from the costs of the motion for that purpose, will not prevent the ct. from granting the injunction.—COLEMAN v. WEST HARTLEPOOL HARBOUR & RY. CO. (1860), 2 L. T. 766; 8 W. R. 734.

Annotation:—*Apld.* Kitcat v. Sharp (1882), 52 L. J. Ch. 134.

924. Statement of claim.]—A statement of claim, charging deft., in effect, with unfair & over-reaching conduct in his business, was circulated by pltfs. amongst some of, their & his, business correspondents before the hearing of the action:—*Held*: pltfs., having committed a contempt of ct., must pay the costs of a motion to commit; & injunction granted to restrain the publication or circulation of the statement of claim.—BOWDEN v. RUSSELL (1877), 46 L. J. Ch. 414; 36 L. T. 177.

925. Publication of notices—With reference to subject of suit.]—Jurisdiction of the ct. to grant or dissolve an injunction, or commit for contempt, in cases where pltfs. or defts., or other persons, publish notices or advertisements with reference to the subject of a suit, calculated to prejudice the rights, or misrepresent the relative position or character, of any of the parties to the cause.—MATTHEWS v. SMITH (1844), 3 Hare, 331; 67 E. R. 408.

Annotation:—*Refd.* *Re* General Exchange Bank (1866), 12 Jur. N. S. 465.

926. ——— Sermon.]—Deft. in a pending action, in which many of the inhabitants of a town were to be examined as witnesses, restrained from preaching a sermon upon the subject in his chapel in the town; also from issuing placards announcing his intention to preach the sermon.—MACKERTT v. HERNE BAY COMRS. (1876), 24 W. R. 845.

927. ——— Abusing party.]—An injunction was granted on motion in an action, to restrain a party to the action, from a threatened publication of circulars abusive of a party to, & tending to prejudice the fair trial of, the action.—KITCAT v. SHARP (1882), 52 L. J. Ch. 134; 48 L. T. 64; 31 W. R. 227.

Annotation:—*Refd.* Hubbard v. Woodfield (1913), 57 Sol. Jo. 729.

WORKS CO. v. KIMBERLEY BOROUGH COUNCIL (1902), 19 S. C. 404; 12 C. T. R. 758.—S. AF.

PART X. SECT. 22.

922 i. Publication of proceedings of court—General rule.]—The ct. will not interfere by way of interdict to prevent the publication of a report of proceedings in an open ct. of justice, British or foreign, including letters produced in evidence & read, when it is

not alleged that the report is unfair.—RIDDELL v. CLYDESDALE HORSE SOCIETY (1885), 12 R. (Ct. of Sess.) 976; 22 Sc. L. R. 657.—SCOT.

d. Publication of newspaper articles—Discussing transaction subject of libel action.]—During the course of an action for alleged libel contained in newspaper articles an injunction was allowed to pltf. against deft., the newspaper publisher, restraining the

continuance of articles discussing the transaction which had been the subject of the articles complained of, as tending to interfere with a fair trial of the action, the ct. before granting the injunction, having required pltf. to file an affidavit pledging his oath to the untruthfulness of the alleged libellous statements, such affidavit being accepted only as sufficient for the purposes of the application, & not affecting the trial of the action.—

928. Commenting on merits of action.]

Issue of circular by one party to an action containing statements on the merits of the case:—*Held*: a contempt of ct. & restrained by *interim* injunction.—*COATS (J. & P.) v. CHADWICK*, [1894] 1 Ch. 347; 63 L. J. Ch. 328; 70 L. T. 228; 42 W. R. 328; 10 T. L. R. 226; 38 Sol. Jo. 217; 8 R. 159.

Annotation:—*Reid. Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860.

929. — Containing charges against liquidator — Application for removal under voluntary winding up.]—Where a summons to remove a liquidator in a voluntary winding up is taken out on behalf of appct. & all other shareholders, the ct. will not, on the ground of contempt, restrain appct. from issuing a circular to the shareholders asking their support to the summons, though it contains charges against the liquidator, made *ex p.*, to justify the application.—*Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860; 70 L. J. Ch. 355; 17 T. L. R. 312; 8 Mans. 296.

SECT. 23.—RIPARIAN RIGHTS.

See, generally, EASEMENTS, Vol. XIX., pp. 145 *et seq.*; WATERS & WATER COURSES.

SECT. 24.—TRADE MARKS.

See TRADE MARKS.

SECT. 25.—TRESPASS.

See TRESPASS.

SECT. 26.—TRUSTS.

See, generally, TRUSTS & TRUSTEES.

SECT. 27.—WASTE.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 45 (1) (2) (3); & *generally*, LANDLORD & TENANT; MORTGAGE; REAL PROPERTY; SETTLEMENTS.

930. Who may bring action — Party claiming by adverse title.]—Injunction to restrain a party claiming by an adverse legal title from committing acts of trespass, alleged to be productive of irrepar-

able waste, refused, under the special circumstances of the case. *Semble*: although a man be in full & complete possession of an estate by a title adverse to another who claims it against him, & there be no privity between the parties, & the party in possession swear that his own title is just & valid, or that the title of his adversary is unjust & invalid, that state of things does not prevent a ct. of equity from interfering, before judgment at law or decree in equity, to restrain the party in possession from committing a waste upon the inheritance.—*HAIGH v. JAGGAR* (1845), 2 Coll. 231; 63 E. R. 712.

Annotations:—*Expld. Talbot v. Hope Scott* (1858), 4 K. & J. 96. *Reid. East Lancashire Ry. v. Hattersley* (1849), 8 Hare, 72; *Lowndes v. Bettie* (1864), 3 New Rep. 409; *Carrow v. Ferrior, Dunn v. Ferrior* (1868), 37 L. J. Ch. 569. *Mentd. Smith v. Smith* (1861), 8 Jur. N. S. 459.

931. — —.]—*TALBOT (EARL) v. HOPE SCOTT*, No. 939, *post*.

— *Ecclesiastical owner.]*—*See* AGRICULTURE, Vol. II., pp. 71, 72, Nos. 490, 491, 496.

932. Waste ceasing before trial.]—*A.-G. v. BURROWS* (1747), 1 Dick. 128; 21 E. R. 216; *sub nom. ANON.*, 3 Atk. 485, L. C.

933. —.]—(1) Injunction to stay waste refused, the acts of waste committed being trivial, & pltf.'s proceedings having been dilatory. (2) A small degree of waste manifesting an intent to do more is sufficient for the ct. to act upon.

In this case, when pltf. has permitted his father to go on for five or six years & suffered him to commit waste, under the notion that he was making improvements: or when it is admitted, that upon the filing of the bill, he desisted, though I am ready to say that if another tree be cut down, if any act of waste be done in future, pltf. shall have an injunction, & though I do not mean to sanction the acts that have been done, yet under the form in which this application is made, I cannot grant it (*LORD ELDON, C.*).—*BARRY v. BARRY* (1820), 1 Jac. & W. 651; 37 E. R. 516, L. C.

Annotation:—*As to* (2) *Reid. Hony v. Hony* (1824), 1 Sim. & St. 568.

934. Threatened waste.]—*BARRY v. BARRY*, No. 933, *ante*.

935. —.]—Where equitable waste of one kind only has been done or threatened the injunction is not to be extended to equitable waste of other kinds. *Semble*: usual injunction in cases of equitable waste not extended to trees which protect the premises from the effect of the sea.

The ct. grants injunctions against waste, when it is done only in a slight degree, or when threatened. The injunction here went too far: nothing was done by defts. but sending the notice; which, if R. really pointed out the ornamental timber, admits the construction put upon it, of an

CAMPBELL v. SUN PRINTING & PUBLISHING Co., [1921] 2 W. W. R. 987.—*CAN.*

e. Publication of memorial & queries for opinion of counsel.]—*Interim* interdict granted against circulation of a memorial & queries for opinion of counsel printed & alleged to be circulated by one of the parties in a cause depending before the ct.—*MILLER v. MITCHELL* (1835), 13 Sh. (Ct. of Sess.) 644.—*SCOT.*

PART X. SECT. 27.

f. Who may bring action—Remainderman.]—A person who has an interest in remainder, subject to an estate for life, cannot maintain a bill in respect of merely permissive waste by whomsoever committed.—*ZIMMERMAN v. O'REILLY* (1868), 14 Gr. 646.—*CAN.*

g. —.]—Such proof of possession as would maintain a suit at law against a wrongdoer, is sufficient

prima facie proof of title to enable a party to obtain a decree for an injunction to restrain waste.—*WALKER v. FRIEL* (1869), 16 Gr. 105.—*CAN.*

h. —.]—An injunction to stay waste at the suit of the devisee in trust against the heir-at-law in possession who disputed the will, will not be granted.—*FINGAL v. BLAKE* (1826), 2 Mol. 542.—*IR.*

k. —.]—The ct. will not entertain a motion for an injunction to restrain waste, unless the title is clear.—*LOWE v. LUCEY* (1838), 1 I. Eq. R. 93.—*IR.*

l. —.]—When the relation of landlord & tenant exists between parties, the ct. sometimes interferes by injunction to restrain waste, though the *locus in quo*, being the landlord's property, is not any part of the demised premises. Unless that relation exists, the ct. will not interfere. When waste on the demised premises

was commenced during the tenancy, & continued, after the tenancy had determined, by persons claiming under the late tenant, the ct., after the determination of the tenancy, refused to grant an injunction.—*WRIXON v. CONDAN* (1839), 1 I. Eq. R. 380.—*IR.*

934 i. Threatened waste.]—*WHITE v. NELLES* (1885), 11 S. C. R. 587.—*CAN.*

934 ii. —.]—*A.*, holding meadows & pasture lands under a lease for lives renewable for ever, demised part of the premises to B. for a similar term, with a covenant to keep & deliver up the premises in tenantable order, etc., & with a power of surrender at the end of every three years. B. assigned his interest. His assignees being about to convert the premises into a public cemetery, A.'s representatives obtained an injunction to prevent them.—*HUNT v. BROWNE* (1837), Sau. & Sc. 178.—*IR.*

Sect. 27.—Waste. Sect. 28: Sub-sect. 1, A. (a) & (b).]

intention to cut it down (LORD ELDON, C.).—*COFFIN v. COFFIN* (1821), Jac. 70; 37 E. R. 776, L. C.

936. —.]—An injunction to restrain a tenant for life, unimpeachable of waste, from cutting trees which have not attained their full growth & maturity, cannot be sustained. The ct. will not maintain an injunction against equitable waste, unless it be proved that equitable waste either has been committed, or is threatened.—*POTTS v. POTTS* (1825), 3 L. J. O. S. Ch. 176.

937. Malicious or destructive waste.] — A. on marriage of his son, settles a messuage on himself for life, *sans* waste, remainder to his son. The father, though his estate for life be *sans* waste, cannot pull down the house nor commit any voluntary waste therein; if he does the ct. will grant an injunction to stay waste, & compel the father to put the messuage in as good repair as before the waste committed.—*VANE v. BARNARD* (LORD) (1716), 2 Vern. 738; 1 Salk. 161; 1 Eq. Cas. Abr. 399; 23 E. R. 1082; *sub nom.* *BERNARD'S* (LORD) CASE, Gilb. Ch. 127; Prec. Ch. 454, L. C.

*Annotations:—**Appld.* *London (Bp.) v. Web* (1718), 1 P. Wms. 527. *Consd.* *Aston v. Aston* (1749), 1 Ves. Sen. 264. *Refd.* *Rolt v. Somerville* (1737), 2 Eq. Cas. Abr. 759; *Packington's Case* (1744), 3 Atk. 215; *Micklethwait v. Micklethwait* (1857), 26 L. J. Ch. 721; *Turner v. Wright* (1860), 2 De G. F. & J. 234; *Baker v. Sebright* (1879), 13 Ch. D. 179. *Mentd.* *Lempster v. Pomfret* (1752), Amb. 154; *Pyne v. Dor* (1785), 1 Term Rep. 55; *Powys v. Blagrove* (1854), Kay, 495.

938. —.]—Lessor for years *sans* waste remainder in fee to a bishop, lesser enjoined from digging the ground for brick.—*LONDON (BP.) v. WEB* (1718), 1 P. Wms. 527; 2 Eq. Cas. Abr. 758; 24 E. R. 501, L. C.

*Annotation:—**Mentd.* *Chamberlyne v. Dummer* (1792), 3 Bro. C. C. 549.

939. —.]—The authorities as to the jurisdiction of this ct. to interfere at the instance of parties claiming real property under a legal title, by appointing a receiver of the rents & profits, & by injunction to restrain waste, examined. They establish these propositions: (1) In the absence of fraud, & where there is no privity between the parties, this ct. will not interfere, at the instance of a person so claiming, to grant a receiver against

parties in possession. (2) Nor will it interfere, at the like instances, to restrain waste, except malicious or destructive waste, *e.g.* by pulling down the capital messuage, stripping the estate of its timber, or other like acts, which no owner would do, or which would destroy the property before they could be arrested at law. (3) But flagrant acts of this exceptional character would at the present day be restrained, & that before judgment at law, & notwithstanding pltf. were out of possession, & his title denied on oath by deft.—*TALBOT (EARL) v. HOPE SCOTT* (1858), 4 K. & J. 96, 139; 27 L. J. Ch. 273; 31 L. T. O. S. 392; 4 Jur. N. S. 1172; 6 W. R. 269; 70 E. R. 40, 58.

*Annotations:—**As to* (1) *Consd.* *Carrow v. Ferrior*, *Dunn v. Ferrior* (1868), 3 Ch. App. 719; *Foxwell v. Van Grutten*, [1897] 1 Ch. 64. *Refd.* *Wright v. Wilkin* (1859), 7 W. R. 337; *Berry v. Keen* (1882), 51 L. J. Ch. 912. *As to* (2) *Refd.* *Wright v. Wilkin* (1859), 7 W. R. 337. *As to* (3) *Refd.* *Lowndes v. Bettie* (1864) 33 L. J. Ch. 451.

940. —.]—*BARRY v. BARRY*, No. 933, *ante*.

941. Trivial or slight waste.]—*BARRY v. BARRY*, No. 933, *ante*.

942. —.]—*COFFIN v. COFFIN*, No. 935, *ante*.

943. —.]—*DOHERTY v. ALLMAN*, No. 14, *ante*.

944. Permissive waste.]—A trustee to whom real property is devised in trust to one for life cannot interfere with the possession of the equitable tenant for life, because he neglects to keep the property in repair; but if the tenant for life should be committing active waste the trustee may interfere, at least if the parties entitled in remainder are under disability.

Cts. of equity have no means of interfering in cases of permissive waste by a tenant for life of real estate.—*POWYS v. BLAGRAVE* (1854), 4 De G. M. & G. 448; 2 Eq. Rep. 1204; 24 L. J. Ch. 142; 24 L. T. O. S. 17; 2 W. R. 700; 43 E. R. 582, L. C.

*Annotations:—**Refd.* *Warren v. Rudall*, *Ex p. Godfrey* (1860), 1 John. & H. 1; *Barnes v. Dowling* (1881), 44 L. T. 809; *Re Williams*, *Andrew v. Williams* (1884), 52 L. T. 41. *Mentd.* *Re Hotchkys*, *Freke v. Calmady* (1886), 32 Ch. D. 408; *Re Cartwright*, *Avis v. Newman* (1889), 41 Ch. D. 532; *Re Freeman*, *Dimond v. Newburn*, [1898] 1 Ch. 28; *Blackmore v. White*, [1899] 1 Q. B. 293.

See Law of Property Act, 1925 (c. 20), s. 135.

945. Ameliorating waste.]—*DOHERTY v. ALLMAN*, No. 14, *ante*.

937 i. Malicious or destructive waste.]—One tenant in common will be restrained at the suit of a co-tenant from digging earth for bricks on the joint property.—*DOUGGALL v. FOSTER* (1854), 4 Gr. 319.—CAN.

937 ii. —.]—A tenant in common, upon satisfying the ct. that the cutting of the timber by his co-tenant operates to the destruction of the inheritance, is entitled to an injunction.—*PROUDFOOT v. BUSH* (1859), 7 Gr. 518.—CAN.

937 iii. —.]—The right to restrain waste, involved in the removal by a tenant of a building forming part of the freehold, is clear.—*GRAY v. MACLENNAN* (1886), 3 Man. L. R. 337.—CAN.

937 iv. —.]—Where deft., by leave & licence of four of the tenants in common, entered a wood in which pltf. was the owner of a five-eighth interest, & cut eight cords of wood thereon, an injunction was refused as the cutting did not amount to a destruction of the common property.—*HERSEY v. MURPHY* (1921), 48 N. B. R. 65.—CAN.

937 v. —.]—A lessee for lives renewable for ever will be restrained from committing waste on the demised premises by cutting turf, though it

appears that the tenants had immemorially cut turf.—*WATERPARK (LORD) v. AUSTEN* (1822), 1 Jo. Ex. Ir. 627, n.—IR.

937 vi. —.]—Tenant for lives renewable for ever, though unimpeachable of waste, will be restrained from felling ornamental timber, or timber too young for cutting, or from felling timber in an unhusbandlike manner; but an intention on the part of the tenant to commit such acts must be shown to the ct. in order to induce it to interfere by injunction.—*PENTLAND v. SOMERVILLE* (1851), 2 I. Ch. R. 289; 4 Ir. Jur. 4, 335.—IR.

941 i. Trivial or slight waste.]—Where an injunction to stay waste was continued at the hearing, & the waste committed did not exceed \$20, the ct. refused to direct any account, & left the amount of the waste to be dealt with in any action for mesne profits which pltf. might bring.—*RAVEN v. LOVELESS* (1865), 11 Gr. 435.—CAN.

945 i. Ameliorating waste.]—A *zamindar* sued for an injunction to compel deft., who held agricultural lands comprised in the *zamindari* with occupancy rights, to demolish a dwelling-house which he had erected thereon for purposes not connected with agriculture & to restrain him from

altering the character of the land:—*Held*: pltf. was entitled to the injunction sued for.—*RAMANADHAN v. ZAMINDAR OF RAMNAD* (1893), 1 L. R. 16 Mad. 407.—IND.

945 ii. —.]—A lessee of lives renewable for ever will be restrained from committing waste on the demised premises by cutting turf, although it appear the bog cut out was converted into pasture land, & that the ground was improved by the waste.—*ANON.* (1822), 1 Jo. Ex. Ir. 627, n.—IR.

945 iii. —.]—*WHITE v. WALSH* (1829), 1 Jo. Ex. Ir. 626, n.—IR.

945 iv. —.]—Waste will be restrained in Chancery, although the act done may lead to the improvement of the land, if it immediately occasions any damage to the inheritance.—*COPPINGER v. GUBBINS* (1846), 9 I. Eq. R. 304; 3 Jo. & Lat. 397.—IR.

945 v. —.]—In an action for an injunction:—*Held*: it was open to deft. to show that the acts complained of were meliorative waste, & if so, the ct. would not restrain him by injunction.—*PALMER v. M'CORMICK* (1890), 25 L. R. Ir. 110, 120.—IR.

m. Lease containing penalty clause.]—The ct. will not grant an injunction

946. —.]—Deft. held a farm under a twenty-one years' lease from pltf., which contained a covenant by the lessee to cultivate the farm in a good, proper, & husbandlike manner, according to the best rules of husbandry practised in the neighbourhood. Deft. claimed the right to erect glass-houses on arable land, part of the demised premises, & to cultivate tomatoes, mushrooms, grapes, & the like for the London market, a mode of cultivation which was being practised on other farms in the neighbourhood. Pltf. sought to restrain him from so doing:—*Held*: this mode of cultivation was not prohibited by the express provisions of the lease, & whether it did or did not amount technically to waste, it was "meliorating" waste, in respect of which an injunction ought not to be granted, & the action was dismissed with costs.—*MEUX v. COBLEY*, [1892] 2 Ch. 253; 61 L. J. Ch. 449; 66 L. T. 86; 8 T. L. R. 173.

Annotations:—*Mentd. Re Morse & Dixon* (1917), 87 L. J. K. B. 1; *I. R. Comrs. v. Ransom* (1918), 119 L. T. 369.

947. —.]—A public body in 1844 let for ninety-nine years land with buildings on it used as barracks to the War Department, who covenanted to repair, uphold & keep "the said messuages & buildings, & other the demised premises" in all necessary reparations during the term. An Act of Parliament passed in 1853 recited that the bishop of D. & the public body respectively claimed this & other land, & that litigation having taken place between them, but without any decision, they were desirous of preventing further litigation & of giving up their interests in the property; & by the Act the property was vested in a corpn. managing the S. orphan asylum, freed from all claims of the bishop & of the public body, "but subject to the existing leases of the same hereditaments or any part thereof." In 1911 the lease of 1844 was assigned to certain river comrs. who proposed to connect the demised property with their quay by a railway which was to pass through a retaining wall on the property & along a cutting to be made thereon. These works involved the pulling down of part of the wall, & of two small buildings on the land which had been erected subsequently to the date of the lease. These works would, however, rather improve the property than not:—*Held*: the covenant to repair was not a general covenant to repair, but one which only concerned the particular premises mentioned, & therefore did not include buildings erected after the date of the lease, & having regard to the term having twenty-seven years still to run, any damages recoverable by the reversioners for the alteration in wall would be only nominal, & having regard to these things, & to the fact that the covenant sought to be enforced was an affirmative & not a negative covenant, & the waste complained of was ameliorating waste, an injunction at the suit of the asylum to restrain the comrs. from carrying out their proposals would not be granted.—*SUNDERLAND ORPHAN ASYLUM v. RIVER WEAR COMRS.*, [1912] 1 Ch. 191; 81 L. J. Ch. 269; 106 L. T. 288.

Equitable waste—Destruction of ornamental timber.—*See AGRICULTURE*, Vol. II., pp. 107, 108, 109, Nos. 896–915.

—.]—*See, also*, Nos. 930, 937, 939, *ante*.

Cutting down trees.—*See AGRICULTURE*, Vol. II., pp. 83 *et seq.*

SECT. 28.—RESTRAINT OF LEGAL PROCEEDINGS.

SUB-SECT. 1.—IN ENGLISH COURTS.

A. Civil Proceedings.

(a) In General.

948. **Mandamus.**—Demurrer to *mandamus* allowed; so to indictment, information, or prohibition.

This ct. has no jurisdiction to grant an injunction to stay proceedings on a *mandamus* nor to an indictment nor to an information nor to a writ of prohibition (LORD HARDWICKE, C.).—*MONTAGUE (LORD) v. DUDMAN* (1751), 2 Ves. Sen. 396; 28 E. R. 253, L. C.

Annotation:—*Mentd. R. v. Ambergate, etc. Ry.* (1852), 17 Q. B. 957.

Proceedings in High Court.—*See Supreme Court of Judicature (Consolidation) Act*, 1925 (c. 49), s. 41; & *generally*, PRACTICE.

— **Jurisdiction of county court to restrain.**—*See COUNTY COURTS*, Vol. XIII., p. 472, No. 210.

Proceedings in county court.—*See COUNTY COURTS*, Vol. XIII., p. 474, No. 240.

Proceedings in Mayor's Court.—*See MAYOR'S COURT*, LONDON.

Proceedings in palatine courts.—*See COURTS*, Vol. XVI., pp. 194, 196, Nos. 985, 1009 *et seq.*

Proceedings against officer of the court.—*See COURTS*, Vol. XVI., p. 177, Nos. 825, 826.

Proceedings in police court.—*See CROWN PRACTICE*, Vol. XVI., p. 376, No. 2139.

Injunction as alternative to writ of prohibition.—*See CROWN PRACTICE*, Vol. XVI., p. 376, Nos. 2137–2140.

Proceedings in bankruptcy.—*See BANKRUPTCY*, Vol. V., pp. 995, 996, 1018, 1182, Nos. 8123–8130, 8305, 8307, 9555.

Proceedings against companies—Winding up.—*See COMPANIES*, Vol. X., pp. 834, 846, 876, 959–973, 1011–1015, Nos. 5447–5452, 5576, 5577, 5947.

Where Crown property affected.—*See CONSTITUTIONAL LAW*, Vol. XI., pp. 521, 527, Nos. 272, 316.

Proceedings between husband & wife.—*See HUSBAND & WIFE*, Vol. XXVII., p. 548, No. 6000.

(b) Special Tribunals.

949. **Competency of tribunal.**—(1) A canal co. was authorised by its Act, to purchase the coal, which the safety of the canal required to be left unworked. The purchase of part was delayed many years, & in the meantime a lease had been granted by the owner to a coal worker. The co. purchased the interest of the owner:—*Held*: the coal worker was also entitled to compensation. No equity can be founded on an allegation that a ct. legally constituted is not properly competent to decide questions within its jurisdiction; & where the legislature has given jurisdiction to a ct. provided by the Act, & has made its decision final, if any inconvenience arises from the legal exercise of the jurisdiction, the legislature alone can supply a remedy.

(2) A canal Act provided, that in case the co. & the coal owner could not agree as to the amount of compensation for the coal taken for the purposes of the canal, it should be settled by a jury summoned by the comrs., whose verdict was "to be conclusive, & should not be removed, by *certiorari* or other process whatever, into any of the cts. of record at Westminster, or any other ct." A bill

Sect. 28. Restraint of legal proceedings: Sub-sect. 1, A. (b), & B.; sub-sects. 2 & 3. Sects. 29 & 30. Part XI. Sect. 1: Sub-sect. 1, A.]

was filed, praying an injunction to restrain proceedings before a jury, on the ground that deft. was entitled to no compensation, & that the special jurisdiction provided by the Act was not so constituted as to be likely to come to a just conclusion:—*Held*: pltf. were not entitled to an injunction if deft. was entitled to any compensation, the amount of which had to be ascertained; *qu.*: whether this ct. had any jurisdiction to interfere in the matter, if it had clearly appeared that deft. was entitled to no compensation.—*BARNSELY CANAL CO. v. TWIBELL* (1844), 7 Beav. 19; 3 Ry. & Can. Cas. 471; 13 L. J. Ch. 434; 40 E. R. 969; *affd.*, 3 Ry. & Can. Cas. 485, L. C.

Annotation:—*As to* (1) *Refd.* *Jolcey & Eden's Exors. v. N. E. Ry.*, [1907] 1 K. B. 402.

950. Jury to assess damages.]—*BARNSELY CANAL CO. v. TWIBELL*, No. 949, *ante*.

951. Inclosure commissioners.]—An application had been made, under Inclosure Act, 1845 (c. 118), to the Inclosure Comrs., to inclose certain lands alleged by the parties applying to be common lands, but alleged by pltf. to be his own exclusive property. The Comrs. had given time to pltf. to vindicate his rights, but he brought no action at law. He afterwards filed his bill to restrain defts. from proceeding before the Comrs.:—*Held*: this ct. had no jurisdiction to interfere.—*HARRIS v. JOSE* (1866), 13 L. T. 699; 14 W. R. 303.

952. —.]—*BEAUCHAMP (EARL) v. DARBY*, [1866] W. N. 308.

—*See, further*, COMMONS, Vol. XI., p. 84, Nos. 1027–1029.

953. Fraud alleged.]—*BEAUCHAMP (EARL) v. DARBY*, [1866] W. N. 308.

B. Criminal Proceedings.

954. Jurisdiction of court—To restrain proceedings—At suit of Crown.]—Pltfs. claiming an exclusive right of fishery, brought their bill to be quieted in the possession of it, & to prevent multiplicity of actions. Defts. by answer insist on a custom they have of fishing on the borders of their land. Pending the suit, pltfs. indict several persons in the ct. of sessions for the city of York for fishing under an authority from defts.; & now, upon affidavit that the mayor & aldermen, pltfs., are in commission of the peace for York, & consequently would be judges of their own case, defts. moved for an injunction to stay proceedings on these indictments:—*Held*: though this ct. cannot grant an injunction to stay a criminal proceeding at the suit of the Crown, so as to re-

strain the A.-G., yet as this is an indictment for trespass in which was no violence, & is to try a civil right, which is the subject of an action, it can order prosecutor, who is pltf. now before the ct., not to proceed.—*YORK CORPN. v. PILKINTON* (1742), 9 Mod. Rep. 273; 2 Atk. 302; 88 E. R. 447; *sub nom.* *PILKINGTON v. YORK (CITY)*; 1 Dick. 84, L. C.

Annotations:—*Distd.* *Montague v. Dudman* (1751), 2 Ves. Sen. 396. *Consd. & Distd.* *Saull v. Browne* (1874), 10 Ch. App. 64. *Dtd.* *Kerr v. Preston Corpn.* (1876), 6 Ch. D. 463. With the exception of that case before Lord Hardwicke, there is no instance in which a ct. of equity has interfered in criminal proceedings (*JESSEL, M.R.*). *Refd.* *Re Briton Medical & General Life Assco. Asscn.* (1886), 32 Ch. D. 503; *Grand Junction Waterworks Co. v. Hampton U. C.*, [1898] 2 Ch. 331.

955. — Civil proceedings pending.]—*YORK CORPN. v. PILKINTON*, No. 954, *ante*.

956. —.]—Unless the cases raised & the objects sought are identical the ct. will not prevent a pltf. in this ct. from proceeding in a criminal ct. against defts. to the suit in this ct.—*SAULL v. BROWNE* (1874), 10 Ch. App. 64; 44 L. J. Ch. 1; 31 L. T. 493; 39 J. P. 181; 23 W. R. 50; 13 Cox, C. C. 30, L. C. & L. JJ.

Annotations:—*Folld.* *Kerr v. Preston Corpn.* (1876), 6 Ch. D. 463. *Distd.* *Re Briton Medical & General Life Assco. Asscn.* (1886), 32 Ch. D. 503. *Refd.* *Grand Junction Waterworks Co. v. Hampton U. C.*, [1898] 2 Ch. 331.

957. — Indictment.]—*MONTAGUE (LORD) v. DUDMAN*, No. 948, *ante*.

958. To restrain proceedings for recovery of penalty.]—A ct. of equity has no jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by an Act of Parliament for a breach of its enactments. A board having statutory power to consent in writing to a particular act is not bound by tacit acquiescence. Pltfs., owners of a house & area situate in & fronting a street, altered the front of the house by throwing out bay windows projecting beyond the street line of frontage but not beyond the limits of the area. After the completion of the alterations defts., the local authority threatened pltfs. with summary proceedings before the justices for the recovery of penalties under the Public Health Act, 1875 (c. 55), on the ground that pltfs. had set forward their building without the written consent of defts. under sect. 156 of the Act. Pltfs. then moved *ex p.* for an injunction to restrain defts. from taking these proceedings, alleging: (a) as the alterations had been made over their own property defts. in threatening proceedings were acting *ultra vires*; (b) defts. having had notice of pltfs.' intention to make the alterations were bound by acquiescence; (c) the justices had no jurisdiction as defts. had not made their complaint within six

PART X. SECT. 28, SUB-SECT. 1.—B.

n. Court of Conciliation & Arbitration.]—An agreement was made by an organisation of employees with an employer that it would not make any further claims on the employer in relation to industrial matters for a period of three years. Within that time the organisation commenced proceedings in the Commonwealth Ct. of Conciliation & Arbitration in which further demands were made on the employer in relation to industrial matters:—*Held*: the High Ct. had jurisdiction by injunction to restrain the organisation from instituting such proceedings.—*WILLIAMSON (J. C.), LTD. v. MUSICIANS' UNION OF AUSTRALIA* (1912), 15 C. L. R. 636.—*AUS.*

o. —.]—An agreement between an organisation of employees & an employer, made at a time when there is an industrial dispute extending beyond the limits of one State to which

they are parties, & which is intended by both of them to be operative only as an industrial agreement within Commonwealth Conciliation & Arbitration Act, 1904–1911, or as an agreement certified & filed under sect. 24 of that Act, is not operative at all if it is not such an industrial agreement or is incapable of being certified & filed under sect. 24, & the High Ct. will not interfere by injunction to restrain the organisation from including the employer in proceedings in the Commonwealth Ct. of Conciliation & Arbitration in respect of that dispute.—*AUSTRALIAN AGRICULTURAL CO. v. FEDERATED ENGINE DRIVERS & FIREMEN'S ASSOCN.* (1913), 17 C. L. R. 261.—*AUS.*

p. Unauthorised proceedings.]—The principle that where a special tribunal for the determination of any matter exists, the ct. should not, as a rule, interfere by injunction, is inapplicable where the injunction is

granted merely for the purpose of preventing unauthorised proceedings.—*PARK v. MACDONALD* (1915), 8 W. W. R. 431; 25 D. L. R. 792.—*CAN.*

q. Stewards of racing club.]—On a motion to rescind an *interim* injunction:—*Held*: the principles as to pecuniary interest which apply to ordinary judicial bodies are not applicable to the stewards of a racing club; such stewards constitute a peculiar & special tribunal, to which, to the knowledge of parties who, by racing under its rules, have accepted such tribunal, considerations & conditions apply which do not exist in ordinary judicial bodies; the possibility that the stewards have to decide matters in which the interests of the Jockey Club are involved must have been anticipated by the parties; such an interest does not preclude the stewards from considering & deciding a protest. In the absence of evidence that they

months after the alleged offence as required by sect. 252 of the Act. Motion refused.—*KERR v. PRESTON CORPN.* (1876), 6 Ch. D. 463; 46 L. J. Ch. 409; 25 W. R. 265.

Annotations:—*Distd.* *Re Briton Medical & General Life Assce. Asscn.* (1886), 32 Ch. D. 503. *Consd.* *Grand Junction Waterworks Co. v. Hampton U. C.*, [1898] 2 Ch. 331. *Refd.* *Hedley v. Bates* (1880), 42 L. T. 41; *Barlow v. St. Mary Abbott's, Kensington Vestry* (1883), 31 W. R. 514; *Preston Corpn. v. Fullwood L. B.* (1885), 53 L. T. 718; *Merrick v. Liverpool Corpn.*, [1910] 2 Ch. 449; *A.-G. v. Donby*, [1925] Ch. 596. *Mentd.* *Re McIntosh & Pontypridd Improvements Co., Re Pontypridd (Mill Street & Rhondda Road) Improvements Act, 1890, & Lands Clauses Act, 1845* (1891), 61 L. J. Q. B. 164; *Yabbicom v. King*, [1899] 1 Q. B. 444.

— **Proceedings against companies in liquidation for penalties.**—*See COMPANIES*, Vol. X., p. 962, Nos. 6591,

SUB-SECT. 2.—IN FOREIGN COURTS.

In general.—*See CONFLICT OF LAWS*, Vol. XI., pp. 444, 477–485, Nos. 1034–1037, 1331–1373.

Creditors suing abroad—Bankruptcy proceedings pending.—*See BANKRUPTCY*, Vol. V., pp. 1008, 1137, Nos. 8219, 8221, 9234.

Proceedings by & against companies.—*See COMPANIES*, Vol. X., pp. 795, 880, 960, 963, 1204, Nos. 5017, 5981, 6579, 6605, 8525, 8526.

SUB-SECT. 3.—ARBITRATION.

Restraint of proceedings pending arbitration.—*See ARBITRATION*, Vol. II., pp. 363, 367, 368, Nos. 324, 346, 350.

Restraint of arbitration.—*See ARBITRATION*, Vol. II., pp. 377 *et seq.*

Restraint of proceedings to assess compensation.—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., pp. 187, 188.

SECT. 29.—RESTRAINT OF AGENT FROM CONTINUING TO ACT.

959. Agent given right to reside in premises

Notice to quit—Refusal to leave.—*SPURGIN WHITE*, No. 907, *ante*.

SECT. 30.—OTHER PURPOSES.

Fraudulent & voidable conveyances—Restraint from exercise of power thereunder.—*See FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., p. 221, Nos. 516, 517.

Protection of property of bankrupt.—*See BANKRUPTCY*, Vol. IV., p. 42, Nos. 365, 366.

Restraint of distress.—*See BANKRUPTCY*, Vol. V., pp. 956, 957, 1089, 1094, Nos. 7842–7846, 8913, 8939; *DISTRESS*, Vol. XVIII., pp. 394, 395, Nos. 1360–1370.

Restraint of negotiation of negotiable instruments.—*See BILLS OF EXCHANGE*, Vol. VI., pp. 208, 209, 454, Nos. 1277–1293, 2894.

Restraint of removal & sale.—*See BILLS OF SALE*, Vol. VII., pp. 131, 132, Nos. 743–753.

Restraint in relation to burial & cremation.—*See BURIALS*, Vol. VII., pp. 528, 549, 550, 555, Nos. 78, 275, 279, 316.

Restraint of publication of letters.—*See COPYRIGHT*, Vol. XIII., pp. 200, 201, Nos. 355, 358–373.

Restraint of disturbance of easements.—*See EASEMENTS*, Vol. XIX., pp. 187–196.

Restraint from declaring office void.—*See ELECTIONS*, Vol. XX., p. 194, Nos. 1699, 1700.

Restraint on parental control of children.—*See INFANTS*, pp. 256–274, *ante*.

Restraint of marriage with infant wards of court.—*See INFANTS*, pp. 341, 342, Nos. 2098–2110, *ante*.

Restraint of infringement of market rights.—*See MARKETS*.

Restraint of receiver acting ultra vires.—*See RECEIVERS*.

Protection of receiver in possession.—*See RECEIVERS*.

Restraint of solicitor—Renewal of certificate.—*See SOLICITORS*.

Part XI.—Procedure.

SECT. 1.—PARTIES.

SUB-SECT. 1.—PLAINTIFF.

A. In General.

960. **Must have sufficient interest—Remainderman—Waste.**—The ct. will grant an injunction at the suit of a ground landlord to stay waste in an under lessee, who holds by lease from the original lessor. A remainderman in fee may have an injunction to stay waste in the first tenant for life notwithstanding an intermediate estate for life.—*FARRANT v. LOVEL* (1750), 3 Atk. 723; 26 E. R. 1214; *sub nom.* *FARRANT v. LEE*, Amb. 105, L. C. *Annotation*:—*Consd.* *Harper v. Aplin* (1886), 54 L. T. 383.

had prejudged the matter, or were actuated by improper or discreditable motives, or had identified themselves with one aspect of the point in dispute so as to make it inequitable that they should be permitted to decide it, the ct. refused to make the *interim* injunction absolute.—*O'BRIEN v. BOYLE* (1893), 13 N. Z. L. R. 69.—N.Z.

PART XI. SECT. 1, SUB-SECT. 1.—A.

r. Must have sufficient interest.—*Deft.* was engaged in making boilers

& gas receivers, in the manufacture of which it was necessary to join together pieces of iron, about an inch thick, by riveting, which produced noises, continuing from seven in the morning until six o'clock at night, rendering the occupation of the house of *pltf.*'s wife, which was only 15 feet distant, & in which they lived, almost impossible, & seriously interfering with her health. Upon a bill filed by *pltf.*, the ct. granted an interlocutory injunction restraining *deft.* from continuing the boiler-making in such a

961. ——— & tenants—**Ejectment of tenants by receiver.**—Motion by a remote remainderman & tenants, to restrain receiver from ejecting tenants, refused, with costs; their interest not being sufficient.—*WYNNE v. NEWBOROUGH (LORD)* (1790), 1 Ves. 164; 3 Bro. C. C. 88; 30 E. R. 282, L. C.

Annotation:—*Mentd.* *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305.

962. ——— **Reversioner—Waste.**—*ELIAS v. SNOWDON SLATE QUARRIES CO.*, No. 503, *ante*.

963. ——— **Trustee—Remaindermen under disability—Waste.**—*POWYS v. BLAGRAVE*, No. 944, *ante*.

manner as to be a nuisance to *pltf.* & his premises:—*Held*: reversing this order, the wife was the proper person to file the bill, for, as an injury to property is the ground of jurisdiction in cases of nuisance, the owner of the property is the proper party to complain. An application made by counsel to add the wife as a party, in order to meet the difficulty, authority having been given by her, was refused on the ground that the suit was not merely improperly constituted, but that, the husband having no locus

Sect. 1.—Parties: Sub-sect. 1, A. & B. (a) & (b) i.

964. Judgment creditor—Waste.]—The ct. will not grant an injunction to stay waste at the instance of a judgment creditor, in a suit by him against the heir & administrator of the debtor.—*LEAKE v. BECKETT* (1827), 1 Y. & J. 339; 148 E. R. 701.

965. — Agent—Waste.]—Bill by a purchaser from a mtgee. against the mtgor., & A. his agent, who was made a deft., as an accounting party in respect of the receipt of rents of the mortgaged estate. Pltf. obtained an order for a receiver, & before the receiver was appointed, proceeded to cut timber upon the estate. An application by A. for an injunction against pltf. was refused, on the ground that A. had no authority from his principal to make the application, & had no interest in the matter.—*HUNTER v. NOCKOLDS* (1846), 15 L. J. Ch. 320; 7 L. T. O. S. 27; 10 Jur. 771.

966. — Spes successionis.]—*Re ASHTON* (1900), 44 Sol. Jo. 429.

967. Must rely on own equity.]—The ct. will not interfere on behalf of a pltf., who claims relief, not through direct equities of his own, but indirectly through the equities of other parties, on which equities those parties themselves do not insist.—*ROBERTS v. BOZON* (1825), 3 L. J. O. S. Ch. 113.

*B. Where Public Interest Affected—Joinder of Attorney-General.**(a) In General.*

See, generally, CROWN PRACTICE, Vol. XVI., pp. 481 et seq.

968. Injury of public nature — Attorney-General must be a party.]—Pltf. sued, as one of the public, to restrain a railway co. from closing the railway:—*Held*: such a suit could not be maintained.—*THORNE v. TAW VALE RY. & DOCK CO.* (1850), 13 Beav. 10; 51 E. R. 4.

standi, the suit had no proper existence at all, & another person who had the right could not be substituted for one who had not the right to institute the proceedings.—*HATHAWAY v. DOIG* (1881), 6 A. R. 264.—CAN.

t. —.]—An Act was passed providing for the construction of the R. Ry. In pursuance of this Act a contract was entered into between Her Majesty & two of defts., & the contractors thereupon proceeded to build the road. Pltf., being aware that the route contemplated would cross certain lands, purchased them with a view of obstructing the building of the road. It was not contended that this would disentitle him to an injunction, but it was alleged that he was acting not for himself but in reality for a rival railway whose hand he was. To show this, pltf. was examined & he refused to answer several proper & material questions. He appeared to have acted through the rival railway's officials & to have reported progress to them; to have made some agreements with that co., giving to it certain privileges in respect of the land purchased, but the nature of this agreement he refused to divulge; & in a letter he referred to "the party for whom I have purchased":—*Held*: pltf. was not entitled to an injunction, he being the representative merely of the rival railway & not acting on his own behalf.—*BROWNING v. RYAN* (1887), 4 Man. L. R. 486.—CAN.

a. —.]—A franchise of ferry within certain defined limits was vested by Act of Parliament in a statutory body of harbour trustees

who maintained a service of steamers for ferry traffic. When the steamers were not required for ferry traffic the trustees let them out on hire for excursion trips beyond the ferry limits. A firm of shipowners, who let out steamers on excursion trips, & who paid rates to the trustees for the use of the harbour, brought an action of interdict to restrain the trustees from so using their steamers:—*Held*: as harbour ratepayers the shipowners had a good title & interest to sue.—*DUNDEE HARBOUR TRUSTEES v. NICOL*, [1915] A. C. 550.—SCOT.

b. Adding plaintiff at trial.]—A patentee assigned part of his interest to pltf., who alone filed a bill to restrain the infringement of the patent. At the hearing an objection was taken that the patentee was not a party to the suit; but he, by his counsel, appearing & consenting to be named as a pltf. & to be bound by the proceedings in the cause, an amendment in that respect was directed by the decree to be made, & relief granted as prayed.—*YATES v. GREAT WESTERN RY. CO.* (1877), 24 Gr. 495.—CAN.

c. Absence of necessary party as to part of claim.]—The rule of equity is that if any person not made a party to the suit be a necessary party in respect of any part of the relief prayed by the bill, it is ground of demurrer.—*ATLANTIC & PACIFIC TELEGRAPH CO. v. DOMINION TELEGRAPH CO.* (1880), 27 Gr. 592.—CAN.

d. Crown.]—The Crown, in right of the Dominion, has a right to take proceedings to restrain an individual

—.]—(1) Where there has been an excess of the statutory powers granted to a co., but no injury has been occasioned to any individual, & there is none which is imminent or of irreparable consequence, the A.-G. alone can obtain an injunction to restrain the exorbitance.

(2) Effect of delay on suit for injunction.

I cannot avoid being influenced by the delay . . . which is calculated to throw considerable doubt upon the reality of his alleged injury (LORD CHELMSFORD, C.).—*WARE v. REGENT'S CANAL CO.* (1858), 3 De G. & J. 212; 28 L. J. Ch. 153; 32 L. T. O. S. 136; 23 J. P. 3; 5 Jur. N. S. 25; 7 W. R. 67; 44 E. R. 1250, L. C.

Annotations:—As to (1) Expld. A.-G. v. G. E. Ry. (1879), 11 Ch. D. 449. *Refd. McCormac v. Queen's University* (1867), 15 W. R. 733; *Lawrence v. West Somerset Mineral Ry.*, [1918] 2 Ch. 250. *Generally, Mentd. A.-G. v. Frimley & Farnborough District Water Co.*, [1908] 1 Ch. 727; *A.-G. v. Barnet District Gas & Water Co.* (1909), 101 L. T. 651.

970. —.]—Public Health Act, 1875 (c. 55), s. 107, enacts that any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, "cause any proceedings to be taken" against any person in any supreme ct. of law or equity to enforce the abatement or prohibition of any nuisance under the Act:—*Held*: such proceedings must be ordinary proceedings known to the law & in the absence of special damage a local authority cannot sue in respect of a public nuisance except with the sanction of the A.-G. by action in the nature of an information.—*WALLASEY LOCAL BOARD v. GRACEY* (1887), 36 Ch. D. 593; 56 L. J. Ch. 739; 57 L. T. 51; 51 J. P. 740; 35 W. R. 694.

Annotations:—Apprvd. Tottenham U. D. C. v. Williamson, [1896] 2 Q. B. 353. *Consd. Stoke Parish Council v. Price*, [1899] 2 Ch. 277. *Mentd. Sheringham U. D. C. v. Holsey* (1904), 91 L. T. 225.

971. —.]—A parish council cannot in their own name without the A.-G. maintain an action to enforce a right of the inhabitants of a parish to the use of a well or spring of water.—*STOKE PARISH COUNCIL v. PRICE*, [1899] 2 Ch.

from making use of a provincial grant in a way to embarrass the Dominion in the exercise of its territorial rights.—*FARWELL v. R.* (1894), 22 S. C. R. 553.—CAN.

PART XI. SECT. 1, SUB-SECT. 1.—B. (a).

968 i. Injury of public nature — Attorney-General must be a party.]—In respect of mining for gold by strangers upon private land, the A.-G. has a right to an account of the gold raised, & to stop further mining. The owner has a right to restrain it, only as far as it injures his enjoyment of the surface.—*A.-G. v. SCHOLLES* (1863), 5 W. W. & A. B. 164.—AUS.

968 ii. —.]—The A.-G. & freehold owners of land, may join in a suit to restrain a trespasser from mining for gold on the land.—*A.-G. v. LANSSELL* (1882), 8 V. L. R. 155.—AUS.

968 iii. —.]—A corpn. was, under Act of Parliament seized of 120 acres, upon trust, to lay out & maintain the same as a public park or pleasure ground for the enjoyment & recreation of the inhabitants:—*Held*: an individual inhabitant could not sue to restrain a misuse of the park, unless specially injured thereby: but the A.-G. must join or be joined.—*ANDERSON v. VICTORIA CITY CORPN.* (1884), 1 B. O. R. pt. 2, 107.—CAN.

968 iv. —.]—*A.-G. v. VAUGHAN ROAD CO.* (1892), 14 P. R. 516.—CAN.

968 v. —.]—*A.-G. v. WEL-LINGTON COLLIERY CO.* (1903), 10 B. C. R. 397.—CAN.

277; 68 L. J. Ch. 447; 80 L. T. 643; 63 J. P. 502; 47 W. R. 663.

Annotations:—*Consd.* A.-G. & Spalding R. D. C. v. Garner, [1907] 2 K. B. 480. *Mentd.* Sheringham U. D. C. v. Holsey (1904), 91 L. T. 225.

972. ———.]—Public Health Act, 1875 (c. 55), s. 107, enacts that any local authority may, if in their opinion summary proceedings would afford an inadequate remedy, “cause any proceedings to be taken” against any person in any superior ct. of law or equity to enforce the abatement or prohibition of any nuisance:—*Held*: such proceedings must be ordinary proceedings known to the law, & in the absence of special damage a local authority cannot sue in respect of a public nuisance except by action in the nature of an information with the sanction of the A.-G.—TOTTENHAM URBAN DISTRICT COUNCIL v. WILLIAMSON & SONS, [1896] 2 Q. B. 353; 65 L. J. Q. B. 591; 75 L. T. 238; 60 J. P. 725; 44 W. R. 676, C. A.

Annotations:—*Consd.* Stoke Parish Council v. Price, [1899] 2 Ch. 277. *Mentd.* Sheringham U. D. C. v. Holsey (1904), 91 L. T. 225.

973. ———.]—DEVONPORT CORPN. v. TOZER, No. 74, *ante*.

974. ———.]—This was a motion by pltf., claiming, on behalf of themselves & other the burgesses of the borough of Hythe, an injunction to restrain the borough council from consenting to a bill for the construction of certain tramways within the borough otherwise than in accordance with a certain resolution passed & confirmed by the council on Aug. 5, & Aug. 9, 1905. The preliminary objection was taken by deft. council that this action involving a public & not a private injury, the A.-G. should be a party to it:—*Held*: the objection was well founded, & the action was not properly constituted.—WATSON v. HYTHE BOROUGH COUNCIL (1906), 70 J. P. 153; 22 T. L. R. 245; 4 L. G. R. 340.

975. ———.]—DOVER PICTURE PALACE, LTD., & PESSERS v. DOVER CORPN. & CRUNDALL, WRAITH, GURR & KNIGHT, No. 243, *ante*.

976. ———.]—Where some of the provisions of an order of the light railway comrs., modified & confirmed by the Board of Trade, were clearly for the benefit of the public, the fact that the same were stated to be inserted for the protection of the undertakers did not justify their being treated as a mere contract which the parties thereto could release or vary; & the A.-G. was therefore held to be entitled to bring an action for the protection of the public, their rights not being intended to be at the mercy of the parties to the contract.—A.-G. v. NORTH EASTERN RY. CO., [1915] 1 Ch. 905; 84 L. J. Ch. 657; 113 L. T. 25; 79 J. P. 500; 13 L. G. R. 1130, C. A.

977. ———.]—Relator joined as plaintiff.]—In the case of a public nuisance, the A.-G. is justified in taking proceedings at the relation of any person, whether residing near the nuisance or not, & whether interested in the property on which the nuisance exists or not. The A.-G. & the owner of a canal filed an information & bill against a municipal corpn. to restrain them from

permitting sewage to be discharged into the canal, & for an inquiry as to damages:—*Held*: the A.-G. was justified in taking proceedings at the relation of pltf., & pltf. was entitled to an injunction & an inquiry as to damages, although he had permitted an obstruction to remain in the canal whereby the sewage was prevented from being carried away by the flow of the water.—A.-G. & DOMMES v. BASINGSTOKE CORPN. (1876), 45 L. J. Ch. 726; 24 W. R. 817.

Annotation:—*Refd.* Glossop v. Heston & Isleworth L. B. (1879), 12 Ch. D. 102.

978. ———.]—A local authority may act as relators in an action brought by the A.-G. for the purpose of abating a public nuisance, & may themselves maintain an action for damages for a nuisance affecting property of which they are the actual owners.—A.-G. v. LOGAN, [1891] 2 Q. B. 100; 65 L. T. 162; 55 J. P. 615; 7 T. L. R. 279, D. C.

Annotations:—*Consd.* A.-G. & Spalding R. D. C. v. Garner, [1907] 2 K. B. 480. *Refd.* Wednesbury Corpn. v. Lodge Holes Colliery Co., [1907] 1 K. B. 78.

979. ———.]—Where the relators join the A.-G. as co-pltfs., they are entitled on proof of special damage to an injunction in their own right although they could not have succeeded if the A.-G. had not.—A.-G. v. BARKER (1900), 83 L. T. 245; 16 T. L. R. 502.

980. ———.]—A special Act authorised a co. to construct & maintain certain waterworks within a local board's district, &, after enacting that the powers granted by the Act should cease if the works were not completed within a certain time, provided that for the protection of the board certain provisions as to construction & completion, laying mains, keeping mains under pressure, filtration, etc., should have effect. A district council, the board's successors, commenced an action, & delivered a statement of claim alleging that the co. had committed breaches of the Act, & claiming that it should be ordered to keep its mains under pressure, & should be restrained by injunction from supplying water not properly filtered:—*Held*: (1) the action was one which was not maintainable by the council alone, & the A.-G. was a necessary pltf.; (2) the terms of giving leave to join the A.-G. ought to be that the council should pay the costs of the action up to the time of & including those of joining him as co-pltf.—A.-G. v. PONTYPRIDD WATERWORKS CO., [1908] 1 Ch. 388; 77 L. J. Ch. 237; 98 L. T. 275; 72 J. P. 48; 24 T. L. R. 196; 6 L. G. R. 39.

Annotation:—*As to* (1) *Refd.* A.-G. v. N. E. Ry., [1916] 1 Ch. 905.

—— Obstruction of highways.]—*See* HIGHWAYS, Vol. XXVI., pp. 450 *et seq.*

(b) When Joinder Dispensed with.

i. In General.

981. When dispensed with.]—Pltf. may sue in respect of a public right without joining the A.-G. first, where the interference with the public right is such that some private right is interfered with; & secondly, where no private right is interfered with but pltf. in respect of his public right suffers

payer may bring an action for an injunction to prevent such payment, without the intervention of the A.-G.—DAVIS v. CITY OF WINNIPEG (1914), 28 W. L. R. 93.—CAN.

981 v. ———.]—The A.-G. is not a necessary party upon a motion for an *interim* injunction brought by a ratepayer & made on his own behalf & on behalf of all the other ratepayers to prevent the council from submitting a local option bye-law to the electors.—

PART XI. SECT. 1, SUB-SECT. 1.— B. (b) (i).

981 i. When dispensed with.]—To a bill filed by the municipal council of an incorporated town to prevent an injury to the property of the municipality, the A.-G. is not a necessary party.—GUELPH TOWN v. CANADA CO. (1854), 4 Gr. 632.—CAN.

981 ii. ———.]—ELWORTHY v. VICTORIA CITY CORPN. (1896), 5 B. C. R. 123.—CAN.

981 iii. ———.]—In an action for specific performance on an agreement between a tramway co. & a municipal corpn., & to enforce the agreement by injunction it is not necessary to make the A.-G. of the Province a party.—HAMILTON STREET RY. CO. v. CITY OF HAMILTON (1906), 39 S. C. R. 673.—CAN.

981 iv. ———.]—When a municipal council proposes to make a payment of money beyond its powers, any rate-

Sect. 1.—Parties: Sub-sect. 1, B. (b) i., ii. & iii.]

special damage peculiar to himself from the interference with the public right.—*BOYCE v. PADDINGTON BOROUGH COUNCIL*, [1903] 1 Ch. 109; 72 L. J. Ch. 28; 87 L. T. 564; 67 J. P. 23; 51 W. R. 109; 19 T. L. R. 38; 47 Sol. Jo. 50; 1 L. G. R. 98; *on appeal*, [1903] 2 Ch. 556, C. A.; *sub nom.* *PADDINGTON CORPN. v. A.-G.*, [1906] A. C. 1, H. L.

Annotations:—Refd. *Hurley v. Stepney B. C.* (1923), 67 Sol. Jo. 767. *Mentd.* *Heath's Garage v. Hodges* (1915), 14 L. G. R. 195.

ii. Where Private Right Interfered with.

982. Private interest must be shown — Substantial damage.]—A ry. co. purchased a part of pltf.'s land, the value being settled by arbn. The co. entered, & were proceeding to make their line in a manner which clearly exceeded their powers of vertical deviation. Pltf. filed his bill, alleging injury, & praying an injunction:—*Held*: a pltf. ought to satisfy the ct. that he has sustained substantial damage from the violation of a legal right, in order to entitle himself to an injunction.—*HOLYOAKE v. SHREWSBURY & BIRMINGHAM RY. CO.* (1848), 5 Ry. & Can. Cas. 421; 11 L. T. O. S. 489, L. C.

Annotations:—Refd. *Wintle v. Bristol & South Wales Union Ry.* (1862), 6 L. T. 20; *Grand Junction Canal Co. v. Shugar* (1871), 6 Ch. App. 483.

983. —.]—Persons obtaining from the legislature power to interfere with the rights of property are bound strictly to adhere to the powers so conceded to them, to do no more than the legislature has sanctioned, & to proceed only in the mode which the legislature has pointed out; but, except in a proceeding at the instance of the A.-G., any one seeking the assistance of a ct. of equity, to restrain the violation of such a contract with the legislature, is bound to show that he has a private interest in the matter. Therefore, where a waterworks Act empowered a co. to divert the water of a stream, without limit as to quantity, by means of an open channel filled with loose stones, & they were diverting it by means of a culvert:—*Held*: another co. who were entitled to the water of a stream into which the diverted stream had flowed were not entitled to an injunction to restrain a violation of the terms of the Act as to the mode of diversion.—*LIVERPOOL CORPN. v. CHORLEY WATERWORKS CO.* (1852), 2 De G. M. & G. 852; 42 E. R. 1105, L. JJ.

Annotations:—Distd. *Cromford & High Peak Ry. v. Stockport, Disley & Whaley Bridge Ry.* (1857), 24 Beav. 74. *Appld.* *Marriott v. East Grinstead Gas & Water Co.*, [1909] 1 Ch. 70. *Mentd.* *A.-G. v. Sheffield Gas Consumers Co.* (1853), 3 De G. M. & G. 304.

984. —.]—Defts. were by Act of Parliament authorised to make a short line uniting their main line with pltfs.' line, but the Act prohibited defts. opening their main line until the junction should be completed. In default of defts. making the junction within a specified time, pltfs. were authorised to make it. Defts. proposed opening their main line before the completion of the junction:—*Held*: pltfs. had a sufficient interest to entitle them to an injunction to prevent this proceeding, & it was not necessary to resort to an information for that purpose, & an injunction was granted, although the delay in opening the main line might be prejudicial to the public.—*CROM-*

FORD & HIGH PEAK RY. CO. v. STOCKPORT, DISLEY & WHALEY BRIDGE RY. CO. (1857), 24 Beav. 74; 29 L. T. O. S. 245; 21 J. P. 468; 3 Jur. N. S. 628; 5 W. R. 636; 53 E. R. 285; *on appeal*, 1 De G. & J. 326, L. JJ.

985. —.]—Where pltf. suffers a particular injury from the obstruction of a public way a bill for an injunction will lie & the A.-G. need not be a party.—*COOK v. BATH CORPN.* (1868), L. R. 6 Eq. 177; 18 L. T. 123; 32 J. P. 741.

Annotations:—Refd. *A.-G. v. Lonsdale* (1868), L. R. 7 Eq. 377; *Vernon v. St. James, Westminster, Vestry* (1880), 16 Ch. D. 449.

986. —.]—Where the promoters of a public undertaking have statutory authority to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment so far as it makes provision on his behalf. No ct. can remodel arrangements sanctioned, or relax conditions imposed by Act of Parliament.

A local Act empowered comrs. to take water from a river for the supply of a township on condition of their executing certain works & (*inter alia*) a reservoir to supply compensation water to mill owners & a conduit, the reservoir to be constructed by an embankment across the river. The Act & the relative plans & sections described the position of the reservoir, its contour & capacity, & the height of the embankment & provided that in constructing the authorised works the comrs. might subject to the provisions of the Act deviate from the lines of the works to any extent not exceeding the limits of lateral deviation shown on the deposited plans & from the levels shown on the deposited sections, in the case of the reservoir to any extent of lesser height which would enable the comrs. to give a sufficient supply of water for compensation purposes; but the comrs. should not in the exercise of the power of lateral deviation thereby given construct any embankment or wall of any reservoir of a greater height above the general surface of the ground than that shown on the plans with reference to the corresponding embankment or wall & 6 feet in addition. In constructing the reservoir the comrs. curtailed it by more than one-third of its length & nearly two-thirds of its capacity & placed the embankment higher up the river than the point fixed by the Act & so that the capacity could not be enlarged in the event of the supply of compensation water proving insufficient. In constructing the conduit the comrs. disregarded in material points the directions of the Act as to the course & serviceableness of the conduit & constructed a conduit which they alleged was "a substantial equivalent" to the mill owners. The mill owners having brought an action against the comrs.:—*Held*: though no actual damage was proved the mill owners were entitled to a declaration that the reservoir & conduit were not in accordance with the provisions of the Act, & to an injunction restraining the comrs. from taking or using the waters of the river or from interfering with the flow of the river otherwise than as authorised by the Act.—*HERRON v. RATHMINES & RATHGAR IMPROVEMENT COMRS.*, [1892] A. C. 498; 67 L. T. 658, H. L.

Annotations:—Refd. *Fielden v. Morley Corpn.* (1898), 14 T. L. R. 566; *A.-G. v. Frimley & Farnborough Water Co.*, [1908] 1 Ch. 727. *Mentd.* *The Johannesburg*, [1907] P. 65; *A.-G. v. Barnet District Gas & Water Co.* (1909), 101 L. T. 651.

STEPHENSON v. COWAN (1914), 30 W. L. R. 297; 7 W. W. R. 772; 25 Man. L. R. 67; 20 D. L. R. 605.—CAN.

— vi. —.]—A ratepayer has a right, without the interposition of the A.-G. to bring an action on behalf of himself & all other ratepayers to

restrain a municipality from doing an act *ultra vires* its powers.—*STEEVES v. MONOTON* (1914), 14 E. L. R. 321; 17 D. L. R. 560.—CAN.

987. —.]—An owner of premises abutting on a highway enjoys as a private right the right of access from his own premises to the highway & any interference with that access is an interference with a private right.

Pltfs. have a special & individual interest in the public right to this portion of the highway & they are entitled to sue without joining the A.-G. because they sue in respect of that individual interest (BUCKLEY, J.).—CHAPLIN (W. H.) & Co., LTD. v. WESTMINSTER CORPN., [1901] 2 Ch. 329; 70 L. J. Ch. 679; 85 L. T. 88; 65 J. P. 661; 49 W. R. 586; 17 T. L. R. 576; 45 Sol. Jo. 597.

Annotations:—**Refd.** Boyce v. Paddington B. Co., [1903] 1 Ch. 109; Anglo-Algerian S.S. Co. v. Houlder Line (1907), 77 L. J. K. B. 187.

988. —.]—An urban district council can in their own name, without the A.-G., maintain an action for damages for the removal of a post put up by them in the centre of a public footway so as to prevent it being used for wheeled traffic & for an injunction.—SHERINGHAM URBAN DISTRICT COUNCIL v. HOLSEY (1904), 91 L. T. 225; 68 J. P. 395; 20 T. L. R. 402; 48 Sol. Jo. 416; 2 L. G. R. 744.

Annotation:—**Consd.** A.-G. & Spalding R. D. C. v. Garner, [1907] 2 K. B. 480.

989. **Slight damage.**—Waterworks Clauses Act, 1847 (c. 17), s. 28, merely enables a water co. to lay pipes under streets in connection with the undertaking authorised by their special Acts, & if they are being laid in connection with unauthorised works the owner of the soil can sue the water co. in trespass, raise the question of *ultra vires*, & obtain an injunction without joining the A.-G. The fact that the damage is small is immaterial.—MARRIOTT v. EAST GRINSTEAD GAS & WATER CO., [1909] 1 Ch. 70; 78 L. J. Ch. 141; 99 L. T. 958; 72 J. P. 509; 25 T. L. R. 59; 7 L. G. R. 477.

Annotations:—**Refd.** A.-G. v. Barnet District Gas & Water Co. (1909), 74 J. P. 1. **Mentd.** Schweder v. Worthing Gas, Light & Coke Co. (No. 2), [1913] 1 Ch. 118.

iii. On Proof of Special or Particular Damage.

990. Necessity for special damage.—(1) Where an injury is done to the public generally by a nuisance, & to persons individually, the latter may maintain a bill, without making the A.-G. a party thereto.

(2) The ct. will, in some cases, by means of an injunction in a negative form, compel parties who have begun to take away the rights of others, in some measure to restore them before the hearing of the cause.—SPENCER v. LONDON & BIRMINGHAM RY. CO. (1836), 8 Sim. 193; 1 Ry. & Can. Cas. 159; 7 L. J. Ch. 281; 59 E. R. 77.

Annotations:—**As to** (1) **Folld.** Soltau v. De Held (1851), 2 Sim. N. S. 133; Cook v. Bath Corpn. (1868), L. R. 6 Eq. 177. **Consd.** A.-G. v. Lonsdale (1868), L. R. 7 Eq. 377; London Asscn. of Shipowners & Brokers v. London & India Docks Joint Committee, [1892] 3 Ch. 242. **Refd.** Thorne v. Taw Vale Ry. & Dock Co. (1850), 13 Beav. 10. **As to** (2) **Refd.** Lond v. Murray (1851), 17 L. T. O. S.

991. —.]—Where an individual sustains special damage from a nuisance, he may file a bill to restrain it, without making the A.-G. a party.—SAMPSON v. SMITH (1838), 8 Sim. 272; 7 L. J. Ch. 260; 2 Jur. 563; 59 E. R. 108.

Annotations:—**Folld.** Soltau v. De Held (1851), 2 Sim. N. S. 133. **Consd.** London Asscn. of Shipowners & Brokers v. London & India Docks Joint Committee, [1892] 3 Ch. 242. **Refd.** Lond v. Murray (1851), 17 L. T. O. S. 248.

992. —.]—A bill may be filed to restrain a public nuisance, without making the A.-G. a party, if pltf. sustains special damage from the

nuisance.—SOLTAN v. DE HELD (1851), 2 Sim. N. S. 133; 21 L. J. Ch. 153; 16 Jur. 326; 61 E. R. 291.

Annotations:—**Refd.** Crump v. Lambert (1867), L. R. 3 Eq. 409; Walker v. Brewster (1867), L. R. 5 Eq. 25; A.-G. v. Cambridge Consumers Gas Co. (1868), 4 Ch. App. 71; Gort v. Clark (1868), 16 W. R. 569; Inchbald v. Robinson, Inchbald v. Barrington (1868), 20 L. T. 109; Harrison v. Good (1871), 24 L. T. 263; Roskell v. Whitworth (1871), 19 W. R. 804; Gaunt v. Fynney (1872), 8 Ch. App. 8; Winter v. Baker (1887), 3 T. L. R. 569. **Mentd.** R. v. Lister & Biggs (1857), Dears & B. 209.

993. — **Action by rival corporation.**—A public co. exceeding its legislative limits cannot be restrained by injunction at the suit of a rival co., which does not allege that it has sustained some private injury by such excess, though the acts complained of may be injurious to the public interests.—STOCKPORT DISTRICT WATERWORKS CO. v. MANCHESTER CORPN. (1862), 7 L. T. 545; 9 Jur. N. S. 266; 11 W. R. 156, L. C.

Annotations:—**Folld.** Pudsey Coal Gas Co. v. Bradford Corpn. (1873), L. R. 15 Eq. 167. **Consd.** Dover Picture Palace & Pessers v. Dover Corpn. & Crundall, Wraith, Gurr & Knight (1913), 11 L. G. R. 971. **Refd.** Preston Corpn. v. Fullwood L. B. (1885), 53 L. T. 718; Dundee Harbour Trustees v. Nicol, [1915] A. C. 550.

994. —.]—A municipal corpn. having, under the provisions of an Act of Parliament, bought up a gas co. which previously supplied gas to the borough, & which had compulsory powers for the purpose within the borough, commenced supplying gas to an adjoining township, in which another gas co. already existed having similar powers, within the township. The gas co. of the township having filed a bill against the corpn. to restrain them from supplying gas within the township, & alleging, as a personal injury which entitled them to maintain their suit, that the corpn. had contracted to supply gas to a particular manufactory within the township which otherwise they must have supplied, & that they had thereby been deprived of the profits arising from the supply of gas to the manufactory, & that great loss would be sustained by them:—**Held**: the injury alleged was not such as entitled pltfs. to maintain the suit.—PUDSEY COAL GAS CO. v. BRADFORD CORPN. (1873), L. R. 15 Eq. 167; 42 L. J. Ch. 293; 28 L. T. 11; 37 J. P. 340; 21 W. R. 286.

Annotation:—**Refd.** Preston Corpn. v. Fullwood L. B. (1885), 53 L. T. 718.

995. —.]—A local board of health entered into an agreement with a sewage co., in pursuance of which they afterwards granted a lease to the co. of the sewage works of a town, & of a plot of land, for a term of fourteen years, the co. covenanting that they would during the term keep the outfall of the works, with the engines, pumps, & apparatus, in proper working order, so as to admit of the free flow of the sewage through the sewers communicating with the works, & so that the same might not at any time be stopped. To a bill by the local board against the co., complaining that the company's works were insufficient to treat the sewage successfully, that they were pumping only a portion of the sewage out of the sewers, and were damming up or heading back the residue in the sewers, so as to be a nuisance to the inhabitants of the town, & that pltfs. were being threatened with proceedings, & praying for an injunction to restrain defts. from permitting the sewage to remain in the sewers, so as to be a nuisance or damage to pltfs. & from damming up or heading back the sewage in the sewers, defts. demurred, on the grounds that the ct. could not superintend the proper performance of the works; that pltfs. had alleged no special damage; & that it was not the practice of the ct. to restrain the infringement

Sect. 1.—Parties: Sub-sect. 1, B. (b) iii., C.
sub-sect. 2. Sect. 2: Sub-sect. 1, A

of a public right at the suit of a corpn., except at the instance or in the presence of the A.-G. Demurrer overruled, & injunction granted.—*NUNEATON LOCAL BOARD v. GENERAL SEWAGE CO.* (1875), L. R. 20 Eq. 127; 44 L. J. Ch. 561.

Annotations:—Distd. Wallasey L. B. v. Gracey (1887), 36 Ch. D. 593. *Reid. Strelley v. Pearson* (1880), 43 L. T. 155.

996. —.]—A dock co. having, under its special Act & Harbours, Docks & Piers Clauses Act, 1847 (c. 27), s. 83, power to make regulations & bye-laws, issued a compulsory code of regulations for shipowners using the docks; but these regulations were not confirmed as “bye-laws” in manner prescribed by Harbours, Docks & Piers Clauses Act, 1847 (c. 27), s. 85. Certain accommodation provided for by the regulations, such as the appropriation of particular berths at the option of any shipowner upon certain specified terms, were in excess of what was required by statute to be provided by the dock co., & certain rates & charges imposed by them were beyond the co.’s statutory powers. A firm of shipowners which, prior to the issue of the regulations, had been in the habit of using the docks & having particular berths appropriated for their ships, finding that the terms imposed by regulations for such accommodation caused them inconvenience & increased expense, brought an action, by themselves as individuals, against the dock co., for a declaration that the regulations were altogether invalid until confirmed as required by statute, & also an injunction by way of consequential relief; a trade protection assocn. of shipowners, of which the firm & other shipowners were members, but which owned no ships themselves, being made co-pltfs.:—*Held*: (1) pltf. assocn. had no *locus standi*, not being themselves shipowners, & not being entitled to sue as agent for their members; & (2) pltf. firm, suing as individuals, & not by the A.-G. as representing the public, were bound to prove special damage by the issue of the regulations, & this they had failed to do, inasmuch as any accommodation provided by the dock co. beyond the statutory requirement must be a matter of agreement between the firm & the dock co.—*LONDON ASSOCN. OF SHIPOWNERS & BROKERS v. LONDON & INDIA DOCKS JOINT COMMITTEE*, [1892] 3 Ch. 242; 62 L. J. Ch. 294; 67 L. T. 238; 8 T. L. R. 717; 7 Asp. M. L. C. 195; 2 R. 23, C. A.

Annotations:—Mentd. Barraclough v. Brown, [1897] A. C. 615; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536; *Re Clay, Clay v. Booth, Re A Deed of Indemnity*, [1919] 1 Ch. 66.

997. — Statutory provision for protection of pltf.]—A co. were prohibited from making a railway from the station at or near Grange-lane to or to communicate with Woodside Ferry until a branch railway should have been made from the main line to Birkenhead & Tranmere Ferries. The declaration alleged that defts. wrongfully & fraudulently, & for the purpose of evading a [private] Act opened a railway from the station at Grange-lane to & to communicate with the shore of the Mersey, in the township of Birkenhead, between Woodside Ferry & Birkenhead Ferry, & near Woodside Ferry, & conveyed passengers & merchandise along the same to the station at Grange-lane, although no branch railway had been made from the main line to Tranmere Ferry, in contempt of the Act of Parliament & to pltf.’s damage of £20,000. On a general demurrer:—*Held*: the declaration was bad as it did not contain any averment that defts.

made a railway to or to communicate with Woodside Ferry, or anything necessarily equivalent to such an averment. But if it had contained such an averment, the action might have been sustained without any allegation of special damage, the act prohibited not being one merely affecting the public, but an act obviously prohibited for the protection of one particular individual.—*CHAMBERLAINE v. CHESTER & BIRKENHEAD RY. CO.* (1848), 1 Exch. 870; 18 L. J. Ex. 494; 11 L. T. O. S. 270; 154 E. R. 371.

998. —.]—The comrs., under a local improvement Act, were empowered to make new sewers, but prohibited from making any new sewer to drain into the river R. above a certain point:—*Held*: (1) they ought to be restrained, at the suit of the private owners of a weir in & part of the soil of the river below that point, from enlarging & deepening an old sewer running into the river above that point, so as to make it virtually a new sewer; (2) pltf.’s suit being based upon their statutory rights, was maintainable without making the A.-G. a party thereto, or priving special injury.—*HOLT v. ROCHDALE CORPN.* (1870), L. R. 10 Eq. 354; 39 L. J. Ch. 761; 23 L. T. 43; 35 J. P. 6; 18 W. R. 885.

999. —.]—A private Act of Parliament authorising the construction of tramways in the boroughs of P. & D., provided that, without the consent of the corpn., the co. should not use for traffic any one of the tramways until the whole were completed; & in case either corpn. complained to the Board of Trade that this provision was not complied with, the board should make inquiry & give relief accordingly:—*Held*: the jurisdiction of this ct. to grant relief was not ousted in favour of the Board of Trade, & one of the boroughs was entitled to relief for a breach of the provisions without joining the A.-G. & without showing special damage.—*DEVONPORT CORPN. v. PLYMOUTH, ETC. TRAMWAYS CO.* (1884), 52 L. T. 161; 49 J. P. 405, C. A.

1000. — Special powers entrusted to public body.]—In an action for an injunction to restrain deft. co. from preventing gas examiners from making tests on Sundays:—*Held*: the London County Council as the body entrusted by a private Act of Parliament with control & management of the testing places provided by the co. were proper pltfs., & therefore it was not necessary that the action should be brought by the A.-G.—*LONDON COUNTY COUNCIL v. SOUTH METROPOLITAN GAS CO.*, [1904] 1 Ch. 76; 73 L. J. Ch. 136; 89 L. T. 618; 68 J. P. 5; 52 W. R. 161; 20 T. L. R. 83; 48 Sol. Jo. 99; 2 L. G. R. 161, C. A.

C. Infants.

Injunction at suit of infant en ventre sa mère.—*See INFANTS*, p. 295, Nos. 1509, 1510.

D. Married Women.

See HUSBAND & WIFE, Vol. XXVII., pp. 248-261.

SUB-SECT. 2.—DEFENDANT.

Parties against whom injunction may be granted.

—*See Part IX., ante.*

When whole interest parted with.—*See Part IX., sect. 3, ante.*

Quia timet actions.—*See Part VI., ante.*

SECT. 2.—THE APPLICATION.

SUB-SECT. 1.—BY ACTION.

A. In General.

1001. Indorsement of claim on writ—Necessity for.]—Pltf. should indorse his writ with a claim for an injunction or receiver when the obtaining of either is a substantial object of his action.

A. & B. were entitled under a will to certain personalty in equal shares. A., as sole exor. of testator, advertised part of the personalty for sale, & intended, it was stated, to go abroad. B., thereupon, brought an action asking in the indorsement of the writ for administration only:—*Held*: on an *ex p.* application, B. might amend the indorsement by asking for a receiver & for an injunction to restrain the intended sale.—*COLEBOURNE v. COLEBOURNE* (1876), 1 Ch. D. 690; 45 L. J. Ch. 749; 24 W. R. 235; 2 Char. Pr. Cas. 197.

1002. — Particulars.]—*Re MYERS' PATENT* (1882), 26 Sol. Jo. 371, C. A.

1003. Where injunction not specifically claimed—Leave to amend granted.]—Order for amendment without costs, requiring no further answer; the amendment was, by inserting prayer for injunction:—*Held*: deft. might answer. Proper injunction cannot be granted, unless expressly prayed by the bill.—*SAVORY v. DYER* (1749), Amb. 70; 27 E. R. 41, L. C.

Annotations:—*Distd. Wood v. Beadell* (1829), 3 Sim. 273. *Reid. Russell v. L. C. & D. Ry.* (1863), 4 Giff. 403.

1004. — — — *Ex parte.*]—*COLEBOURNE v. COLEBOURNE*, No. 1001, *ante*.

Court may grant—At hearing.]—Devise to A. & her heirs for ever, "in the fullest confidence, that after her decease she will devise the property to my family," being restrained to an estate for life by decree at the Rolls, the devisee

was enjoined from cutting timber pending an appeal.

With regard to the injunction there is a distinction upon the practice; generally, if the bill does not pray an injunction, pltf. cannot move for an injunction under the prayer for general relief; but if, after a decree for an account under a bill for foreclosure, the mtgor. attempted to cut timber, the ct. would enjoin him, though there was no prayer for that (*LORD ELDON, C.*).—*WRIGHT v. ATKYNS* (1818), 1 Ves. & B. 313; 35 E. R. 122, L. C.

Annotations:—*Consd. Russell v. L. C. & D. Ry.* (1863), 4 Giff. 403. *Mentd. Heneage v. Andover* (1822), 10 Price, 230; *Blake v. Peters* (1863), 1 De G. J. & Sm. 345.

1006. — — — — —.]—After a decree in a foreclosure suit a mtgor. in possession began to commit waste: he was restrained by injunction though no injunction was prayed by the bill.—*GOODMAN v. KINE* (1845), 8 Beav. 379; 50 E. R. 149.

1007. — — — — —.]—On looking at the prayer of the bill I do not find that it distinctly & specifically prays to restrain deft. from setting up any outstanding legal estate; but nevertheless I think that it is quite clear the whole object of the proceeding would be defeated if any such outstanding term could be set up. I must consider this case as one of the few exceptions which there are to the rule that in order to obtain an injunction there must be a distinct prayer for it in the bill (*LORD LANGDALE, M.R.*).—*BLOMFIELD v. EYRE* (1845), 8 Beav. 250; 14 L. J. Ch. 260; 9 Jur. 717; 50 E. R. 99.

Annotations:—*Mentd. Howard v. Shrewsbury* (1874), L. R. 17 Eq. 378; *Wall v. Stanwick* (1887), 34 Ch. D. 763.

1008. — — — — —.]—At the hearing an injunction may be granted although not prayed for

PART XI. SECT. 2, SUB-SECT. 1.—A.

a. Application essential.]—An injunction cannot be granted where none is prayed for.—*REID v. GIBSON*, 17 C. L. T. Occ. N. 226.—CAN.

i. Application must be specific.]—An injunction must be specifically prayed for, & will not be granted under the general prayer for relief.—*McKINNON v. McDougall* (1879), R. E. D. 342.—CAN.

to purpose of injunction.]—Action to restrain defts. from interfering with or removing a fence alleged by pltf. to be the western boundary of lot 26 of which lot they were the owners. Defts. by counterclaim asked that pltf. be ordered to remove the fence:—*Held*: both parties had failed to prove the location of the western boundary of lot 26, & that *onus* was on pltf.—*LAKE ERIE EXCURSION CO. v. BERTIE* (1912), 23 O. W. R. 94; 4 O. W. N. 111; 6 D. L. R. 853.—CAN.

h. When application made.]—Injunction being prayed for in the prayer for process is sufficient.—*CLARKE v. MANNERS* (1844), 2 O. S. 1.—CAN.

k. Necessity for filing of bill.]—A notice of motion for partition having been served, pltf. moved for an injunction restraining deft. from collecting rents & for a receiver. It appeared that deft. was a stranger whose right to be in possession was denied:—*Held*: that no relief could be had against him without bill filed.—*v. WRIGHT* (1879), 8 P. R. 198.

l. — — — Unless urgent.]—An injunction will not be granted on affidavits without bill, unless it appears that there is urgent necessity for it.—*GOSLIN v. GOSLIN* (1888), 27 N. B. R. 221.—CAN.]

m. Where application & bill inconsistent.]—An injunction was refused, the allegation & prayer of the bill having been framed with a view to relief on other grounds than those upon which the application was founded, although the affidavits in support of it would warrant the injunction.—*Ely v. WILSON* (1859), 7 Gr. 103.—CAN.

n. Where bill defective.]—An injunction may be granted in a proper case, though the bill is defective in respect of parties & form.—*DUMBLE v. PETERBOROUGH & LAKE CHEMUNG RY. CO.* (1865), 12 Gr. 74.—CAN.

o. When only injunction applied for—Or with further relief.]—Where an injunction only is claimed, the proceedings must be by motion under rr. 456 & 457 of the Code. If an injunction is claimed with further or other relief the case comes under r. 463, & the proceeding may be by writ & trial in the ordinary course.—*MANSFORD v. ROSS* (1886), 4 N. Z. L. R. 290 (S. C.).—N.Z.

p. — — — No other remedy—Power to amend application.]—No relief beyond the issue of an injunction & costs can be claimed in a statement of claim for an injunction filed & served without writ under rr. 452 & 456. The ct. has power to amend in such a case under r. 285; & pltf. was allowed to amend by abandoning a claim for relief other than the injunction.—*COLEGROVE v. YOUNG* (1902), 22 N. Z. L. R. 491.—N.Z.

q. Absence of defendant—Effect of—Grounds for application inadequate.]—Where defts. did not appear upon a notice of motion for injunction, the ct. directed the writ to issue, although entertaining great doubt whether a sufficient foundation for the interposition of the ct. had been laid.—*DENNISON*

v. CITY OF TORONTO (1858), 6 Gr. 513.—CAN.

r. Plea of defendant—Whether requisite.]—When a party applies to the ct. to prevent another from doing an act which will be injurious to his rights, the injunction asked for ought not to require the other party to plead.—*BEAMISH v. HALIFAX CITY* (1857), 2 Thom. 227.—CAN.

t. What court will decide—Not question of title.]—The ct. will not, as a general rule, decide a question of title upon a writ of injunction, more especially when there is a third party interested who is not a party in the cause.—*GILMOUR v. PARADIS* (1887), M. L. R. 3 Q. B. 449; 31 L. C. J. 232.—CAN.

a. Necessity for affidavit—Ex parte application.]—A bill in equity, praying for an *ex p.* injunction must be supported by affidavit.—*GLASIER v. MACPHERSON* (1897), 34 N. B. R. 206.—CAN.

b. — — —.]—Under 53 Vict., c. 4, ss. 23, 24, a bill in an injunction suit need not be sworn to or supported by affidavit. It is only where an injunction is sought before the hearing that the bill must be supported by affidavit.—*TRITES v. HUMPHRIES* (1899), 2 N. B. Eq. Rep. 1; 19 C. L. T. Occ. N. 407.—CAN.

c. Ex parte application—Counsel.]—Where an injunction is being applied for *ex parte* counsel who desire to appear in opposition to the application should be heard.—*McLEOP v. NOBLE* (1897), 24 A. R. 459.—Q.

d. Before judge in chambers.]—An application for an interlocutory injunction may be made by summons before a judge in chambers.—*A. G. v. HUNTLY (SAIRE)* (1887), 13 V. L. R. 66.—AUS.

Sect. 2.—The application: Sub-sect. 1, A. & B.; sub-sects. 2 & 3, A. & B. (a) & (b).]

by the bill.—*REYNELL v. SPRYE, SPRYE v. REYNELL* (1852), 1 De G. M. & G. 660; 21 L. J. Ch. 633; 42 E. R. 710, L. JJ.

Annotations:—Mentd. Re Tratt, Ex p. James (1853), 3 De G. M. & G. 493; *Parr v. Jewell* (1855), 1 K. & J. 671; *Adams v. Lloyd* (1858), 27 L. J. Ex. 499; *Parker v. Clarke* (1861), 7 Jur. N. S. 1267; *Traill v. Baring* (1864), 4 De G. J. & Sm. 318; *Hilton v. Woods* (1867), L. R. 4 Eq. 432; *Arkwright v. Newbold* (1881), 17 Ch. D. 301; *Rees v. De Bernhardt*, [1896] 2 Ch. 437; *Hermann v. Charlesworth* (1905), 74 L. J. K. B. 620; *Parkinson v. College of Ambulance & Harrison*, [1925] 2 K. B. 1.

B. Joinder of Claims.

See R. S. C., Ord. 18, r. 2, & generally, PRACTICE.

1009. With action for recovery of land—Whether joinder possible.]—Leave was given to join with an action for the recovery of land three other claims, namely, for an injunction against one of defts. receiving the rents & profits, for the appointment of a receiver of the rents & profits, & for the delivery up & cancellation of a deed under which the same deft. claimed to be entitled.—*COOK v. ENCHMARCH* (1876), 2 Ch. D. 111; 45 L. J. Ch. 504; 24 W. R. 293; 3 Char. Pr. Cas. 37.

Annotation:—Mentd. Re Pilcher, Pilcher v. Hinds (1879), 40 L. T. 422.

1010. ———.]—A purchaser of real property brought an action claiming quiet possession of the property purchased, & an injunction to restrain deft. from interfering with such possession:—*Held*: the claim for an injunction was not a separate cause of action, & could be joined with that for possession without the leave of the ct.—*KENDRICK v. ROBERTS* (1882), 46 L. T. 59; 30 W. R. 365.

1011. ———.]—*DENNIS v. CROMPTON*, [1882] W. N. 121.

1012. ———.]—*HAMBLING v. WALLANI*, [1889] W. N. 133.

Annotation:—Consd. Wheeler v. Keeble (1914), Ltd., [1920] 1 Ch. 57.

1013. ———.]—The writ in an action was indorsed to recover possession of a house, for arrears of rent & mesne profits, for an injunction to restrain defts. from doing upon the house any act which might be or become a nuisance to pltf. contrary to the provisions of a lease granted by pltf. to defts., & damages. Before the statement of claim had been delivered, defts. moved to set aside the writ upon the ground that pltf. had not, before issue thereof, obtained leave for the joinder of the cause of action for the injunction with the cause of action for the recovery of land:—*Held*: though a perpetual injunction, if claimed by the statement of claim, when delivered, might possibly be inconsistent with the terms of R. S. C., Ord. 18, r. 2, an interlocutory injunction, being only a substitute for damages between the issue of the writ & the trial, was not inconsistent with such rule; & upon the face of the writ there was no infringement of the rule, & the motion must be refused.—*READ v. WOTTON*, [1893] 2 Ch. 171; 62 L. J. Ch. 481; 68 L. T. 209; 41 W. R. 556; 37 Sol. Jo. 285; 3 R. 374.

Annotation:—N.F. Wheeler v. Keeble (1914), Ltd., [1920] 1

Ch. 57. Having regard to the earlier authorities, I do not feel myself forced to accept the decision of *STIRLING, J.*, in *Read v. Wotton* as affecting the well-settled principles which appear to me to be in question here (*YOUNGER, J.*).

1014. ———.]—Pltfs. by their writ claimed possession of premises comprised in a lease, damages for breach of covenants contained in the lease, & an interim injunction; & served a notice of motion for an injunction to restrain defts. from erecting or permitting to remain erected certain lettering then erected on the front of the premises in breach of the covenants contained in the lease. The breach of covenant by deft. responsible for the breach was admitted, but since the notice of motion was served the breach of covenant had been remedied:—*Held*: the issue of the writ to recover possession was an unequivocal determination of the lease on the part of pltfs. & that it was not open to them to move for an injunction on the footing that the lease was still subsisting, & pltfs. must pay the costs of the motion.—*WHEELER v. KEEBLE* (1914), Ltd., [1920] 1 Ch. 57; 88 L. J. Ch. 554; 63 Sol. Jo. 724; *sub nom* *WHEELER v. HITCHINGS, LTD.*, 121 L. T. 636.

SUB-SECT. 2.—WHO MAY APPLY.

See, generally, R. S. C., Ord. 50, r. 6.

1015. Defendant—Before judgment—Previous motion by plaintiff for like relief.]—Under R. S. C., Ord. 52, r. 4, a deft. in an action may, before judgment, apply for an injunction & a receiver. Deft. may do so notwithstanding that pltf. has already served notice of motion for the like purpose; & in such case one order will be made on the two motions, but the conduct of the proceedings will in general be given to pltf.—*SARGANT v. READ* (1876), 1 Ch. D. 600; 45 L. J. Ch. 206; 2 Char. Pr. Cas. 81.

Annotations:—Distd. Carter v. Fey, [1894] 2 Ch. 541. *Consd. Collison v. Warren*, [1901] 1 Ch. 812. *Mentd. Re Lloyd, Allen v. Lloyd* (1879), 12 Ch. D. 447; *Taylor v. Neate* (1888), 39 Ch. D. 538; *Burt, Boulton & Hayward v. Bull*, [1895] 1 Q. B. 276.

1016. ——— No counterclaim filed—Relief incident to plaintiff's claim.]—Deft. who has not filed a counterclaim cannot apply for an injunction against pltf. unless the relief sought is incident to or arising out of the relief sought by pltf.—*CARTER v. FEY*, [1894] 2 Ch. 541; 63 L. J. Ch. 723; 70 L. T. 786; 10 T. L. R. 486; 38 Sol. Jo. 491; 7 R. 358, C. A.

Annotation:—Apld. Collison v. Warren, [1901] 1 Ch. 812.

1017. ——— Before counterclaim delivered—Both parties suing upon same contract.]—(1) Deft. may before delivering a counterclaim apply by motion for an injunction against pltf. if he & pltf. are both suing upon the same contract.

(2) An interlocutory injunction was, on deft.'s motion granted to restrain pltf. from interfering with or disturbing deft. in his possession & occupation of a house.—*COLLISON v. WARREN*, [1901] 1 Ch. 812; 70 L. J. Ch. 382; 84 L. T. 482; 17 T. L. R. 362; 45 Sol. Jo. 377, C. A.

PART XI. SECT. 2, SUB-SECT. 1.—B.

a. Bill filed by representative—Joinder of parties represented.]—A bill was filed by a ratepayer seeking to restrain school trustees from allowing the school house to be used for religious services, but the bill did not allege that it was filed on behalf of pltf. & all other ratepayers. Two of the three school trustees consented to the injunction being granted as asked. The ct. refused application, on the grounds that the

suit was not properly constituted.—*RABIAN v. THURLOW TOWNSHIP SCHOOL TRUSTEES* (1865), 12 Gr. 115.—*CAN.*

f. Landlord & tenant—Against trespasser.]—A landlord & tenant are entitled to raise an action in their joint names for having a party interdicted against trespassing on the estate.—*JOLLY v. BROWN* (1828), 6 Sh. (Ct. of Sess.) 872.—*SCOT.*

PART XI. SECT. 2, SUB-SECT. 2.

g. Defendant—Before judgment.]—

An injunction may be granted against a pltf. at the instance of deft., before decree.—*STEWART v. KINGSMILL* (1867), 13 Gr. 347.—*CAN.*

h. Defendant—Before hearing—Specific application.]—If an injunction may be granted to a deft. before the hearing (as to which *quaere*), the answer must pray therefor specifically.—*BRANDON v. ELLIOTT* (1867), 14 Gr. 109.—*CAN.*

SUB-SECT. 3.—APPLICATION *EX PARTE*.A. *Form of Notice of Motion.*

1018. *How intitled.*—*Re PIKE*, [1902] W. N. 42.

B. *When Application made.*(a) *Before Writ.*

1019. *In urgent cases—To preserve funds.*—*COLEBOURNE v. COLEBOURNE*, No. 1001, *ante*.

1020. ———.]—Deceased died intestate. Pltf. as next of kin claimed the grant of administration alleging that deceased had died a bachelor. At pltf.'s instance a writ of summons issued against deft. who claimed to be the lawful widow of deceased & was in possession of his personal estate, but there was some difficulty in serving the writ upon her. The ct. granted an injunction restraining her from dealing with the estate.—*BRAND v. MITSON (OTHERWISE BRAND)* (1876), 45 L. J. P. 41; 34 L. T. 854; 40 J. P. 407; 24 W. R. 524; 2 Char. Pr. Cas. 83.

1021. *Defendant out of jurisdiction—Injunction granted with order for service of writ.*—(1) When it is necessary to serve a writ in an action on a deft. out of the jurisdiction there must be an affidavit in support of the application, & the order made under R. S. C., Ord. 2, r. 4, will provide, if necessary, for service of interrogatories, & also for the issuing of an injunction, if it should be applied for *ex parte*.

(2) The affidavit should be intitled in the contemplated action, & also in the Jud. Acts.—*YOUNG v. BRASSEY* (1875), 1 Ch. D. 277; 45 L. J. Ch. 142; 24 W. R. 110; 1 Char. Pr. Cas. 88. *Annotation*:—*As to (1) Reid. Stigand v. Stigand* (1882), 19 Ch. D. 460.

In applications on notice.—See Sub-sect. 4, C. (b), *post*.

(b) *After Appearance.*

1022. *Not granted after appearance.*—After appearance no special injunction, such as the navigating of a ship, without notice.—*MARASCO v. BORTON* (1750), 2 Ves. Sen. 112; 28 E. R. 74, L. C.

1023. ———.]—Deft. having appeared, motion for an injunction in respect of waste, without notice, was refused.—*COLLARD v. COOPER* (1821), 6 Madd. 190; 56 E. R. 1064.

1024. ———.]—Pltf. cannot move *ex p.* for an injunction, after he has served deft. with subpoena, & deft. has appeared.—*PERRY v. WELLER* (1827), 3 Russ. 519; 38 E. R. 670, L. C.

Annotations:—*Appld. Randall v. Commercial Ry.* (1839), 3 Jur. 381. *Follid. Langham v. G. N. Ry.* (1847), 16 L. J. Ch. 437.

1025. ———.]—After service of subpoena & the appearance of deft., a motion for an injunction cannot be made *ex p.* Where, in an injunction suit, pltf. moved before answer that the bill might be dismissed & that defts. might pay the costs of the suit, on the ground that the suit was occasioned by their wrongful act, & that all the purposes of it had been attained by the motion for an injunction, the ct., although considering such an application reasonable, declined to introduce a new practice by making the order.—*LANGHAM v. GREAT NORTHERN RY. CO.* (1847), 1 De G. & Sm. 486; 5 Ry. & Can. Cas. 263; 16 L. J. Ch. 437; 9 L. T. O. S. 452; 11 Jur. 839; 63 E. R. 1160.

Annotations:—*Mentd. Ex p. G. N. Ry.* (1848), 5 Ry. & Can. Cas. 269; *Wallis v. Wallis* (1859), 4 Drew. 458; *Cotter v. Met. Ry.* (1864), 10 L. T. 777.

1026. *Appearance without service.*—Where a deft., not having been served with a subpoena, has, nevertheless, appeared several days before an application is made for an injunction, it is difficult to say he ought not to be served with notice of motion, whatever be the nature of the mischief apprehended. Deft. having become aware that a bill has been filed, & of course having also become aware of the object of that bill, the delay in making the application shows that pltf. could not think the danger arising from notice very great.—*MANSFIELD v. SHORT* (1818), 2 Coop. temp. Cott. 169; 47 E. R. 1108.

1027. ———.]—I am of opinion that except the mischief threatened be irreparable, for instance, the cutting down of ornamental timber & the like, no injunction ought to be granted, even after a gratis appearance, as it is called, unless upon notice. There is already too great a facility to obtain *ex p.* injunctions (*LEACH, V.C.*).—*LEWIS v. LANGHAM* (1835), 2 Coop temp. Cott. 170; 47 E. R. 1108.

1028. ——— & service of notice of motion.]—C. having, through D., his agent, agreed to sell a property to F., G., alleging a prior contract for sale to himself, commenced an action against C., D., & F. for specific performance, & in default, for damages against C. & D., & obtained an interlocutory injunction restraining C. & F. from completing the sale, G. giving the usual undertaking as to damages, the judge held that no contract had been entered into with G., & dismissed the claim with costs as against F., but as against C. & D. without costs, considering the conduct of D. blamable, & refused to give any inquiry as to damages. C. & D. appealed, on the ground that the dismissal ought to have been with costs, & that an inquiry as to damages ought to have been granted. G. presented a cross appeal asking for damages against C. & D.:—(1) C. was entitled to damages under the undertaking, for that, unless under special circumstances, effect ought to be given to such an undertaking when an injunction turns out to have been wrongly granted, but that in the present case, as the only possible damage was that C. had been delayed in receiving the purchase-money, an inquiry would not be directed, but C. should receive from pltf. interest at £5 per cent. on the purchase money, minus any interest actually made by him, the amount to be verified by affidavit; (2) C. & D. were entitled to the costs of both appeals, but that although C.'s appeal was not for costs alone, & by reason of that fact & of the cross appeal the whole case had been heard, the ct. was not at liberty to vary the order of the ct. below as to costs; (3) where a deft. has had notice of motion for an injunction, it is improper to grant an injunction against him *ex p.* though the pressure of business may be such as to prevent the motion on notice from being brought on.

(4) An interlocutory injunction ought to be made upon an undertaking for damages.—*GRAHAM v. CAMPBELL* (1878), 7 Ch. D. 490; 47 L. J. Ch. 593; 38 L. T. 195; 26 W. R. 336, C. A.

Annotations:—*As to (4) Consd. A.-G. v. Albany Hotel Co.*, [1896] 2 Ch. 696. *Apprvd. Re Hallstone, Hopkinson v. Carter* (1910), 102 L. T. 877. *Generally, Mentd. Campbell v. Holyland* (1877), 7 Ch. D. 166.

1029. ——— *Except in urgent cases—Waste.*—Injunction against waste not prevented by appear-

PART XI. SECT. 2, SUB-SECT. 3.—A.

k. *When leave granted—Whether notice of motion must conform.*—The notice of motion asking something more than leave was given to ask, does not

vitiolate it.—*MCDONALD v. CHARLEBOIS* (1890), 7 Man. L. R. 35.—CAN.

PART XI. SECT. 2, SUB-SECT. 3.—B. (b).

l. *Conditional appearance.*—An ap-

plication for an interlocutory injunction is properly made *ex p.* where deft. has entered a conditional appearance.—*FLETCHER v. MCGILLIVRAY* (1893), 3 B. C. R. 40.—CAN.

Sect. 2.—The application: Sub-sect. 3, B. (b), & C.; sub-sect. 4, A., B. & C. (a) & (b).]

ance the day before the motion.—**ALLARD v. JONES** (1809), 15 Ves. 605; 33 E. R. 883, L. C. *Annotations:—***Appld.** **Randall v. Commercial Ry.** (1839), 3 Jur. 381. **Refd.** **Mansfield v. Short** (1818), 2 Coop. Cott. 169.

1030. ———.]—**HARRISON v. COCKERELL**, No. 1035, *post*.

1031. ———.]—Injunction to restrain waste granted *ex p.*, notwithstanding appearance.—**PETLEY v. EASTERN COUNTIES RY. Co.** (1839), 8 Sim. 483; 8 L. J. Ch. 209; 59 E. R. 193; *sub nom.* **PETLEY v. EASTERN COUNTIES RY. Co.**, 3 Jur. 21.

*Annotation:—***Appld.** **Randall v. Commercial Ry.** (1839), 3 Jur. 381.

1032. ———.]—An injunction allowed to be moved for *ex p.* in a pressing case after defts. had entered an appearance.

In this case counsel having been instructed to oppose the motion, although no notice had been given, the ct. allowed them to be heard.—**ACRAMAN v. BRISTOL DOCK Co.** (1830), 1 Russ. & M. 321; 39 E. R. 124, L. C.

1033. ———.]—(1) Although an injunction obtained *ex p.*, upon a statement in which material facts are concealed or misrepresented, would, on a speedy application, be dissolved with costs; yet, it is not a sufficient ground for a motion to dissolve that injunction, after a period of several months has elapsed before notice of such motion is given; nor will the question, whether there has been such concealment or misrepresentation, be taken into consideration on appeal from an order made by the ct. in which the injunction was granted, & by which order the injunction was continued & the costs reserved.

(2) An injunction may be granted *ex p.*, notwithstanding deft. has appeared to the bill.—**BELL v. HULL & SELBY RY. Co.** (1840), 1 Ry. & Can. Cas. 616; 2 Coop. temp. Cott. 169; 47 E. R. 1107, L. C.

Annotations:—Generally, Mentd. **Wilson v. Newry, Warrenpoint & Rostrevor Ry.** (1847), 10 L. T. O. S. 211; **Dowling v. Pontypool, Caerleon & Newport Ry.** (1874), L. R. 18 Eq. 714.

1034. ———.]—It is not usual to grant an injunction *ex p.* after the appearance of deft., though it may be done in some pressing cases. But it is a rule without any exception, that if deft. has appeared, pltf., on applying for an *ex p.* injunction, ought to inform the judge of that fact (**NORTH, J.**).—**MEXICAN CO. OF LONDON v. MALDONADO**, [1890] W. N. 8.

1035. Fact of appearance—Must be disclosed.]—Although, in cases in the nature of waste, an injunction will sometimes be granted *ex p.* even after appearance, yet if, in such a case, an injunction has been obtained for default of appearance, & it turns out that an appearance had in fact been entered at the time when the injunction was moved for, the order will be discharged.—**HARRISON v. COCKERELL** (1817), 3 Mer. 1; 36 E. R. 1, L. C.

*Annotations:—***Appld.** **Randall v. Commercial Ry.** (1839), 3 Jur. 381. **Refd.** **Mexican Co. of London v. Maldonado**, [1890] W. N. 8.

1036. ———.]—Where the deft. has previously appeared, & that circumstance is concealed, an order for an injunction obtained *ex p.* will be discharged (**LEACH, V.C.**).—**SUTTON v.**

MUMFORD (1830), 2 Coop. temp. Cott. 171; E. R. 1108.

1037. ———.]—An order for an injunction was obtained *ex p.* after an appearance had been entered by the clerk in ct., who had instructions from the solr. for the railway co. to enter an appearance immediately to every bill which should be filed against them; but the fact of defts. having appeared was not known to the pltf.'s solr. when the injunction was obtained:—**Held:** the order must be discharged; for, although the ct. might grant an injunction *ex p.* under some circumstances even after appearance, yet the fact of such appearance having been entered must be stated when the application is made; &, if not known at the time, then pltf. must take his chance whether he obtains a good or a bad order.—**RANDELL v. COMMERCIAL RY. Co.** (1839), 2 Coop. temp. Cott. 169, 171; 8 L. J. Ch. 252; 3 Jur. 381; 47 E. R. 1107, 1108.

1038. ———.]—**MEXICAN CO. OF LONDON v. MALDONADO**, No. 1034, *ante*.

C. Grounds for Granting or Refusing.

See R. S. C., Ord. 52, r. 3.

1039. Serious injury caused by granting.]—**CROWDER v. TINKLER**, No. 339, *ante*.

1040. Urgency—Prevention of irreparable injury.]—**LEWIS v. LANGHAM**, No. 1027, *ante*.

—An *ex p.* injunction ought never to be granted, unless there is some real mischief, either likely to arise or requiring to be immediately remedied.—**PETRE (LORD) v. EASTERN COUNTIES RY. Co.** (1838), 1 Ry. & Can. Cas. 462, L. C.; *subsequent proceedings* (1843), 3 Ry. & Can. Cas. 367.

*Annotations:—***Refd.** **Lindsey v. G. N. Ry.** (1853), 10 Hare, 664. **Mentd.** **Stockton & Hartlepool Ry. v. Leeds & Thirsk & Clarence Ry.** (1848), 5 Ry. & Can. Cas. 691; **Eastern Counties Ry. v. Hawkes** (1855), 3 W. R. 609; **Caledonian & Dumbartonshire Junction Co. v. Helensburgh Harbour Trustees** (1856), 27 L. T. O. S. 241; **Preston v. Liverpool, Manchester & Newcastle-upon-Tyne Junction Ry.** (1856), 25 L. J. Ch. 421; **Leominster Canal Navigation Co. v. Shrewsbury & Hereford Ry.** (1857), 3 K. & J. 654; **Bowes v. Toronto City** (1858), 11 Moo. P. C. C. 463; **Bedford & Cambridge Ry. v. Stanley** (1862), 1 New Rep. 162; **Shrewsbury v. North Staffordshire Ry.** (1865), L. R. 1 Eq. 593.

1042. ———.]—Injunction granted *ex p.* to restrain the publication of the statutes of Magdalen College, Oxford. The same dissolved upon the facts stated in the answer.

When application is made to me for such an injunction I am always disposed to accede to the application where little mischief can arise by the granting of the injunction *ex p.*, & on the other hand irreparable injury may ensue were the injunction refused (**LORD LANGDALE, M.R.**).—**MAGDALEN COLLEGE, OXFORD v. WARD** (1839), 1 Coop. temp. Cott. 265; 47 E. R. 849.

1043. ———.]—**PEDLEY v. COOPER** (1892), 36 Sol. Jo. 729; *subsequent proceedings*, 36 Sol. Jo. 769.

1044. ———.]—*Prima facie* an injunction ought not to be granted *ex p.* or without hearing both sides, but in cases of emergency it will be so granted. Where an application was made *ex p.* for an injunction to restrain a distress for rent on the ground that the landlord was under a condition precedent to repair, it was directed that the other side should be served with notice of the

PART XI. SECT. 2, SUB-SECT. 3.—C.

*m. Costs of former motion not paid.]—*A motion by pltf. to continue an *ex p.* injunction was refused, with costs, but at the same time leave was given to amend the bill & another interlocutory

injunction was granted *ex p.* On the return of the motion to continue the latter:—**Held:** non-payment of the costs of the former motion was no objection to the motion being pro-

*n. Where injunction refused—Grants ex parte pending appeal.]—*A motion for injunction to restrain a sheriff's sale was refused by a single judge after argument. Upon motion *ex p.* to the full ct., pltf.'s counsel stating his intention to appeal, an injunction was granted

application.—ANON., [1876] W. N. 12; Bitt. Prac. Cas. 93; 1 Char. Cham. Cas. 18.

1045. —.]—Injunctions may be granted *ex p.*, but only in pressing cases; a receiver ought not to be granted *ex p.* except in cases of extreme emergency (LINDLEY, L.J.).—PIPERNO v. HARMSTON (1886), 3 T. L. R. 219; *sub nom.* PEPERNO v. HARMISTON, 31 Sol. Jo. 154, O. A.

1046. — Preservation of property in dispute.]—LONDON & COUNTY BANKING Co. v. LEWIS, No. 93, *ante*.

1047. —.]—Where on the issue of a summons for the appointment of a receiver of property by way of equitable execution an order was made *ex p.* according to R. S. C., Ord. 50, r. 15 (a), Appendix K., No. 61 (a), for an injunction to restrain the judgment debtors from dealing with the property until after the hearing of the application:—*Held*: the injunction ought not to be granted in the absence of anything to show that there was danger of the property being made away with by the judgment debtors before the hearing of the application for a receiver.—LLOYDS BANK, LTD. v. MEDWAY UPPER NAVIGATION Co., [1905] 2 K. B. 359; 74 L. J. K. B. 851; 93 L. T. 224; 54 W. R. 41, C. A.

1048. Clear right to relief.]—In an action of trover by the claimant of goods sold under an order of the ct. by defts. who were exors., an administration suit being pending, an *ex p.* application by defts. for an injunction was refused on the ground that this relief will only be given in very plain cases.—WOOD v. WAKEFIELD, [1875] W. N. 238; Bitt. Prac. Cas. 50; 1 Char. Cham. Cas. 9.

SUB-SECT. 4.—APPLICATION ON NOTICE.

A. When Application made.

1049. Before writ—In urgent cases.]—In an urgent case an *interim* injunction may be granted before bill filed.—THORNELOE v. SKOINES (1873), L. R. 16 Eq. 126; 42 L. J. Ch. 788; 21 W. R. 880.

1050. — Where writ office closed.]—Where, on account of the offices of the ct. being closed, the filing of a bill has been delayed, the ct. may grant an injunction before bill filed, & direct the bill & affidavit to be filed as on the day when the offices were closed.—CARR v. MORICE (1873), L. R. 16 Eq. 125; 42 L. J. Ch. 787.

1051. —.]—Injunction granted before bill filed to restrain deft. from levying execution.—CAMPANA v. WEBB (1874), 22 W. R. 622.

1052. — Writ handed to registrar in court.]—CHANOCH v. HERTZ (1888), 4 T. L. R. 331.

Applications *ex parte*.]—See Sub-sect. 3, B. (a), *ante*.

Applications in vacation.]—See Sub-sect. 5, *post*.

until the re-hearing of the order or the hearing of the cause, whichever should first come on.—LEWIS v. WOOD (1884), 2 Man. L. R. 73.—CAN.

PART XI. SECT. 2, SUB-SECT. 4.—B.

1053 i. When by leave of court—Must state leave granted.]—Where an injunction is granted to a particular day, which is not a motion day, & the writ is served, together with a notice of motion for that day to extend the injunction, the notice is not irregular, though it omit to mention, that such notice is given by leave of the ct.—JOHNSON v. CARR (1865), 11 Gr. 117.—CAN.

o. Sufficiency of notice.]—Pltf. sued defts. to recover back certain tolls which he alleged to have been illegally charged; & indorsed on his summons, "N.B.—Take notice, that in default of appearance pltf. may, besides proceeding to judgment & execution for damages & costs, apply for & obtain a writ of injunction".—*Held*: notice insufficient according to the form in O. L. P. Act, 1856, No. 59, Sched. A.—RITCHIEY v. TORONTO ROADS Co. (1863), 23 U. C. R. 62.—CAN.

PART XI. SECT. 2, SUB-SECT. 4.—C. (a).

p. Necessity for.]—Notice of an appli-

B. Contents of Notice.

See, generally, PRACTICE.

1053. When by leave of court—Must state leave granted.]—COOKE v. —, No. 1066, *post*.

1054. —.]—Where a motion [for an injunction] is made by leave of the ct., the notice ought to mention that it is to be so made, otherwise deft. may disregard it.—HILL v. RIMELL (1837), 8 Sim. 632; 2 Jur. 45; 59 E. R. 251; *on appeal*, 2 My. & Cr. 641, L. C.

1055. —.]—Where special leave is obtained to serve short notice of motion with a copy of the bill, it must be so stated in the notice, otherwise the motion will be refused.—CHAMBERS v. TOYNBEE (1864), 10 L. T. 860; 12 W. R. 1100. *Annotation*:—FOLLADAWSON v. BEESON (1882), 22 Ch. D. 504.

1056. —.]—DAWSON v. BEESON, No. 1058, *post*.

C. Service of Notice and Affidavit.

(a) In General.

1057. On whom served.]—Notice of motion for an injunction to restrain execution at law served on the housekeeper of deft.'s attorney at law insufficient.

Where it was stated in the order for an injunction that notice had been served on defts., & in the affidavit that it was served on the persons acting as solrs. to defts., the order was discharged for irregularity. The proper course in such a case is to move to discharge the order, & not to dissolve the injunction.—ANGIER v. MAY (1855), 3 Eq. Rep. 488; 3 W. R. 330.

1058. Effect of irregularity.]—(1) Where a party applies for special leave to serve short notice of motion he must distinctly state to the ct. that the notice applied for is short; & the same fact must distinctly appear on the face of the notice served on the other party.

(2) But in a case where short notice of a motion had been irregularly applied for & served, but the party served had not been injured by the irregularity, the ct. exercised its discretion under R. S. C., Ord. 59, r. 1, & disregarded the irregularity & heard the motion on the merits.—DAWSON v. BEESON (1882), 22 Ch. D. 504; 52 L. J. Ch. 563; 48 L. T. 407; 31 W. R. 537, C. A.

Annotations:—As to (1) *Reid*. Reynolds v. Coleman (1887), 35 W. R. 813. *Generally*, *Mentd.* Pearson v. Pearson (1884), 54 L. J. Ch. 32.

1059. —.]—SIMPSON & SONS, LTD. v. COLLINSON (1896), 40 Sol. Jo. 753.

(b) Before Writ.

1060. By leave of court—In urgent cases—Waste.]—Subpoena will issue, & leave to serve notice of motion for an injunction will be given, before bill filed in cases of bills for injunctions to stay waste.—FOSBROOK v. WOODCOCK (1848), 12 Jur. 956.

cation for an injunction should be given to a deft. where that can conveniently be done without producing any mischief to pltf., & although a subpoena may have been served to appear & answer the bill.—HOME v. THOMPSON (1837), Sau. & So. 615.—IR.

q. —.]—TONI TYRES, LTD. v. PALMER TYRE, LTD. (1905), 7 F. (Ct. of Sess.) 477; 42 So. L. R. 352; 12 S. L. T. 707.—SCOT.

1057 i. On whom served.]—If a bill for an injunction prays for an account & answer from any of defts., all defts. must be served before moving on the bill.—NEWHAM v. O'SULLIVAN (1838), 1 I. Eq. R. 68.—IR.

2.—*The application: Sub-sect. 4, C. (b), (c), (d) & (e); sub-sects. 5, 6 & 7. Sect. 3: sects. 1 & 2.]*

1061. —.]—Application for leave to serve a notice of motion for an injunction, prior to the bill being filed, refused, the ct. declining to do more than give leave to serve the notice of motion with the copy of the bill.—*SIMMONS v. HEAVISIDE* (1856), 22 Beav. 412; 52 E. R. 1167.

(c) *With Writ.*

See, now, R. S. C., Ord. 52, r. 9.

1062. Leave of court necessary.]—*SIMMONS v. HEAVISIDE*, No. 1061, *ante*.

1063. —.]—*SMITH v. TRICKELL* (1893), 38 Sol. Jo. 113.

1064. Copy of affidavit served at same time.]—In all cases where leave has been given to serve short notice of motion with the writ it is desirable, in the interests of fairness, that pltf. should when he serves the writ & notice of motion, serve also copies of the affidavits on which he intends to rely, & shall not wait for deft. to inquire what evidence in support of the motion has been filed & leave him to ask for copies, as is the ordinary practice where a motion is brought on on full notice (*YOUNGER, J.*).—*PARAVICINI & SUCCRI v. GUNNER*, [1919] W. N. 173.

(d) *Before Appearance.*

See, now, R. S. C., Ord. 52, r. 8.

1065. Leave of court necessary.]—Pltf. cannot, before the appearance of deft., give notice of an application for a special injunction, without previously obtaining the leave of the ct.—*ANON.* (1823), 2 L. J. O. S. Ch. 81.

1066. —.]—A motion for an injunction upon notice, & before appearance, cannot be made, unless leave to give notice has been obtained, & the notice express that fact.—*COOKE v. —* (1826), 4 L. J. O. S. Ch. 141.

1067. —.]—Service of a notice of motion upon deft. before he has appeared to the bill, is irregular, unless the leave of the ct. has been previously obtained.—*HILL v. RIMELL* (1837), 2 My. & Cr. 641; 40 E. R. 784, L. C.

1068. Personal service necessary.]—An injunction may be obtained before appearance upon personal service of the notice of motion; but a receiver cannot, except leave be given to serve the notice personally. Such leave will not be granted, unless it appear that pltf. has used due diligence to compel an appearance.—*RAMSBOTTOM v. FREEMAN* (1841), 4 Beav. 145; 10 L. J. Ch. 362; 49 E. R. 294.

(e) *Service out of Jurisdiction.*

See, generally, R. S. C., Ord. 11, r. 8 A.

1069. With writ—Whether leave may be given.]—*Semble*: the ct. cannot allow notice of motion

for an injunction to be served outside the jurisdiction with the writ.—*MANITOBA & NORTH WEST LAND CORPN. v. ALLAN*, [1893] 3 Ch. 432; 63 L. J. Ch. 156; 69 L. T. 558; 37 Sol. Jo. 715.

Annotation:—*Consd. Overton v. Burn, Lowe* (1896), 74 L. T. 776.

1070. —.]—*HERSEY v. YOUNG* (No. 2) (1894), 38 Sol. Jo. 216, C. A.

Annotation:—*Folld. Overton v. Burn, Lowe* (1896), 74 L. T. 776.

1071. —.]—Leave to serve notice of motion for an interlocutory injunction, with notice of the writ in an action out of the jurisdiction, upon some of defts. who are foreign subjects, will be given, without prejudice to any question which may arise on the order.—*OVERTON & Co. v. BURN, LOWE & SONS* (1896), 74 L. T. 776; 40 Sol. Jo. 620, C. A.

SUB-SECT. 5.—APPLICATION IN VACATION.

See R. S. C., Ord. 62.

1072. In urgent cases.]—*GALLOWAY v. APPLETON* (1821), 10 Price, 133, n.; 147 E. R. 267.

1073. —.]—*TUCKER v. SANGER* (1822), 10 Price, 132; 147 E. R. 266.

1074. —.]—*CRESWELL v. LONG* (1822), 10 Price, 133, n.; 147 E. R. 267.

1075. —.]—*BRITISH MOTOR CAR CO., LTD. v. ATLEE* (1914), 58 Sol. Jo. 807.

SUB-SECT. 6.—EFFECT OF AMENDMENT OF PLEADINGS.

See, generally, PRACTICE; R. S. C., Ord. 28.

1076. After notice of motion—Operates as abandonment.]—Pending a notice of motion for an injunction to stay an action, pltf. amended his bill under an order obtained as of course:—*Held*: he had waived the prior notice.—*MARTIN v. FUST* (1836), 8 Sim. 199; 59 E. R. 79.

1077. —.]—A motion for an injunction & receiver is irregular where pltf. amends his bill between the time of giving notice of moving & the time of bringing on the motion.—*GOUTHWAITE v. RIPPON* (1838), 1 Beav. 54; 48 E. R. 859.

1078. —.]—*MONYPENNY v. —* (1852), 1 W. R. 99.

1079. Whether injunction granted after.]—Pltf., entitled to an injunction, on affidavit, as, to stay proceedings at law by a party abroad, must state the whole of his case within his knowledge upon the original bill; & cannot after answer, upon which he neither moved nor excepted, have the injunction upon amendment & affidavit, as a general rule; subject to exception; as circumstances come to his knowledge subsequently: surprise,

1079 i. Whether injunction granted after.]—Where a motion for injunction stood over, & before it was again brought on, pltf. amended his bill by adding parties necessary to the suit, for the purpose of obtaining the relief sought thereby, & in the absence of whom such relief would not have been granted, & again brought on the motion without giving a fresh notice, the ct. refused to hear the motion on this objection being taken.—*WESTACOTT v. COCKERLINE* (1867), 13 Gr. 159.—*CAN.*

1079 ii. —.]—Where after serving a notice of motion for injunction, & before the motion is made pltf. amends his bill, such amendment is an answer to the motion.—*MCDONELL v. STREET* (1867), 13 Gr. 168.—*CAN.*

PART XI. SECT. 2, SUB-SECT. 4.—C. (d).

1065 i. Leave of court necessary.]—*FARQUHARSON v. SYDNEY TOWN* (1892), 40 N. S. R. 617.—*CAN.*

PART XI. SECT. 2, SUB-SECT. 5.

r. Bill of suspension & interdict—Interdict refused—New bill allowed.]—A bill of suspension & interdict, presented during vacation, having been passed but the interdict refused:—*Held*: a new bill competent to the next succeeding. Ordinary, although not presented.—*TROTTER v. FARNIE* (1830), 6 Ch. 104.

; *affg. 5 Wils. & S. 649.*—*SCOT.*

PART XI. SECT. 2, SUB-SECT. 6.

t. General rule.]—Where pltf. amends his bill to continue or obtain an injunction on equity confessed, this is always looked upon as dilatory, & the ct. will take no notice of the charges or allegations added by the amendment, unless pltf. files an affidavit verifying such additional allegations that they are material, & came to his knowledge since the filing of the original bill.—*BAILY v. BARNEWALL* (1743), 2 How. E. E. 556.—*IR.*

2 How. E. E. 556.—IR. (1757),

b. —.]—*HICKSON v. —* (1758), 2 How. E. E. 556.—*IR.*

etc.—**NORRIS v. KENNEDY** (1805), 11 Ves. 565; 32 E. R. 1208, L. C.

Annotations:—**Consd. Ferrand v. Hamer** (1838), 8 L. J. Ch. 96. **Refd. Wood v. Beadell** (1829), 3 Sim. 273.

1080. —.]—Pltf. in a bill for an injunction must state at once the whole case within his knowledge; but the ct. though very jealous of amendment without prejudice to the injunction, permits even re-amendment; ascertaining precisely its nature, & by clear & positive affidavit that the pltf. had not a knowledge of the facts, enabling him to bring that case upon the record sooner.—**SHARP v. ASHTON** (1814), 3 Ves. & B. 144; 35 E. R. 433, L. C.

Annotation:—**Consd. Ferrand v. Hamer** (1838), 4 My. & Cr. 143.

1081. Amendment granted without prejudice to injunction.—In a case in which there were two defts. one of whom had answered but a common injunction had been obtained against the other deft. for want of answer pltf. obtained an order of course on an *ex p.* application for leave to amend without prejudice to the injunction:—**Held**: such an order was regular & a motion to discharge it on the ground that a special motion ought to have been made was refused.—**FERRAND v. HAMER** (1838), 4 My. & Cr. 143; 8 L. J. Ch. 96; 3 Jur. 236; 41 E. R. 57, L. C.

Annotation:—**Consd. Brooks v. Purton** (1842), 1 Y. & C. Ch. Cas. 271.

As dissolution of injunction.—See Part XIII., Sect. 8, *post*.

LONDON RY. CO. (1875), L. R. 20 Eq. 544; 44 L. J. Ch. 602; 23 W. R. 901.

Annotations:—**Mentd. Norton v. L. & N. W. Ry.** (1878), 9 Ch. D. 623; **Pugh v. Golden Valley Ry.** (1879), 12 Ch. D. 274; **C. & S. L. Ry. v. L. C. C.** (1891), 7 T. L. R. 643; **Harrison v. Southwark & Vauxhall Water Co.**, [1891] 2 Ch. 409; **Morris v. Tottenham & Forest Gate Ry.**, [1892] 2 Ch. 47; **A.-G. v. Met. Ry.**, [1894] 1 Q. B. 384; **Barnard v. G. W. Ry.** (1902), 86 L. T. 798.

1085. Application by plaintiff for injunction in terms of order—Simultaneous action by defendant to discharge order—Right to begin.—Where an *interim* order has been obtained, & simultaneous applications are made, on the part of pltf. for an injunction in terms of the order, & on the part of defts. to discharge the order, pltf. have the right to begin.—**FRASER v. WHALLEY, GARTSIDE v. WHALLEY** (1864), 2 Hem. & M. 10; 11 L. T. 175; 71 E. R. 361.

Annotations:—**Mentd. Punt v. Symons**, [1903] 2 Ch. 506; **Piercy v. Mills**, [1920] 1 Ch. 77.

1086. “Until further order” —Meaning of.—Where an *interim* injunction is granted over the next motion day or until further order it signifies that the injunction may be dissolved before the day fixed, but cannot be extended beyond that period except with the leave of the ct.—**BOLTON v. LONDON SCHOOL BOARD** (1878), 7 Ch. D. 766; 47 L. J. Ch. 461; 38 L. T. 277; 42 J. P. 647; 26 W. R. 549.

Annotations:—**Consd. Boyce v. Gill** (1891), 64 L. T. 824. **Refd. Wimbledon L. B. v. Croydon R. S. A.** (1886), 55 L. T. 106. **Mentd. Re Wallis & Grout’s Contract**, [1906] 2 Ch. 206.

SUB-SECT. 7.—INTERIM ORDER IN NATURE OF INJUNCTION.

Interlocutory injunction.—See Part III., *ante*.

1082. Nature of interim order.—Where an *interim* order in the nature of an injunction *ex p.* is applied for & granted, but it appears upon the regular hearing of the motion for an injunction, that the statement upon which the order was obtained did not contain a full disclosure of material circumstances, the ct. will make such order as to the costs of the parties as will show its sense of the impropriety of such a proceeding.—**FULLER v. TAYLOR** (1863), 32 L. J. Ch. 376; 8 L. T. 69; 9 Jur. N. S. 743; 11 W. R. 532.

1083. The application—Necessity for full disclosure of facts.—**FULLER v. TAYLOR**, No. 1082, *ante*.

1084. — When granted—After notice of motion—Urgency.—I have only had the affidavits read for the purpose of seeing if it was a case not for an *ex p.* injunction, but for an *interim* order, where the other side is served with notice & has not had an opportunity of answering the affidavits. I am clearly of opinion on the facts that, supposing pltf. are right as to the law, it is a case for that kind of injunction which is not strictly an *ex p.* injunction but which is very much like it. They give notice to the other side, they have not had time to answer, & therefore I shall give them an injunction on the usual terms of an undertaking in damages (**JESSEL, M.R.**).—**FENWICK v. EAST**

SECT. 3.—EVIDENCE.

SUB-SECT. 1.—DISCRETION OF COURT.

1087. To act on evidence before it—Without cross-examination of witnesses.—On a motion to dissolve an injunction to stay proceedings at law pltf. in equity has no right, under 15 & 16 Vict. c. 86, s. 40, to require that the motion shall stand over in order that he might examine orally witnesses who have made affidavits for deft.—**NORMANVILLE v. STANNING** (1853), 10 Hare, App. I., xx.; 68 E. R. 1124.

1088. — — ——In an injunction suit to restrain the infringement of a patent, a pltf. moving for leave to proceed at law must file an affidavit of his belief in his title & in the alleged infringement. Order made upon such an affidavit, notwithstanding an application by deft. that the motion might stand over for the cross-examination of pltf.—**MAYER v. SPENCE** (1860), 1 John. & H. 87; 29 L. J. Ch. 552; 6 Jur. N. S. 672; 8 W. R. 559; 70 E. R. 673.

SUB-SECT. 2.—ON APPLICATION EX PARTE.

See, generally, PRACTICE.

1089. All material facts must be disclosed—Interim order.—**FULLER v. TAYLOR**, No. 1082, *ante*.

PART XI. SECT. 2, SUB-SECT. 7.

c. Pending appeal.—Pltf. in a partnership action obtained judgment in his favour, & deft. having given security for costs appealed to the Ct. of Appeal. Pltf. then made an application to the Ct. of Appeal for an injunction to restrain deft. from dealing with partnership moneys & for a receiver:—**Held**: a judge of the Ct. of Appeal may at time during vacation make any

interim order to prevent prejudice to the claims of any party pending an appeal & what may be done by a judge during vacation may be done by the Ct. at any other time; & the Ct. of Appeal, for the purposes of appeals, etc., may exercise the power, authority, & jurisdiction by the Jud. Act vested in the High Ct.—**EMBRICE v. McCURDY** (No. 2) (1907), 10 O. W. R. 131; 14 O. L. R. 325.—**CAN**

PART XI. SECT. 3, SUB-SECT. 1.

d. Conflicting evidence.—Where the evidence, as to the injury done to a highway by the manner in which a railway was constructed, was conflicting, the ct. refused an injunction, leaving the parties to their legal remedy.—**FREDERICKSBURG MUNICIPALITY v. GRAND TRUNK RY. CO.** (1858), 6 Gr. 555.—**CAN.**

Sect. 3.—Evidence: Sub-sects. 2, 3 & 4, A., B & C.]

1090. —.]—SCHMETTEN v. FAULKS (1893), 37 Sol. Jo. 389.

—.]—See Part XIII., Sect. 5, sub-sect. 2, post.

1091. What are material facts—Question for court.]—SCHMETTEN v. FAULKS (1893), 37 Sol. Jo. 389.

See, also, No. 57, ante, No. 1414, post.

1092. What must be shown—Extreme urgency—Or that notice mischievous.]—The affidavits, upon which an *ex p.* application for an injunction is made, must show, either, that notice to deft. would be mischievous, or that the mischief is so urgent, that it would be done, if notice were served upon deft., before the injunction could be obtained. When the affidavits fall short of this point, the motion must be directed to stand over, & notice of it to be served upon deft. (*per CUR.*).—ANON. (1822), 1 L. J. O. S. Ch. 3.

1093. —.]—Date when plaintiff knew of threatened injury.]—An affidavit in support of an *ex p.* injunction, must always state the precise time at which pltf., or those acting for him, became aware of the threatened injury. This is a rule which I have laid down for my own guidance, & I have seen no reason to relax it (SHADWELL, V.C.).—CALVERT v. GRAY (1830), 2 Coop. temp. Cott. 171; 47 E. R. 1108.

1094. Evidence dispensed with—Plaintiff out of jurisdiction—Undertaking by counsel in damages.]—HAMILTON v. BOARD (1863), 1 New Rep. 379, L. JJ.

1095. —.]—On motion for judgment.]—DYKES v. THOMSON, [1909] W. N. 104.

SUB-SECT. 3.—AT HEARING.

1096. Must correspond with case pleaded.]—The contents of documents set forth in the schedule to the answer, in an injunction cause, may be obtained before the dissolution of the injunction, & used to oppose the motion to dissolve it. Hence,

PART XI. SECT. 3, SUB-SECT. 2.

1090 i. All material facts must be disclosed.]—The rule that all material facts must be brought forward in obtaining *ex p.* injunctions is a useful one, but care must be taken not to carry it too far by which prolixity would be produced.—LAVEZZOLO v. DAYLESFORD CORPN. (1864), 1 W. W. & A'B. 113.—AUS.

1090 ii. —.]—On an application for an injunction *ex p.*, all the facts should be fully disclosed; but the injunction will not be dissolved on the ground of the suppression of facts, if the facts suppressed would not have altered the decision of the judge.—HAMILTON v. BROWN (1866), 2 Old. 260.—CAN.

1090 iii. —.]—Coy v. Coy (1866), 1 Han. 177.—CAN.

1090 iv. —.]—Where a party applies for an *ex p.* injunction, he is bound to state all the facts which are important to be brought before the Ct., & which might influence it in determining upon the application; & if important facts within the knowledge of the party are omitted, the injunction will be dissolved without regard to the merits.—ST. v. BROWN (1872), 1 Pug.

1090 v. —.]—On a motion *ex p.* for an injunction all facts within the knowledge of appot. & material to the application must be disclosed.—1 Man. L. R.

1090 vi. —.]—BURBANK v. WEBB (1888), 5 Man. L. R. 264.—CAN.

1090 vii. —.]—The rule that on an application for an *ex p.* injunction order a full & truthful disclosure must be made of all material facts, must be strictly observed.—CANADIAN PACIFIC RY. CO. v. NASON (1907), 2 E. L. R. 498; 3 N. B. Eq. Rep. 476.—CAN.

1090 viii. —.]—BASHFORD v. BOTT (1909), 12 W. L. R. 428.—CAN.

1090 ix. —.]—When pltf. comes for an *ex p.* injunction, he must state his case in the first case in the first instance fully & fairly.—HEMPHILL v. M'KENNA (1842), 3 Dr. & War. 183.—IR.

1090 x. —.]—The Ct. deals with great strictness with parties who apply for *ex p.* injunctions, & pltf. applying comes under a contract with the Ct. that he will state the whole case fully & fairly. If he fail to do so, & the Ct. finds, when the other party applies to dissolve the injunction, that any material fact has been suppressed or improperly brought forward, so as to lead the Ct. to grant the injunction, it will dissolve the injunction without deciding on the merits. The affidavit should set forth the grounds on which it is believed that deft. justifies his acts.—SMITH v. PALMER (1873), 1 J. R. 195.—N.Z.

PART XI. SECT. 3, SUB-SECT. 3.

e. Evidence must be clear—As to purpose of injunction.]—On appeal from

when the injunction has been dissolved, & pltf. afterwards by inspecting the documents referred to by the answer, discovers new matter, he cannot move to revive the injunction upon an amended bill containing the new matter & verified by affidavit.—POWELL v. LASSALETTE (1822), Jac. 549; 37 E. R. 957, L. C.

1097. —.]—A.-G. v. LIVERPOOL CORPN., No. 1431, post.

1098. —.]—If pltf. alleges one state of circumstances, & afterwards relies at the hearing on other circumstances, he has not a right to avail himself of it as it comes out; he ought to have amended his bill, & admitted the case, & left defts. to grapple with it as they could. As he proves a different thing from that which he charges, I am of opinion that he has failed in supporting the equity stated by the bill, & it must therefore be dismissed, & the injunction dissolved (SHADWELL, V.C.).—BUTTS v. MATTHEWS (1836), 5 L. J. Ch. 134.

1099. —.]—An injunction was obtained to restrain an action at law on a bond, upon an allegation in the bill that it was obtained under an apprehension of its being another document. A case of a voluntary settlement & breach of confidence between principal & agent was now raised in support of the injunction, from statements contained in deft.'s answer:—*Held*: the case made out upon the answer did not correspond with the allegations in the bill & could not be set up under the general allegation of fraud & under influence.—BURTON v. BLAKEMORE (1838), 2 Jur. 1062; subsequent proceedings (1839), 3 Jur. 70.

1100. —.]—(1) Where pltf. filed a bill praying certain relief, & on that case then made obtained an injunction, & afterwards by supplemental bill made a new case & sought relief upon grounds paramount to the case made by his original bill:—*Held*: pltf. was not entitled to the extraordinary interference of Ct. by injunction, after having kept back the most important parts of the case on which he might have proceeded in the first instance.

(2) A party coming for an injunction is bound

order for attachment:—*Held*: pltf. were bound to give most accurate description of land in respect of which they sought injunction & as this had not been done order for attachment would be set aside.—ASTLEY UNITED GOLD MINING CO. REGISTERED v. COSMOPOLITAN GOLD MINING CO. REGISTERED (1867), 4 W. W. & A'B. 96.—AUS.

f. —.]—Injunction refused on the ground that the evidence did not sufficiently define the acts from which deft. ought to be restrained; & that it would, if granted, have to be such a kind that the Ct. could not hold deft. to be in contempt without the assistance of another jury.—LITCHFIELD v. BLENHEIM CORPN. (1890), 8 N. Z. L. R. 638.—N.Z.

g. Cross-examination of plaintiff.]—As a general rule an order under r. 401 will not be made for the attendance for cross-examination of a pltf. who has made an affidavit leading to an interim injunction before deft. files an affidavit of merits.—LEAVOCK v. WEST (1897), 6 B. C. R. 404.—CAN.

h. Cross-examination of defendant.]—On motion for an injunction against one deft., the cross-examination of another deft. on his answer was held inadmissible in reply to the affidavits filed in answer to the motion, where deft. against whom pltf. moved had no notice of the cross-examination, or of pltf.'s intention to read the depositions

to come with speed after the right he seeks to enforce has been questioned; & he is bound to come, without leaving his opponent to apply himself to a different case than that ultimately made. On that ground, that the interest of suitors requires that pltf. shall state his whole case at once, & not bring it forward piecemeal, I am bound to refuse the injunction (LORD COTTENHAM, L.C.).

—**BARKER v. NORTH STAFFORDSHIRE RY. CO.** (1848), 2 De G. & Sm. 55; 5 Ry. & Can. Cas. 401; 11 L. T. O. S. 345; 12 Jur. 589; 64 E. R. 25, L. C.
Annotations:—Generally, Mentd. Dakin v. L. & N. W. Ry. (1849), 3 De G. & Sm. 414; *L. & Y. Ry. v. Evans* (1851), 15 Beav. 322; *Webster v. S. E. Ry.* (1851), 1 Sim. N. S. 272; *Lavers v. L. C. C.* (1905), 93 L. T. 233.

1101. —.]—**CASTELLI v. COOK**, No. 1422, *post*.

1102. —.]—Where a bill is filed for an injunction, accompanied by affidavits in support of the bill, the affidavits must contain no allegations not inserted in the bill which prays for the injunction.—**BURGESS v. HORNE** (1850), 14 L. T. O. S. 461.

1103. —.]—(1) Where a pltf. alleges & proves, in a case for an injunction, a peculiar & specific injury, the order which he obtains gives him an extended right, in general terms, to restrain any injury of the same kind; but where the peculiar & specific injury is distinctly stated upon the pleadings, & where the words used describe another peculiar & specific injury proposed to be proved, pltf. is not entitled to relief.

(2) Where a bill states that an injury by deft. will, by a certain mode of operation, be inflicted upon pltf., & then, after giving notice of motion for an injunction, that mode of operation is changed & another adopted, the wholesome arrangement is to amend the bill.

(3) General words in a motion for an injunction are only justified by establishing a specific case of injury.—**HERZ v. UNION BANK OF LONDON** (1854), 2 Giff. 686; 66 E. R. 287; *sub nom. HERTZ v. UNION BANK OF LONDON*, 24 L. T. O. S. 137; 1 Jur. N. S. 127; 3 W. R. 49; *on appeal, sub nom. HERTZ v. UNION BANK OF LONDON*, 24 L. T. O. S. 186, L. JJ.

Annotations:—Generally, Reidd. Gooch v. Marshall (1859), 1 L. T. 210; *Lyon v. Dillimore* (1866), 14 L. T. 183; *Browne v. Flower*, [1911] 1 Ch. 219.

1104. General words in notice of motion—Must be borne out by specific case.]—**HERZ v. UNION BANK OF LONDON**, No. 1103, *ante*.

SUB-SECT. 4.—THE AFFIDAVIT.

A. Form of.

1105. How intitled.]—**YOUNG v. BRASSEY**, No. 1021, *ante*.

B. By Whom Sworn.

1106. Plaintiff—Unless sufficient excuse given.]—Injunction, until answer on further order, to restrain the publication of a work as pltf.'s upon affidavit by pltf.'s agents, pltf. himself being

on the motion.—**CURTIS v.** (1866), 12 Gr. 244.—**CAN.**

K. Corroboration of plaintiff's affidavit.]—There is no technical rule requiring pltf.'s affidavit in support of a motion for an injunction to be corroborated by other evidence; though the absence of other evidence may sometimes be a circumstance material to be considered.—**TREADWELL v. MORRIS** (1868), 15 Gr. 165.—**CAN.**

L. Insufficiency of.]—The proprietor of lands on one side of a burn sought to interdict a mining co.—who occu-

pled the ground on the other side for mining purposes, & one of whose levels driven underground discharged the water thereon collected into the burn—from driving another level under it which would have the effect of discharging the water into another stream flowing through a different valley:—*Held*: the party seeking the interdict had not averred on record facts relevant to entitle him to interdict.—**IRVING v. LEADHILLS MINING CO.** (1866), 18 Durl. (Ct. of Sess.) 833; 28 So. Jur. 382.—**SCOT.**

M. False statements.]—False state-

ments made by a person in respect of the property he is seeking to have protected, will disentitle him from claiming relief by injunction in respect of such property.—**WOLFE v. LANG & CO.** (1887), 13 V. L. R. 752.—**AUS.**

Annotations:—Mentd. Clark v. Freeman (1848), 11 Beav. 112; *Day v. Brownrigg* (1878), 10 Ch. D. 294; *Harris v. Warren & Phillips* (1918), 119 L. T. 217.

1107. —.]—Upon an injunction bill to stay proceedings at law, where deft. is abroad, a motion that service of the subpoena upon the attorney of pltf. at law, may be deemed good service, must be accompanied with an affidavit by pltf. in equity, as to merits, & not by his solr., unless he should happen to have personal knowledge of the merits.—**KENWORTHY v. ACCUNOR** (1819), 3 Madd. 550; 56 E. R. 607.

Annotation:—Mentd. Balls v. Strutt (1841), 5 Jur. 1035.

1108. —.]—The affidavit in support of a motion to extend the common injunction must be made by pltf. himself, unless a sufficient reason is assigned for its not being so made.—**SPALDING v. KEELY** (1835), 7 Sim. 377; 58 E. R. 882; *sub nom. SPALDING v. REILEY*, 4 L. J. Ch. 169.

1109. —.]—The affidavit in support of the motion must be made by pltf. himself, unless a sufficient excuse be given. The affidavit of pltf.'s solr. stated, that his client left London for Ireland, on Nov. 23, the motion being made on Dec. 3, without stating that he was obliged to go:—*Held*: no sufficient excuse, as pltf. before his departure had an opportunity of making the requisite affidavit.—**SCOTSON v. GAURY** (1841), 1 Hare, 99; 11 L. J. Ch. 98; 6 Jur. 96; 66 E. R. 965.

Annotation:—Mentd. S. E. Ry. v. Brogden (1850), 3 Mac. & G. 8.

1110. Agent of plaintiff—Plaintiff abroad.]—**BYRON (LORD) v. JOHNSTON**, No. 1106, *ante*.

1111. Solicitor of plaintiff—With personal knowledge of merits.]—**KENWORTHY v. ACCUNOR**, No. 1107, *ante*.

C. Time for Swearing.

See, now, R. S. C., Ord. 38, r. 19.

1112. Not before writ issued.]—No matter what may be the merits, an injunction founded upon an affidavit, sworn before the filing of the bill, cannot stand. The affidavits purport to be sworn in a cause, & yet, until the bill is filed, the cause does not exist (**LEACH, V.C.**).—**WILLIAMS v. DAVIES** (1829), 2 Sim. 461; 2 Coop. temp. Cott. 172; 57 E. R. 860.

Annotations:—Mentd. Clark v. Cort (1840), Cr. & Ph. 154; *Rawson v. Samuel* (1841), Cr. & Ph. 161; *Stimson v. Hall* (1857), 1 H. & N. 831; *Middleton v. Pollock, Ex p. Nugee* (1875), L. R. 20 Eq. 29.

1113. —.]—An injunction cannot be granted on an affidavit sworn on the day before the filing of the bill.—**FRANCOME v. FRANCOME** (1865), 5 New Rep. 289; 11 L. T. 757; 11 Jur. N. S. 123; 13 W. R. 355, L. C.

1114. — Except in special circumstances.]—

N. Interlocutory injunction.]—Although for the purposes of an interlocutory injunction there is not required to be the clear evidence necessary to support the case at the hearing, yet there must be some evidence.—**ROWAND v. RAILWAY COMR.** (1890), 6 Man. L. R. —.—**CAN.**

3.—*Evidence: Sub-sect. 4, C. & D.; sub-sects. 5 & 6. Sect. 4.]*

Interim injunction granted *ex p.* where the affidavits had by mistake been filed before the bill.—**FENNALL v. BROWN** (1854), 18 Jur. 1051.

Annotation:—N.F. Francombe v. Francombe (1865), 11 L. T. 757.

1115. ——— **On undertaking to reswear & file.]**—Upon an undertaking by pltf. to have the affidavit resworn & filed, an *interim* injunction extending over the next motion day was granted in an action where the affidavit in support of the application had been sworn two days before the issue of the writ.—**GREEN v. PRIOR**, [1886] W. N. 50.

— *See, further*, EVIDENCE, Vol. XXII., p. 516, Nos. 5484–5488.

D. Filing Affidavits.

Filing affidavits, *see, now*, R. S. C., Ord. 38, rr. 10, 18; EVIDENCE, Vol. XXII., pp. 562 *et seq.*; PRACTICE.

1116. **On day of motion.]**—It is not necessary that the affidavit of service should be sworn & filed at the time when the motion is actually made, it is nevertheless indispensable that such affidavit should be sworn & filed, previously to the rising of the ct., on the day on which the motion is made.—**MARSHALL v. COLEHILL** (1820), 2 Coop. temp. Cott. 172; 47 E. R. 1109.

1117. **Before motion heard—Office copy must be in court.]**—(1) An injunction, obtained upon affidavits, not actually filed at the time of the order being pronounced, is irregular, and must be discharged.

(2) Special injunction dissolved with costs, office copies of the affidavits in support of it not having been obtained when it was moved for.—**JACKSON v. CASSIDY** (1841), 10 Sim. 326; 2 Coop. temp. Cott. 172; 10 L. J. Ch. 356; 47 E. R. 1109. *Annotation:—As to* (2) **Folld. Elsey v. Adams** (1863), 2 New Rep. 263.

1118. ———.]—If, when an *ex p.* injunction is obtained, no office copy of the affidavit in support of the bill, is in ct., the injunction is irregular, & will be discharged with costs.—**ELSEY v. ADAMS** (1863), 4 Giff. 398; 2 New Rep. 263; 32 L. J. Ch. 616; 8 L. T. 451; 9 Jur. N. S. 788; 66 E. R. 762.

1119. ———.]—**MUNRO v. WIVENHOE & BRIGHTLINGSEA RY. CO.**, No. 134, *ante*.

1120. **At last moment—Court will prevent advantage being gained.]**—I shall at all times endeavour to prevent a party from gaining any advantage from filing affidavits at the last moment. The injunction must be granted in terms of the motion till the next seal, with liberty to pltf. to file such affidavits as he shall be advised (*per* CUR.).—**CAREW v. YATES** (1852), 1 W. R. 11.

1121. ———.]—Upon a motion for an injunction *deft.*, asking for time to answer affidavits, was put upon terms to file his affidavits in two days, an *interim* injunction being granted until the next seal.—**BESEMERES v. BESEMERES** (1853), Kay, App. xvii; 2 Eq. Rep. 668; 23 L. J. Ch. 198; 22 L. T. O. S. 197; 2 W. R. 124; 69 E. R. 330.

1122. **Affidavit not filed at hearing—Court acts on original—Urgent matter in vacation.]**—In the long vacation, when a matter presses, the ct. will sometimes take the original affidavits into its custody, & act on them as if they had been filed;

but when the ct. is sitting, office copies alone can be used.—**A.-G. v. LEWIS** (1845), 8 Beav. 179; 50 E. R. 71.

Annotation:—Folld. Elsey v. Adams (1863), 32 L. J. Ch. 616.

1123. ——— **Undertaking to file.]**—It is my practice in pressing cases, where there is not time to get the affidavit filed before the injunction is applied for, to grant the injunction upon the undertaking of pltf.'s solr. to file the affidavit at the opening of the office on the following day (**MALINS, V.C.**).—**NIEMANN v. HARRIS**, [1870] W. N. 6.

1124. ——— **Offices closed—Order to file as on date of hearing.]**—**CARR v. MORICE**, No. 1050, *ante*.

SUB-SECT. 5.—ADMISSIBILITY OF FRESH EVIDENCE.

1125. **Not after motion opened.]**—The rule, that no new evidence can be adduced on a motion after it has been opened, extends to the case of documents which it is proposed to verify *viva voce* by the attesting witness.—**BIRD v. LAKE** (1863), 1 Hem. & M. 111; 8 L. T. 632; 71 E. R. 49.

Annotations:—Mentd. Smith v. Hancock, [1894] 2 Ch. 377; **Cory v. Harrison** (No. 2) (1904), 48 Sol. Jo. 350.

1126. ———.]—**EAST LANCASHIRE RY. CO. v. HATTERSLEY**, No. 86, *ante*.

1127. **Motion ordered to stand till hearing—Fresh evidence cannot be filed.]**—(1) Where a motion is ordered to stand on certain terms till the hearing of the cause, no new evidence can be filed by the parties on the motion, which must be dealt with at the hearing in the manner in which it was originally brought on; & if the motion stands over in consequence of an affidavit of *deft.*, the motion is not “a matter depending in” or “a proceeding before” the ct., which entitles pltf. to cross-examine *deft.* on his affidavit; even although pltf. may have given notice that he is going to use it at the hearing of the cause.

(2) Where the ct. orders a motion to stand till the hearing of the cause, it simply reserves to itself the power of dealing with the costs of it differently from the costs in the cause.—**SINGER v. AUDSLEY** (1872), L. R. 13 Eq. 401; 41 L. J. Ch. 229; 26 L. T. 238; 20 W. R. 438.

1128. **Motion by way of appeal—Fresh evidence admissible—To support injunction.]**—Upon a motion by way of appeal from an order granting an injunction, *resp.* may adduce fresh evidence in support of the injunction.—**POLE v. JOEL** (1858), 2 De G. & J. 285; 44 E. R. 998, L. JJ.

See, now, R. S. C., Ord. 58, r. 4.

SUB-SECT. 6.—APPOINTMENT OF EXPERTS.

1129. **Power of court to appoint—Where evidence conflicting.]**—Experiments directed to be made by a civil engineer to ascertain the effect of steam navigation on a canal. Perpetual injunction granted to restrain a canal company from preventing *ptfs.* using steam power on their canal; *ptfs.* undertaking not to exceed a speed of three miles an hour.—**CASE v. MIDLAND RY. CO.** (1859), 27 Beav. 247; 28 L. J. Ch. 727; 33 L. T. O. S. 39; 5 Jur. N. S. 1017; 54 E. R. 96.

1130. ———.]—**LEECH v. SCHWEDER**, No. 618, *ante*.

1131. ———.]—**CARTWRIGHT v. LAST** (1876),

PART XI. SECT. 3, SUB-SECT. 4.—D. o. Affidavits in reply.]—There is a discretion in the judge on the hearing of such a motion to allow affidavits

in reply which contain statements going merely to strengthen the original case; & when an opportunity is given to the defence to answer the affidavits in reply,

the full ct. on appeal will not interfere with such discretion.—**MILLER v. CAMPBELL** (1903), 23 C. L. T. 233; 14 Man. L. R. 437.—CAN.

1 Seton's Judgments & Orders, 7th ed., pp. 385, 556.

Annotations:—Reid. Re Metropolitan Building Act, Ex p. McBryde (1876), 4 Ch. D. 200. *Mentd. Baltic v. Simpson* (1876), 24 W. R. 390.

1132. ———.]—*CRAVEN v. KAYE* (1876), 1 Seton's Judgments & Orders, 6th ed., p. 577.

1133. ———.]—*Consent of parties.*—(1) In a suit by the owner & occupier of a house against the occupier of an adjoining house, complaining of noise from deft.'s stable & of damp from an artificial mound on which it stood:—*Held*: pltf's. were entitled to an injunction to prevent deft. from keeping horses in his stable so as to be a nuisance; & deft. was also liable for not preventing the damp from going through pltf's. wall.

A special referee was by the consent of the parties appointed to inspect pltf.'s & deft.'s premises & to report to the ct. as to the alleged nuisance.

(2) Such a special referee being a quasi judicial person need not be sworn when called upon to answer questions with reference to his report.

(3) In considering the question of costs, the question of hardship is not wholly irrelevant. Therefore, while I give my judgment against him (deft.), as I am bound to do, I do not intend to make it a judgment with costs (*JESSEL, M.R.*).—*BRODER v. SAILLARD* (1876), 2 Ch. D. 692; 45 L. J. Ch. 414; 40 J. P. 644; 24 W. R. 456, 1011; 2 Char. Pr. Cas. 121, 123.

Annotations:—As to (1) *Reid. Hurdman v. N. E. Ry.* (1878), 3 C. P. D. 168; *Reinhardt v. Mentasti* (1889), 42 Ch. D. 685; *Gill v. Edouin* (1894), 71 L. T. 762; *Colwell v. St. Pancras B. Co.*, [1904] 1 Ch. 707; *Edwards v. Birmingham Navigations*, [1924] 1 K. B. 341. *As to* (3) *Reid. Reinhardt v. Mentasti* (1889), 42 Ch. D. 685. *Generally, Mentd. Humphries v. Cousins* (1877), 2 C. P. D. 239; *House Property & Investment Co. v. H. P. Horse Nail Co.* (1885), 29 Ch. D. 190; *Prinsep v. Belgravia Estate* (1895), 39 Sol. Jo. 381; *Lyons v. Wilkins*, [1899] 1 Ch. 255; *Maxey Drainage Board v. G. N. Ry.* (1912), 76 J. P. 236; *Sack v. Jones*, [1925] Ch. 235.

1134. ———.]—Where there is contradictory evidence on a scientific question, the ct. is at liberty to employ independent expert evidence to give advice upon which the ct. may form its judgment.—*BADISCHE ANILIN UND SODA FABRIK v. LEVINSTEIN* (1883), 24 Ch. D. 156; 52 L. J. Ch. 704; 48 L. T. 822; 31 W. R. 913; *on appeal* (1885), 29 Ch. D. 366, C. A.; (1887), 12 App. Cas. 710, H. L.

Annotations:—Mentd. Easterbrook v. G. W. Ry. (1885), 2 R. P. C. 201; *Haslam Foundry & Engineering Co. v. Hall* (1887), 4 T. L. R. 154; *Kurtz v. Spence* (1887), 58 L. T. 438; *Cole v. Saqui & Lawrence* (1888), 40 Ch. D. 132; *Edison & Swan United Electric Light Co. v. Holland* (1889), 5 T. L. R. 294; *Malan v. Young* (1889), 6 T. L. R. 38; *Vickers v. Siddell* (1890), 7 R. P. C. 292; *Lane Fox v. Kensington & Knightsbridge Electric Lighting Co.*, [1892] 3 Ch. 424; *Re Martindale*, [1894] 3 Ch. 193; *Atkins & Applegarth v. Castner-Kellner Alkali Co.* (1901), 18 R. P. C. 281; *Scott v. Scott*, [1913] A. C. 417; *Osram Lamp Works v. Pope's Electric Lamp Co.* (1917), 34 R. P. C. 369.

1135. ———.]—*ABBOTT v. HOLLOWAY* (1904), 48 Sol. Jo. 525.

1136. ———.]—I have often wondered why the ct. does not more frequently avail itself of the power of calling in a competent adviser to report to the ct. upon the question. There are plenty of experienced surveyors accustomed to deal with large properties in London who might be trusted to make a perfectly fair & impartial report subject of course to examination in ct. if required (*LORD MACNAGHTON*).—*COLLS v. HOME & COLONIAL STORES, LTD.*, [1904] A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687; 53 W. R. 30; 20 T. L. R. 475, H. L.; *revsq. S. C. sub nom. HOME & COLONIAL STORES, LTD. v. COLLS*, [1902] 1 Ch. 302, C. A.

Annotations:—Reid. Higgins v. Betts, [1905] 2 Ch. 210; *Heath v. Brighton Corpn.* (1908), 98 L. T. 718. *Mentd.*

Cowper v. Laidler, [1903] 2 Ch. 337; *Ambler v. Gordon*, [1905] 1 K. B. 417; *Anderson v. Francis*, [1906] W. N. 160; *Andrews v. Waite*, [1907] 2 Ch. 500; *Ankerson v. Connelly*, [1907] 1 Ch. 678; *Jolly v. Kine*, [1907] A. C. 1; *Morgan v. Fe r*, [1907] A. C. 425; *Polsue & Alfieri v. Rushmer*, [1907] A. C. 121; *Clarke & Corst v. Horrocks* (1908), 24 T. L. R. 486; *Cowper v. Milburn* (1908), 52 Sol. Jo. 316; *Hyman v. Van Den Bergh*, [1908] 1 Ch. 167; *Browne v. Flower*, [1911] 1 Ch. 219; *Griffith v. Clay*, [1912] 2 Ch. 291; *Davis v. Marrable*, [1913] 2 Ch. 421; *Bailey v. Holborn & Frascati*, [1914] 1 Ch. 598; *Paul v. Robson* (1914), 83 L. J. P. C. 304; *Hammerton v. Dysart*, [1916] 1 A. C. 57; *Litchfield-Speer v. Queen Anne's Gate Syndicate* (No. 2), [1919] 1 Ch. 407; *Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372; *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431; *Slack v. Leeds Industrial Co-op. Soc.*, [1924] 2 Ch. 475.

1137. ———.]—*Where injury established—Nuisance.*—*A.-G. v. COLNEY HATCH LUNATIC ASYLUM*, No. 4, *ante*.

1138. ———.]—Pltf. seeking to interfere on the ground of nuisance with a work carried on in a normal manner must, in order to sustain his suit, show that he has incurred actual & substantial or "visible" damage. The primary evidence of such damage should be that of ordinary witnesses. Scientific evidence should be resorted to, not to establish the fact of the damage, but only to explain the causes of it. The ct. will not in such cases send an expert to report where such course would in fact be giving a new trial on new evidence, & delegating the judgment of the ct. to that of the expert, nor will it direct an issue where the state of things may have been materially altered from lapse of time since the institution of the suit.

If it could be proved that pltf. was certainly about to sustain very substantial damage by what deft. was doing, & there was no doubt about it, this ct. would at once stop deft. & would not wait until the substantial damage had been sustained (*MELLISH, L.J.*).—*SALVIN v. NORTH BRANCEPETH COAL CO.* (1874), 9 Ch. App. 705; 44 L. J. Ch. 149; 31 L. T. 154; 22 W. R. 904, L. J.

Annotations:—Reid. Shotts Iron Co. v. Inglis (1882), 7 App. Cas. 518; *Fletcher v. Bealey* (1885), 28 Ch. D. 688. *Mentd. M'Murray v. Cadwell* (1889), 6 T. L. R. 76; *A.-G. v. Manchester Corpn.*, [1893] 2 Ch. 87; *Wood v. Conway Corpn.* (1914), 110 L. T. 917; *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431.

1139. *Status of expert—Quasi judicial.*—*BRODER v. SAILLARD*, No. 1133, *ante*.

1140. *Power of Court of Appeal to appoint—Change of circumstances since hearing.*—Where an injunction was rightly granted by a ct. of first instance under the circumstances of the case then before the ct., the Ct. of Appeal has power to direct a reference to an expert to inquire & report as to whether the circumstances have changed, & on his reporting that the circumstances existing at the time when the injunction was granted have changed, to dissolve the injunction.—*A.-G. v. BIRMINGHAM, TAME & REA DISTRICT DRAINAGE BOARD*, [1912] A. C. 788; 82 L. J. Ch. 45; 107 L. T. 353; 76 J. P. 481; 11 L. G. R. 194, H. L.

Annotations:—Reid. Metropolitan Water Board v. Dick, Kerr, [1917] 2 K. B. 1; *Robinson v. R.*, [1921] 3 K. B. 183. *Mentd. A.-G. v. Kerr & Ball* (1914), 79 J. P. 51; *Countess Warwick S.S. Co. v. Nickel Soc. Anon.*, *Anglo-Northern Trading Co. v. Emlyn, Jones & Williams* (1917), 87 L. J. K. B. 309.

SECT. 4.—INSPECTION AND PRESERVATION OF PROPERTY.

See, now, R. S. C., Ord. 50, rr. 3, 4, 6; PRACTICE.

1141. *Inspection—Powers of court to order.*—

Sect. 4.—Inspection and preservation of property.
Sect. 5: Sub-sect. 1.]

LONSDALE (EARL) v. CURWEN (1799), 3 Bli. 168, n. ; 4 E. R. 566.

Annotations:—*Apld.* East India Co. v. Kynaston (1821), 3 Bli. 153. *Foll.* Bennett v. Whitehouse (1860), 28 Beav. 119. *Apld.* Bennett v. Griffiths (1861), 3 E. & E. 407.

1142. ———.]—The owner of a mine sought relief against the owner of an adjoining mine for an alleged trespass in working into the pltf.'s mine:—*Held*: pltf., upon making out a *prima facie* case, was entitled to an interlocutory order for the inspection of deft.'s mine; the denial by the deft. of the trespass was not a sufficient ground for refusing the order, & it did not depend upon the balance of testimony.—**BENNETT v. WHITEHOUSE** (1860), 28 Beav. 119; 29 L. J. Ch. 326; 2 L. T. 45; 6 Jur. N. S. 528; 8 W. R. 251; 54 E. R. 311.

1143. ———.]—**WALL v. DUNN** (1876), Seton's Judgments & Orders, 7th ed. 564.

1144. ———.]—**At cost of plaintiff.**—An order was made in chambers for the inspection of defts.' property, the costs of the inspection to be paid by pltf.:—*Held*: under R. S. C., Ord. 52, r. 3, the judge had a discretion to order pltf. to pay the costs, & the order being made in his discretion pltf. had no right without leave to appeal from it.—**MITCHELL v. DARLEY MAIN COLLIERY CO.** (1883), 10 Q. B. D. 457; 52 L. J. Q. B. 394; 31 W. R. 549, D. C.

Annotation:—*Consd.* Ashworth v. English Card Clothing Co. (1904), 52 W. R. 507.

1145. ———.]—**Order made ex parte—Urgency.**—I have never made an order of this nature *ex p.*, & should not do so except in a case of emergency. I consider that the circumstances of this case warrant me in making an immediate order for inspection of the premises (MALINS, V.C.).—**HENNESSEY v. ROHMANN, OSBORNE & CO.** (1877), 36 L. T. 51.

1146. ———.]—**& excavation of soil.**—Under R. S. C., Ord. 50, r. 3, the ct. has power to make an interlocutory order before trial giving liberty to pltf. to enter upon land belonging to deft., & to excavate the soil thereof for the purposes of inspection.—**LUMB v. BEAUMONT** (1884), 27 Ch. D. 356; 51 L. T. 197; 32 W. R. 985.

Annotation:—*Mentd.* London Corpn. v. Horner (1914), 111 L. T. 512.

1147. ———.]—**Personal inspection by judge.**—**MANSER v. BOWERS**, [1872] W. N. 163.

1148. ———.]—**Effect of.**—In an action for deceit brought on the ground that a particular article used by deft. is a colourable imitation of pltf.'s, the conclusion of the judge, on a view by him of the two articles, such as two rival omnibuses, under R. S. C., Ord. 50, r. 4, deft.'s article is calculated to deceive, is not sufficient by itself to support an injunction. The judge must be satisfied by independent evidence that there is at least a reasonable probability of deception.—**LONDON GENERAL OMNIBUS CO., LTD. v. LAVELL**, [1901] 1 Ch. 135; 70 L. J. Ch. 17; 83 L. T. 453; 17 T. L. R. 61; 18 R. P. C. 74, C. A.

Annotations:—*Consd.* Bourne v. Swan & Edgar, *Re Bourne's Trade Mks.*, [1903] 1 Ch. 211; *Hennessey v. Keating* (1908), 24 R. P. C. 485; *R. v. De Grey*, *Ex p. Fitzgerald*

placed by the deft. for removal. *Interim injunction against removing the timber granted.*—**MORRIS v. HOWELL** (1888), 22 L. R. Ir. 77.—**IR.**

PART XI. SECT. 5, SUB-SECT. 1.

1150 i. Definite directions—What ordered, prohibited, or permitted.—An owner of a theatre may be restrained by an

injunction from conducting his business in such a manner as to induce persons to collect & form a queue on the sidewalk so as to obstruct access to adjacent business premises. An injunction should be issued only in circumstances which would amount to a nuisance. An injunction against "unlawfully obstructing the free access to & egress from the premises of pltf., by the col-

(1913), 109 L. T. 871. *Refd.* Alaska Packers Assocn. v. Crooks (1901), 18 R. P. C. 129.

1149. Preservation—Defendant restrained from ceasing to pump water.—Under R. S. C., Ord. 52, r. 3, the ct. has power in a proper case to grant an *interim* injunction to restrain a deft. from ceasing to pump water out of a mine.—**STRELLEY v. PEARSON** (1880), 15 Ch. D. 113; 49 L. J. Ch. 406; 43 L. T. 155; 28 W. R. 752.

Annotation:—*Consd.* Steamship New Orleans Co. v. London Provincial Marine & General Insee. (1909), 11 Asp. M. L. C. 225.

SECT. 5.—THE ORDER.

SUB-SECT. 1.—FORM OF ORDER.

See, generally, JUDGMENTS.

1150. Definite directions—What ordered, prohibited or permitted.—**MANN v. STEPHENS** (1846), 15 Sim. 377; 60 E. R. 665, L. C.

Annotations:—*Consd.* Tulk v. Moxhay (1848), 11 Beav. 571. *Refd.* Marker v. Marker (1851), 9 Hare, 1; Child v. Douglas (1856), 2 Jur. N. S. 950; Keates v. Lyon (1869), 4 Ch. App. 218; Renals v. Cowlshaw (1878), 9 Ch. D. 125; Nicoll v. Fenning (1881), 51 L. J. Ch. 166; Sheppard v. Gilmore (1887), 57 L. J. Ch. 6; Rogers v. Hosegood, [1900] 2 Ch. 388. *Mentd.* McLean v. McKay (1873), L. R. 5 P. C. 327; Nottingham Patent Brick & Tile Co. v. Butler (1885), 15 Q. B. D. 261.

1151. ———.]—Where the matter in dispute is distinctly raised by a motion for an injunction, & is ready for decision, the right should be declared & the injunction founded upon such declaration, that the order may inform deft. what the opinion of the ct. is as to the limits of his right.—**COTHER v. MIDLAND RY. CO.** (1848), 2 Ph. 469; 5 Ry. & Can. Cas. 187; 17 L. J. Ch. 235; 10 L. T. O. S. 437; 41 E. R. 1025, L. C.

Annotations:—*Refd.* Mid. Ry. v. Ambergate, Nottingham & Boston & Eastern Junction Ry. (1853), 10 Hare, 359; Powell Duffryn Steam Coal Co. v. Taff Vale Ry. (1873), 29 L. T. 575. *Mentd.* Sadd v. Maldon, Witham & Braintree Ry. (1851), 6 Exch. 143.

1152. ———.]—(1) A railway co.'s special Act enacted that, subject to the provisions in the Railway Clauses Consolidation Act, 1845 (c. 20), contained in reference to the crossing of roads on a level, it should be lawful for the co. in constructing the railway to carry the same on the level across the road following, which was then indicated, provided that the co. should erect & maintain a foot-bridge for the use of foot-passengers over the road, at or near the point of such level crossing. The co. proposed to cross the particular road in question not on a level, but to raise the road & build a bridge over it, & carry the line of railway underneath. On a motion for an injunction to restrain the co. from so doing, the judge was of opinion that upon the construction of the Act the words were compulsory & not merely permissive. On appeal:—*Held*: the words, coupled with the other sects. of the Act, were permissive merely, & not mandatory, & dissolved the injunction.

(2) It is highly inconvenient for the ct. to grant an injunction to restrain the performance of works, "in any other manner than authorised by the words of an Act of Parliament," unaccompanied by a statement of what, in the opinion of

lection of crowds of people or otherwise" was criticised as to its form, in that it merely expressed a general obligation imposed by law, leaving undecided & open for discussion, on a motion to punish for breach of it, what is prohibited.—**CANILL & CO. v. STRAND THEATRE CO.**, [1920] 3 W. W. R. 650; 54 D. L. R. 439.—**CAN.**

the ct., is the right mode of constructing those works.—*DOVER HARBOUR (WARDEN & ASSISTANTS) v. LONDON CHATHAM & DOVER RY. CO.* (1861), 3 De G. F. & J. 559; 30 L. J. Ch. 474; 4 L. T. 387; 7 Jur. N. S. 453; 9 W. R. 523; 45 E. R. 995, L. JJ.

Annotation:—As to (1) *Reid. A.-G. v. G. E. Ry.* (1879), 27 W. R. 759.

1153. ———.]—*ISENBERG v. EAST INDIA HOUSE ESTATE CO., LTD.*, No. 268, *ante*.

1154. ———.]—(1) Language of the injunction held to be too indefinite & injunction dissolved on terms.

The first duty of the ct. in granting an injunction of this kind is to lay down a clear & definite rule. If the language of the order in which the injunction is contained be in itself ambiguous, uncertain, indefinite, giving no clear rule of conduct, the injunction becomes a snare to debt. If he violates it, he is liable to be imprisoned. It is the bounden duty of the ct., therefore, in granting an injunction, to take care that the language of its order shall be such that it is quite clear what it permits & what it prohibits (*LORD WESTBURY, C.*).

(2) In all these cases where the ct. interferes by way of enforcing the specific performance of an engagement such as this, the jurisdiction it exercises is in an eminent degree discretionary & ought to be guided & measured altogether by what substantial justice shall require as between the parties (*LORD WESTBURY, C.*).—*LOW v. INNES* (1864), 4 De G. J. & Sm. 286; 11 L. T. 217; 10 Jur. N. S. 1037; 46 E. R. 929, L. C.

1155. ———.]—It is a very serious matter to decide what the terms of it [*i.e.* the injunction] ought to be. It is not necessary that the whole subject-matter should be fought out in a most inconvenient & disagreeable form upon a formal motion to commit debts. for breach of the injunction. Nothing, in my opinion, can be more undesirable. . . . I will grant an injunction to restrain debts. from erecting the new building at a greater height than 46 feet from the pavement or base-line (*JESSEL, M.R.*).—*HACKETT v. BAISS* (1875), L. R. 20 Eq. 494; 45 L. J. Ch. 13.

Annotations:—*Consd. Parker v. First Avenue Hotel Co.* (1883), 24 Ch. D. 282. *Reid. Theod v. Debenham* (1876), 2 Ch. D. 165; *Lawrence v. Horton* (1890), 62 L. T. 749.

1156. ———.]—The injunction ought not to be in general terms to restrain debt. from committing any breach of covenant, . . . but should contain an adjudication on the particular thing which is said to be a breach of the covenant, so to restrain him by injunction from doing that particular thing, & in that way to limit the generality of the injunction (*COTTON, L.J.*).—*PARKER v. FIRST AVENUE HOTEL CO.* (1883), 24 Ch. D. 282; 49 L. T. 318; 32 W. R. 105, C. A.

Annotation:—*Reid. Colls v. Home & Colonial Stores*, [1904] A. C. 179.

—.]—It is the necessary requisite of every injunction & every mandatory order that it should be certain & definite in its terms & it

must or ought to be quite clear what the person against whom the order or injunction is made is required to do or refrain from doing (*JOYCE, J.*).—*A.-G. v. STAFFORDSHIRE COUNTY COUNCIL*, [1905] 1 Ch. 336; 74 L. J. Ch. 153; 92 L. T. 288; 69 J. P. 97; 53 W. R. 312; 21 T. L. R. 139; 3 L. G. R. 379.

Annotation:—*Mentd. Wednesbury Corp'n. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78.

1158. Order may be in general terms.]—In granting an injunction the ct. cannot point out to the co. what they ought to do except by stating the reasons which induce the ct. to come to its conclusion or the manner in which it appears to the ct. that that which seems evil can be remedied.—*A.-G. v. LONDON & SOUTH WESTERN RY. CO.* (1849), 3 De G. & Sm. 439; 7 Ry. & Can. Cas. 624; 13 L. T. O. S. 253; 13 Jur. 467; 64 E. R. 552.

1159. ———.]—*NORTH-EASTERN RY. CO. v. CROSSLAND* (1862), 2 John. & H. 565; 32 L. J. Ch. 353; 7 L. T. 765; 70 E. R. 1183; *on appeal*, 4 De G. F. & J. 550, L. JJ.

Annotations:—*Apprvd. Elliot v. N. E. Ry.* (1863), 10 H. L. Cas. 334. *Mentd. L. & N. W. Ry. v. Walker*, [1903] A. C. 289.

1160. ———.]—It being impracticable to define beforehand the limits within which the workings ought to be restrained, an injunction is properly expressed in general terms against working so as to produce the particular evil apprehended.—*ELLIOT v. NORTH EASTERN RY. CO.* (1863), 10 H. L. Cas. 333; 2 New Rep. 87; 32 L. J. Ch. 402; 8 L. T. 337; 27 J. P. 564; 9 Jur. N. S. 555; 11 W. R. 604; 11 E. R. 1055, H. L.; *varying S. C. sub nom. NORTH-EASTERN RY. CO. v. ELLIOTT* (1860), 2 De G. F. & J. 423, L. C.

Annotations:—*Reid. N. E. Ry. v. Crosland* (1862), 32 L. J. Ch. 353. *Mentd. Stourbridge Navigation Co. v. Dudley* (1860), 3 E. & E. 409; *Goold v. Great Western Deep Coal Co.*, *Great Western Deep Coal Co. v. Goold* (1865), 6 New Rep. 86; *G. W. Ry. v. Bennett* (1867), L. R. 2 H. L. 27; *Mid. Ry. v. Checkley* (1867), L. R. 4 Eq. 19; *Richards v. Jenkins* (1868), 18 L. T. 437; *Popplewell v. Hodgkinson* (1869), L. R. 4 Exch. 248; *Colebeck v. Girdlers' Co.* (1876), 45 L. J. Q. B. 225; *Mid. Ry. v. Haunchwood Brick & Tile Co.* (1882), 20 Ch. D. 552; *Pountney v. Clayton* (1882), 47 L. T. 731; *L. & N. W. Ry. v. Evans*, [1893] 1 Ch. 16; *Aldin v. Latimer Clark*, *Muirhead*, [1894] 2 Ch. 437; *Bradford Corp'n. v. Pickles* (1894), 64 L. J. Ch. 101; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836; *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1900), 85 L. T. 53; *L. & N. W. Ry. v. Walker*, [1903] A. C. 289; *Manchester Corp'n. v. New Moss Colliery*, [1906] 1 Ch. 278; *L. & N. W. Ry. v. Howley Park Coal & Cannel Co.*, [1911] 2 Ch. 97.

1161. ———.]—*VERE v. MINTER* (1914), 49 L. Jo. 129.

1162. "To the injury of the plaintiff."]—In an order for an injunction to restrain debts. from polluting a stream, it is proper to insert the words "to the injury of the plaintiff," in order to establish a ground for the interference of the ct., & to prevent its authority being invoked for trivial purposes.—*LINGWOOD v. STOWMARKET CO.* (1865), L. R. 1 Eq. 77, 336; 13 L. T. 540; 11 Jur. N. S. 993; 14 W. R. 78.

1158 i. Order may be in general terms.]—In cases of public or private nuisance, that is, of private nuisance & of a public nuisance become actionable because peculiarly affecting pltf., the injunction is, as a rule, given in general terms. The ct. does not take it upon itself in the ordinary case to give specific directions how the nuisance is to be abated or how debt. is to act thereafter.—*IRESON v. HOLT TIMBER CO.* (1913), 5 O. W. N. 577; 30 O. L. R. 209.—

Comprehending means of
—The words of an interdict
or injunction against causing a nuisance

ought not to be so drawn as to shut out all scientific attempts to attain the desired end without causing a nuisance.—*FLEMING v. HISLOP* (1886), 11 App. Cas. 686.—*SCOT.*

r. Defect—Effect of.]—It is not a ground for setting aside the service of an *ex p.* injunction order that the order is not intitled in the cause, where debt. had not been misled.—*GAULT BROTHERS CO. v. MORRELL* (1905), 3 N. B. Eq. Rep. 123; 25 C. L. T. 89.—*CAN.*

t. Variation—To suit circumstances of case.]—In a suit for the infringement of a trade-mark, pltf. claimed

the right to be the exclusive user of a flower of a particular design, but his evidence was directed to establish that his goods were recognised by the general design of a flower:—*Held*: in the circumstances of the case, an assocn. had been established between pltf.'s particular design & the goods sold thereunder, & inasmuch as debts. had adopted pltf.'s trade-mark for his own purposes, pltf. was entitled to an injunction. Although no specific objection was taken on appeal to the form of the injunction ordered in the ct. of first instance, which proceeded on the erroneous assumption that the goods sold by pltf. were prepared by him, a

5.—*The order: Sub-sects. 1, 2, 3, 4, 5 & 6.]*

1163. Special terms.]—Pltfs. G., the Procurator of the Monastery of La Grande Chartreuse, & D., his London agent, brought an action to restrain A. from using the word "Chartreuse" in connection with liqueurs not made at the Monastery. Pltfs. alleged that "Chartreuse" meant liqueur made at the Monastery. Deft. A. was London agent of a French distillery at Voiron, Isere, in France. Deft. alleged that "Chartreuse" was a generic word & *publici juris*, & further alleged a concurrent right of user in his principal of the name under an agreement, the meaning of which had been determined by a French ct. of first instance. Pltfs. contended that the agreement was null & void, according to French law, & could have no effect in England:—*Held*: apart from the agreement, pltfs. were entitled to an absolute injunction; but having regard to the agreement & the French judgment thereon, an injunction would be granted in special terms, with liberty to apply should an appeal from the French judgment be successful.—*GREZIER & DOYLE v. AUTRAN* (1895), 13 R. P. C. 1.

Annotation:—*Refd.* *Rey v. Leconturier*, [1908] 2 Ch. 715.

Necessity for indorsement of memorandum—R. S. C., Ord. 41, r. 5.]—*See* CONTEMPT OF COURT, Vol. XVI., p. 60, Nos. 680–682.

SUB-SECT. 2.—SCOPE OF ORDER.

Sec, generally, JUDGMENTS.

1164. General rule—Does not extend to non-parties.]—An injunction cannot reach one who is not a party to the suit.—*DAWSON v. PRINCEPS* (1795), 2 Anst. 521; 145 E. R. 954.

1165. ———.]—Injunction not binding upon a person not a party in the cause.—*IVESON v. HARRIS* (1802), 7 Ves. 251; 32 E. R. 102, L. C.

Annotations:—*Distd.* *Seaward v. Paterson*, [1897] 1 Ch. 545. *Refd.* *Brydges v. Brydges & Wood*, [1909] P. 187. *Mentd.* *London Corpn. v. Cox* (1867), L. R. 2 H. L. 239; *Ranson v. Platt*, [1911] 2 K. B. 291.

1166. Claim against defendant alone—Extended to workmen, servants & agents.]—*HUMPHREYS v. ROBERTS* (1828), 1 Seton's Judgments & Orders, 7th ed., p. 509.

1167. ———.]—A., upon property being conveyed to him, engaged with B. that a certain trade should not be carried on upon it. A.'s tenant carried on such trade. Upon a bill by B. against A. alone, for an injunction, he insisted on his right to carry on the trade. The ct. granted a perpetual injunction against A. his servants & agents, but declined extending it to his tenants.—*HODSON v. COPPARD* (1860), 29 Beav. 4; 7 Jur. N. S. 11; 9 W. R. 9; 54 E. R. 525; *sub nom.* *HODGSON v. COPPARD*, 30 L. J. Ch. 20.

Annotation:—*Apld.* *Williamson v. Sunderland Corpn.* (1892), 9 T. L. R. 143.

1168. ——— Whether extended to tenants.]—Injunction to stay a tenant in possession, not a party, from committing waste.—*A.-G. v. ANCASTER (DUKE)* (1737), 1 Dick. 68; 21 E. R. 193.

variation should be introduced into the terms of the injunction, so as to fit it with the facts as actually established.—*JAWALA PRASAD v. MUNNA LAL SEROWJEE* (1909), 1 L. R. 37 Calc. 204.—IND.

a. *Not granted against strangers to bill—Unless servants of defendant.]*—*FREEMAN v. BURKE* (1845), 7 L. Eq. R. 282.—

PART XI. SECT. 5, SUB-SECT. 2.

1168 i. Claim against defendant alone—Whether extended to tenants.]—*NORBURY v. ALLEYNE* (1838), 1 Dr. & Wal.

b. *Right to extend—Where injunction ineffective.]*—An *ex p.* injunction had been granted to restrain defts., until further order, from interfering with certain saw logs in the S. river,

1169. ———.]—*HODSON v. COPPARD*, No. 1167, *ante*.

1170. ——— Extended to solicitors.]—*LEWES v. MORGAN & LEWIS*, No. 1335, *post*.

1171. ——— Restraint of legal process.]—There is a clear distinction between a motion to commit a man for breach of an injunction on the ground that he was bound by the injunction, & a motion to commit a man on the ground that he has aided & abetted deft. in a breach of an injunction. In the first case the order is made to enable pltf. to get his rights; in the second, because it is not for the public benefit that the course of justice should be obstructed.

The ct. has undoubted jurisdiction to commit for contempt a person [a solr.] not included in an injunction or a party to the action who, knowing of the injunction, aids & abets deft. in committing a breach of it.—*SEAWARD v. PATERSON*, [1897] 1 Ch. 545; 66 L. J. Ch. 267; 76 L. T. 215; 45 W. R. 610; 13 T. L. R. 211, C. A.

Annotations:—*Folld.* *Hubbard v. Woodfield* (1913), 57 Sol. Jo. 729. *Refd.* *Brydges v. Brydges & Wood*, [1909] P. 187; *Scott v. Scott*, [1913] A. C. 417. *Mentd.* *Re J.* (1913), 108 L. T. 554.

1172. ——— Extended to auctioneers—Aiding & abetting defendant.]—*HUBBARD v. WOODFIELD*, No. 602, *ante*.

1173. Restraint of specific injury—Extends to injuries ejusdem generis.]—*HERZ v. UNION BANK OF LONDON*, No. 1103, *ante*.

1174. Interlocutory injunction—Cannot exceed relief claimed.]—*MUNRO v. WIVENHOE & BRIGHTLINGSEA RY. CO.*, No. 134, *ante*.

1175. Right of limited duration—Order limited—Patent.]—A patent was taken out in France, in 1858, by A., who, in 1861, obtained letters patent for his invention in England. The English patent was assigned by A. to C., who, in Jan. 1865, obtained, in a suit against E. for infringement, a decree by which the validity of the patent was declared, & an injunction was granted to restrain infringement. In Feb. 1866, a judgment of *dechéance* was pronounced by the French tribunal at Paris, declaring the French patent & all rights under it, determined & void, from Feb. 1864, on the ground of non-payment by A. from that time of the annual duties imposed upon patentees by the French law.

Upon a motion by C., in Jan. 1867, to commit E. for breach of the injunction awarded by the decree of Jan. 1866:—*Held*: (1) A.'s English patent being identical with his French patent, it was determined in this country by force of 15 & 16 Vict. c. 83, s. 25, from Feb. 1866, the date of the annulment of the French patent by declaration of the French Ct., but not sooner; & although such declaration was in terms retrospective, yet, until actually obtained, the English patent remained in force, & there was no error calling for amendment by bill of review in the decree of this ct., by which its validity was declared in Jan. 1866; (2) the injunction granted in Jan. 1866, being only co-existent with the patent, expired when the patent was determined, & it was open to E. to answer to the motion to commit, to show that there was no longer any order of the ct. in existence which he

which pltf. claimed as his. Defts. having, notwithstanding, obtained possession of the logs, a motion to extend the injunction so that, in effect, pltf. might receive possession of the logs from defts. was retained until after trial of issues as to pltf.'s property in the logs, this being disputed by defts.—*FARWELL v. WALLBRIDGE* (1851), 2 Gr. 332.—CAN.

could be said to have infringed.—*DAW v. ELEY* (1867), L. R. 3 Eq. 496; 36 L. J. Ch. 482; 15 L. T. 559.

Annotations:—*Generally Mentd.* *Murray v. Clayton* (1872), 7 Ch. App. 570; *Re Blake's Patent* (1873), 9 Moo. P. C. C. N. S. 373; *Pneumatic Tyre Co. v. East London Rubber Co.* (1896), 75 L. T. 488.

1176. ——— **Copyright.**—*SAVORY, LTD. v. GYPTICAN OIL CO., LTD.* (1904), 48 Sol. Jo. 573.

SUB-SECT. 3.—DEFENDANT NOT APPEARING.

1177. Some defendants not appearing—Final order not granted against those appearing.—There is a difficulty about making a final order at the hearing of the action against some defts. only in the absence of the others. Where the minutes asked for a perpetual injunction against some defts. only, in the absence of the others, the difficulty was overcome by treating the application as interlocutory, & making the order asked for, & in addition staying all further proceedings against defts. who appeared.—*COOKE v. GILBERT* (1892), 40 W. R. 682; 36 Sol. Jo. 609.

1178. Order by consent—Practice in Chancery Division.—*ELLIMAN v. SEQUAH*, [1903] W. N. 187.

SUB-SECT. 4.—DECLARATION OF RIGHT IN LIEU OF INJUNCTION.

1179. Discretion of court—Injunction oppressive.—The ct. made a declaration of pltf's. right in lieu of granting an injunction, deft. undertaking to submit the plans of his proposed building to pltf's.—*SMITH v. BAXTER*, [1900] 2 Ch. 138; 69 L. J. Ch. 437; 82 L. T. 650; 48 W. R. 458; 44 Sol. Jo. 393.

Annotations:—*Refd.* *Colls v. Home & Colonial Stores*, [1904] A. C. 179; *Hynan v. Van Den Bergh*, [1908] 1 Ch. 167.

1180. ———.]—Where pltf's., the vestry of a parish within the metropolitan area, made an arrangement with certain landowners of a district without the metropolitan area, now represented by defts., the urban district council, whereby the discharge of some sewage from defts.' district into a sewer belonging to pltf's. had been permitted for many years, & this additional sewage had increased so as periodically to clog up pltf's. sewer:—*Held*: having regard to the conduct of pltf's. & to the difficulty in which an injunction would place defts. by compelling them to close their sewers, the ct. ought only to make a declaration that defts. were not entitled to send sewage from their district into pltf's. sewer without the consent of pltf's.—*ST. MARY, ISLINGTON, VESTRY v. HORNSEY URBAN COUNCIL*, [1900] 1 Ch. 695; 69 L. J. Ch. 324; 82 L. T. 580; 48 W. R. 401; 16 T. L. R. 286; 44 Sol. Jo. 327, C. A.

Annotations:—*Mentd.* *L. C. C. v. Acton U. D. C.* (1900), 17 T. L. R. 157; *East Barnet Valley U. C. v. Stallard* (1909), 79 L. J. Ch. 103; *Liverpool Corpn. v. Coghill*, [1918] 1 Ch. 307.

1181. ——— **Injunction unnecessary—Liberty to apply in case of future injury.**—Although it is necessary to consider what has been the intention of deft. against whom an action is brought for the alleged disturbance of a market, in committing the acts complained of, yet in a case where deft. had set up a rival market on a market day, taking

advantage of the concourse of people coming to the lawful market, it was held to be quite immaterial that he had no intention to rivalling the lawful market; but that it was not necessary to give effect to this conclusion by granting an injunction, for, in the circumstances, the justice of the case would be met by a declaration to the effect that the conduct of deft. was unlawful & constituted an invasion of pltf's. market, with liberty to pltf. to apply for an injunction if deft. should repeat the wrongful acts complained of.—*WILCOX v. STEEL*, [1904] 1 Ch. 212; 73 L. J. Ch. 217; 89 L. T. 640; 68 J. P. 146; 20 T. L. R. 78; 2 L. G. R. 105, C. A.

Annotation:—*Mentd.* *Morpeth Corpn. v. Northumberland Farmers' Auction Mart Co.*, [1921] 2 Ch. 154.

1182. ———.]—*LITCHFIELD-SPEER v. QUEEN ANNE'S GATE SYNDICATE (No. 2), LTD.*, No. 321, *ante*.

1183. ——— **Injunction unsuitable remedy—Breach of covenant to repair.**—*GREAT NORTHERN RY. CO. v. BRADFORD CORPN.* (1918), 88 L. J. Ch. 101; 120 L. T. 267; 83 J. P. 33; 63 Sol. Jo. 229; 17 L. G. R. 1.

SUB-SECT. 5.—UNDERTAKING IN LIEU OF INJUNCTION.

1184. Form of order.—*A.-G. v. BIRMINGHAM, TAME & REA DISTRICT DRAINAGE BOARD*, No. 1140, *ante*.

Cross-undertaking in damages.—*See* Sect. 6, sub-sect. 5, *post*.

Breach of undertaking.—*See* Part XII., Sect. 1, sub-sect. 2, *post*.

SUB-SECT. 6.—ANCILLARY ACCOUNTS.

See, now, Judicature Act, 1873 (c. 66); R. S. C. Ord. 3, r. 8, Ord. XV., & *generally*, PRACTICE.

1185. Right to account—Whether incident to right to injunction.—Pltf. who complains of a piracy of his work has no remedy in equity, unless he establish a title to an injunction, & then the account will follow.

The ct. will not grant an injunction, but will leave pltf. to seek his legal remedy where the matter, which is the subject of the alleged piracy, forms but a very inconsiderable part of pltf's work, & contains merely calculations, & when the work complained of has been published some years.—*BAILY v. TAYLOR* (1829), 1 Russ. & M. 73; Tam. 295; 8 L. J. O. S. Ch. 49; 39 E. R. 28.

Annotation:—*Folld.* *Smith v. L. & S. W. Ry.* (1854), Kay, 408.

1186. ———.]—(1) Where the lord of a manor, who claims against the tenants the right of property in the mines within the manor, has stood by for a long period & allowed the tenants, without objection, to work the mines & to expend large sums of money upon their mining operations, the ct. will not assist him by making a decree for an injunction or account against the tenants, but will leave him to his legal remedy.

(2) Distinction between the cases in which the right to an account is incident to the injunction, & those in which it is independent of that relief. Peculiarity of the case of mines in this respect. The right to an account, even in the case of mines,

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— an injunction suit under r. 456, where no writ has been issued the ct. has no power to account to be taken.—*PANAPA v. KING* (1884), 3 N. Z. L. R. 254 (S. C.).—N.Z.

Sect. 5.—The order: Sub-sects. 6, 7, 8 & 9.]

may be lost by laches.—*PARROTT v. PALMER* (1834), 3 My. & K. 632; 40 E. R. 241.

Annotations:—As to (1) Reqd. Blackmore v. White, [1899] 1 Q. B. 293. As to (2) Apld. Wright v. Pitt (1870), L. R. 12 Eq. 408. Reqd. Hunter v. Stewart (1861), 4 De G. F. & J. 168; Elias v. Griffith (1878), 8 Ch. D. 521. Generally, Reqd. Haigh v. Jagger (1845), 2 Coll. 231; Powell v. Aiken (1858), 4 K. & J. 343.

1187. —.]—A bill having been filed by a client against the extrix. of his solr. for an account of all dealings & transactions between pltf. & testator, & for an injunction to restrain an action brought by deft. against pltf., to recover £3,000 for money lent to him by testator pltf. after answer obtained an order for injunction, upon the terms of paying the money into ct. Notwithstanding this order, however, deft., under particular circumstances, went to trial & obtained a verdict for the £3,000, upon the same evidence substantially as was afterwards used in the suit in equity, & which was satisfactory to this ct. No appeal having been made by deft. against the order for the injunction:—*Held*: assuming the effect of that order to be to bring the whole matter into this ct., & therefore, *prima facie*, to entitle the pltf. to an account of the £3,000, as well as of all other matters comprised in the suit, yet, taking into consideration the verdict at law & the evidence in equity, deft. was entitled to have the £3,000 deemed an item in the account; such item, under the particular circumstances of the case, bearing interest at the rate of £4 per cent. *per annum*.—*ABBEY v. PETCH* (1842), 1 Y. & C. Ch. Cas. 258; 11 L. J. Ch. 124; 6 Jur. 433; 62 E. R. 880.

1188. —.]—The right to a decree in equity for an account of the profits made by the manufacture & use of articles in infringement of a patent is incident to the right to an injunction to restrain future infringements; & where no case is made for the injunction the account will not be decreed.—*SMITH v. LONDON & SOUTH WESTERN RY. CO.* (1854), Kay, 408; Macr. 209; 2 Eq. Rep. 428; 23 L. J. Ch. 562; 23 L. T. O. S. 10; 2 W. R. 310; 69 E. R. 173.

Annotations:—Folld. Price's Patent Candle Co. v. Bauwen's Patent Candle Co. (1858), 4 K. & J. 727. Reqd. Saxby v. Easterbrook (1872), L. R. 7 Exch. 207.

1189. —.]—The rule in patent cases, that this ct. cannot decree an account unless it can grant an injunction, applies, notwithstanding it may appear at the hearing that, since an *interim* injunction was moved for, defts. have sold articles which, had the facts & law been then sufficiently ascertained, the ct. would have restrained them from selling.—*PRICE'S PATENT CANDLE CO., LTD. v. BAUWEN'S PATENT CANDLE CO., LTD.* (1858), 4 K. & J. 727; 70 E. R. 302.

Annotations:—Consd. Davenport v. Rylands (1865), L. R. 1 Eq. 302. Reqd. Betts v. Gallais (1870), L. R. 10 Eq. 392.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49).

1190. — & inquiry into damages.]—Where the ct. below directed an inquiry as to damages [under Chancery Amendment Act, 1858 (c. 27)], & also an account of profits:—*Held*: resp. should be called upon to elect between the two which he would adopt, since an account of profits amounts to a condonation of the infringement.—*NEILSON v. BETTS* (1870), L. R. 5 H. L. 1; 40 L. J. Ch. 317; 19 W. R. 1121. H. L.; *varying* S. C. *sub nom.*

[*BETTS v. NEILSON, BETTS v. DE VITRE* (1868), 3 Ch. App. 429, L. C.

Annotations:—Reqd. Watson v. Holliday (1882), 20 Ch. D. 780; Upmann v. Forester (1883), 24 Ch. D. 231; United Telephone Co. v. London & Globe Telephone & Maintenance Co. (1884), 51 L. T. 187; United Horseshoe & Nail Co. v. Stewart (1888), 13 App. Cas. 401; Saccharin Corp'n. v. Chemicals & Drugs Co., [1900] 2 Ch. 556. Mentd. Elmslie v. Boursier (1869), L. R. 9 Eq. 217; Plimpton v. Malcolmson (1876), 3 Ch. D. 531; Plimpton v. Spiller (1877), 6 Ch. D. 412; The Parlement Belge (1880), 42 L. T. 273; Von Heyden v. Neustadt (1880), 50 L. J. Ch. 126; Nobel's Explosives Co. v. Jones (1882), 8 App. Cas. 5; Newman v. Pinto (1887), 57 L. T. 31; Gadd & Mason v. Manchester Corp'n. (1892), 67 L. T. 569; Gill v. Coutts & Cutler (1895), 13 R. P. C. 136; Badische Anilin und Soda Fabrik v. Johnson & Basle Chemical Works, Bindschedler, [1897] 2 Ch. 322; British Motor Syndicate v. Taylor, [1901] 1 Ch. 122; British Thomson-Houston Co. v. Sterling Accessories, Same v. Crowther & Osborn, [1924] 2 Ch. 33.

1191. —.]—The rule that, upon a decree against a party for the infringement of a patent, the patentee is not entitled, under Chancery Amendment Act, 1858 (c. 27), ss. 2, 5, to have both an account of profits & an inquiry into damages, is now established, & applies to every case of infringement. The patentee must, therefore, elect which of the two forms of relief he will adopt.—*DE VITRE v. BETTS* (1873), L. R. 6 H. L. 319; 42 L. J. Ch. 841; 21 W. R. 705, H. L.; *varying* S. C. *sub nom. BETTS v. NEILSON, BETTS v. DE VITRE* (1868), 3 Ch. App. 429, 441, L. C.; *sub nom. BETTS v. DE VITRE* (1865), 34 L. J. Ch. 289.

Annotations:—Reqd. Penn v. Jack (1867), L. R. 5 Eq. 81; Watson v. Holliday (1882), 20 Ch. D. 780; Saccharin Corp'n. v. Chemicals & Drugs Co., [1900] 2 Ch. 556; Meters v. Metropolitan Gas Meters (1911), 104 L. T. 113. Mentd. Penn v. Bibby, Penn v. Jack, Penn v. Fernie (1866), L. R. 3 Eq. 308; Nobel's Explosives Co. v. Jones, Scott (1881), 17 Ch. D. 721; Belvedere Fish Guano Co. v. Rainham Chemical Works, Feldman & Partridge, Ind. Coope v. Same, [1920] 2 K. B. 487; British Thomson-Houston Co. v. Sterling Accessories, British Thomson-Houston Co. v. Crowther & Osborn, [1924] 2 Ch. 33.

— *Infringement of patent generally.*—*See* PATENTS.

— *Infringement of trade mark.*—*See* TRADE MARKS.

Infringement of copyright.—*See* COPYRIGHT, Vol. XIII., p. 221, No. 580.

1192. Suspension of injunction & account—Pending appeal.—The grantees of a patent for improved means of fastening & unfastening doors brought an action against defts. alleging infringement by the use of the combination claimed in pltf.'s specification & asking for the usual relief. Defts. denied the alleged infringement, & put in issue the validity of the patent, alleging that the invention had been anticipated:—*Held*: pltf's. were entitled to the relief asked but the injunction & account of profits ought to be suspended pending appeal.—*KAYE v. CHUBB & SONS* (1886), 4 R. P. C. 23; *affd.*, 5 R. P. C. 641, C. A.

SUB-SECT. 7.—DRAWING UP ORDER.

1193. Effect of delay—Notice to defendant.—In Nov. 1847 an order was made for an injunction, but was not drawn up. Upon an *ex p.* application, in Apr. 1849, to have it drawn up:—*Held*: notice of the application must be given to deft.—*BATEMAN v. WIATT* (1849), 11 Beav. 587; 50 E. R. 944.

SUB-SECT. 8.—SERVICE OF ORDER.

1194. Where made—Defendant's last place of abode.—Injunction upon affidavit of an intended

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d. *Necessity for service—Must be prompt.*—A deft. is bound to obey an

injunction of which he is made aware, before being served with it; but pltf. must not be guilty of delay in effecting formal service, as the rule for dispensing

with such service applies only until pltf. has time to make the service.—*STEWART v. RICHARDSON* (1870), 17 Gr. 150.—CAN.

marriage with a male infant aged eighteen, restraining communication with him until further order; & that service of the order at the house, which appeared to be the last place of abode, though apparently shut up, should be good service.—*PEARCE v. CRUTCHFIELD* (1807), 14 Ves. 206; 33 E. R. 500, L. C.

1195. ———.]—Injunction granted *ex p.* restraining receipt of a pension, & order made that service of the bill, the interrogatories, & the injunction on solrs. who were in communication with deft., or had means of being so, & also service at an address previously given by him, should be good service.—*HEALD v. HAY* (1861), 9 W. R. 369; *subsequent proceedings* (1862), 3 Giff. 467.

1196. ——— Defendant's house.]—(1) The ct. will not order that service of an injunction at the house of a party, who avoids being served, may be good service.

(2) A party who has notice of an injunction, is bound thereby, although the writ of injunction has not been served on him.

All that you have to do is to show that the party knew of the existence of the injunction, & proof of actual service is not necessary (*PEPYS, M.R.*).—*ROBINSON v. ELTON* (1835), 4 L. J. Ch. 197.

1197. On whom made—Defendant personally.]—Deft.'s clerk in ct. is not his agent for the purpose of receiving notice of an injunction granted in the cause.

An injunction has no operation unless it is served either on deft. personally or on some person who, by an order of the ct., has been substituted for deft. (*SHADWELL, V.-C.*).—*GOOSEMAN v. DANN* (1840), 10 Sim. 517; 59 E. R. 716.

1198. ———.]—Personal service of notice of an injunction granted under special circumstances.—*MILLS v. PEARSON* (1841), 4 Y. & C. Ex. 468.

1199. ——— Authorised substitute.]—*GOOSEMAN v. DANN*, No. 1197, *ante*.

1200. ——— Defendant's solicitor.]—A writ of injunction, served on deft.'s solr., ordered to be good service in a case where deft. could not be found at his usual place of residence, & the solr. of deft., who had entered an appearance for him, declined to accept service for him.—*KIRKMAN v. HONNOR* (1843), 6 Beav. 400; 12 L. J. Ch. 336; 49 E. R. 880.

1201. ———.]—*HEALD v. HAY*, No. 1195, *ante*.

1202. ——— Defendant's agent—Defendant resident abroad.]—Where it appeared that the agent of deft. abroad had a general authority to act on behalf of the principal in relation to a matter which eventually became the subject of a suit, the ct. ordered that service upon such agent of an injunction which had been granted against deft. should be deemed good service upon his principal; but before making the order, required a letter to be sent to the principal, stating the proceedings which were being taken.—*MURRAY v. VIPART* (1845), 1 Ph. 521; 14 L. J. Ch. 217; 4 L. T. O. S. 350; 41 E. R. 731, L. C.

Annotations:—Reid. Hornby v. Holmes (1845), 4 Hare, 306; *Cope v. Russell* (1847), 16 L. J. Ch. 369; *Bankier v. Poole* (1849), 13 Jur. 800; *Norton v. Hepworth* (1849), 1 H. & Tw. 158; *Wallis v. Darby* (1849), 6 Hare, 618.

As preliminary to attachment for disobedience.]—See Part XII., Sect. 2, sub-sect. 1, A. (b), *post*.

SUB-SECT. 9.—SUSPENSION OF INJUNCTION.

1203. To enable complaint to be remedied.]—*A.-G. v. HEATH* (1868), cited 4 Ch. App. 161.

Annotation:—Folld. A.-G. v. Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 146.

1204. ———.]—*A.-G. v. COLNEY HATCH LUNATIC ASYLUM*, No. 4, *ante*.

1205. ———.]—Where an information to restrain a nuisance was filed nine months before the hearing, & up to the hearing in Mar. no steps had been taken to abate the nuisance, a perpetual injunction was granted; but under the circumstances, the ct. refused to suspend it beyond the second seal in Michaelmas Term, with liberty for defts. to apply for an extension of the time if they could show the ct. that they had used due diligence in the meantime to abate the nuisance.—*A.-G. v. BIRMINGHAM BOROUGH COUNCIL* (1871), 24 L. T. 224; 19 W. R. 561.

1206. ———.]—*PENNINGTON v. BRINSOP HALL COAL CO.*, No. 389, *ante*.

1207. ———.]—*A.-G. v. WALTHAMSTOW LOCAL BOARD*, [1878] W. N. 90.

1208. ———.]—With respect to the injunction which is sought I propose to adopt the course which was followed in *A.-G. v. Colney Hatch Lunatic Asylum*, No. 4, *ante*, I therefore grant an injunction to restrain defts., their servants or agents from carrying on the asylum so as to be a nuisance to all or any of pltfs., & I suspend the issue of it for three months with liberty to either side to apply (*POLLOCK, B.*).—*HILL v. METROPOLITAN ASYLUM DISTRICT MANAGERS* (1879), 4 Q. B. D. 433; 48 L. J. Q. B. 562; 40 L. T. 491; *on appeal*, 49 L. J. Q. B. 228, C. A.; *sub nom. METROPOLITAN ASYLUM DISTRICT v. HILL* (1881), 6 App. Cas. 193, H. L.

Annotations:—Mentd. Vernon v. St. James, Westminster Vestry (1880), 16 Ch. D. 449; *Dixon v. Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *Lea Conservancy Board v. Hertford Corpn.* (1884), 48 J. P. 628; *Ennew v. G. E. Ry.* (1885), 1 T. L. R. 519; *Gas Light & Coke Co. v. St. Mary Abbott's, Kensington Vestry* (1885), 15 Q. B. D. 1; *L. B. & S. C. Ry. v. Truman* (1885), 11 App. Cas. 45; *Goolden v. Thames Conservators* (1887), 4 T. L. R. 187; *M'Murray v. Cadwell* (1889), 6 T. L. R. 76; *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Rapier v. London Tram. Co.*, [1893] 2 Ch. 588; *Jordeson v. Sutton Southcoates & Drypool Gas Co.*, [1898] 2 Ch. 614; *Canadian Pacific Ry. v. Parke*, [1899] A. C. 535; *Goldberg v. Liverpool Corpn.* (1900), 82 L. T. 362; *East Fremantle Corpn. v. Annois*, [1902] A. C. 213; *A.-G. v. Nottingham Corpn.*, [1904] 1 Ch. 673; *East London Ry. v. Thames Conservators* (1904), 68 J. P. 302; *Re New River Co. & Metropolitan Water Board* (1904), 68 J. P. 329; *A.-G. v. Dorchester Corpn.* (1906), 94 L. T. 682; *Demerara Electric Co. v. White*, [1907] A. C. 330; *Metropolitan Water Board v. Solomon*, [1908] 2 Ch. 214; *Price's Patent Candle Co. v. L. C. C.*, [1908] 2 Ch. 526; *Hanley v. Edinburgh Corpn.* (1913), 77 J. P. 233.

1209. ———.]—*A.-G. v. BIRMINGHAM, TAME & REA DISTRICT DRAINAGE BOARD*, No. 1140, *ante*.

1210. ———.]—*STOLLMAYER v. PETROLEUM DEVELOPMENT CO., LTD.*, No. 212, *ante*.

1211. Convenience of public.]—Considering the inconvenience caused to the public by suddenly stopping the use of the system, it was agreed that the injunction be suspended for six months, defts. keeping an account of the profits.—*HOPKINSON v. ST. JAMES & PALL MALL ELECTRIC LIGHT CO., LTD.* (1893), 10 R. P. C. 46; 9 T. L. R. 173.

1212. To enable parties to reach settlement.]—*SHIEL v. GODFREY & CO.*, [1893] W. N. 115.

1213. Until cessation of hostilities—European

PART XI. SECT. 5, SUB-SECT. 9.

1211. Convenience of public.]—A railway co., instead of obtaining the finding of a jury respecting the amount of compensation due to the owner of land required for the railway, but acting on some oral consent by the owner's solr.,

took possession, & commenced the works:—*Held*: pltf. was entitled to an injunction, & his right to compensation was clear; but, since great public injury would, without corresponding benefit to pltf., result from stopping the works, & to prevent injury to the co.,

there should be no rule on the motion, the co. proceeding at once to obtain the finding of a jury, & paying all costs properly incurred because they had gone into possession without complying with the statute.—*HARE v. CORK & RANDON RY. CO.* (1850), 3 Ir. Jur. 1.—

Sect. 5.—The order: Sub-sects. 9 & 10, A. & B.
Sect. 6: Sub-sect. 1.]

War, 1914-1918.]—DEXTER v. ALDERSHOT URBAN DISTRICT COUNCIL (1915), 79 J. P. Jo. 580.

 .]—Where on the evidence the ct. came to the conclusion that defts., a local authority, were causing a nuisance by reason of offensive smells arising from a refuse tip, although they had taken steps to abate it by keeping the tip covered with earth, but that by reason of war & consequent shortage of labour it was difficult for the local authority to abate the nuisance, the ct. in granting an injunction ordering them to do so suspended its operation until after the termination of hostilities.—**GREAT CENTRAL RY. CO. v. DONCASTER RURAL COUNCIL (1917), 87 L. J. Ch. 80; 118 L. T. 19; 82 J. P. 33; 62 Sol. Jo. 212; 15 L. G. R. 813.**

1215. Suspension by consent—Power of court to grant further suspension.]—Held: that under the consent order the ct. only had power to grant one suspension of the injunction.—**GIFFARD v. WOLVERHAMPTON CORPN. (1889), 5 T. L. R. 434, D. C.**

1216. Continuance of suspension—To whom application made—Injunction suspended by Court of Appeal in first instance.]—A judgment directing an inquiry as to damages on account of a nuisance was varied by the Ct. of Appeal, who granted an injunction, but suspended its operation for a certain time:—Held: an application for its further suspension might be made to & disposed of by the judge to whose ct. the action was

attached.—**SHELFER v. CITY OF LONDON ELECTRIC LIGHTING CO., MEUX'S BREWERY CO. v. CITY OF LONDON ELECTRIC LIGHTING CO., [1895] 2 Ch. 388; 64 L. J. Ch. 736; 73 L. T. 42; 44 W. R. 198; 39 Sol. Jo. 583; 12 R. 441, C. A.**

Suspension pending appeal.]—See Sub-sect. 10, B., post.

SUB-SECT. 10.—APPEALS.

A. In General.

See R. S. C. Ord. 58, r. 15.

1217. Advancing appeal—To prevent irreparable damage.]—An appeal from a decree granting an injunction to restrain the use of a trade mark ordered to be advanced, on the ground that the injury done to deft. by the continuance of the injunction, if wrongly granted, would be irreparable.—LAZENBY v. WHITE (1870), 6 Ch. App. 89; 19 W. R. 291, L. JJ.

Annotation:—Folld. Roskell v. Whitworth (1871), 19 W. R. 804.

1218. Interlocutory order—To whom appeal lies.]—A summons asking for an interim injunction until the trial of the action is a matter of "practice & procedure," within Judicature Act, 1894 (c. 16), s. 1 (4), & the appeal from the order of a judge at chambers on such a summons is to the Ct. of Appeal & not to the Div. Ct.—MCHARG v. UNIVERSAL STOCK EXCHANGE, [1895] 2 Q. B. 81; 64 L. J. Q. B. 498; 72 L. T. 602; 43 W. R. 464; 11 T. L. R. 409; 39 Sol. Jo. 471; 15 R. 459.

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e. Interlocutory order—Delay.]—A receiver was appointed by the ct. by way of equitable execution of pltf's judgment against deft., & proceeded to collect rents of land which had been conveyed by deft. to trustees in trust for the benefit of deft.'s creditors. The trustees intervened; & upon their application, an order was made by a judge in chambers enjoining the receiver from interfering in the collection of rents:—Held: this was an interlocutory order; & notice of appeal therefrom not having been given within the time proscribed for appeals from such orders, the appeal was quashed.—**BLEASDELL MACHINERY CO. v. SPENCER (1913), 24 W. L. R. 47; 4 W. W. R. 139; 11 D. L. R. 75.—CAN.**

f. Appeals discouraged.]—The Judicial Committee will not encourage appeals from interlocutory orders of a temporary character, such as an interim injunction.—CROUDACE v. ZOBEL (1898), 79 L. T. 602.—AUS.

g. Discretion of court to grant.]—Motion for special leave to appeal was refused when applied for in regard to a mandatory order respecting the running of cars & extensions of the tramway, the questions not being of a character to warrant the exercise of discretion in giving special leave.—LONDON STREET RY. CO. v. LONDON CITY (1904), Cout. 322.—CAN.

h. Jurisdiction of Superior Court.]—The Superior Ct. has no jurisdiction to entertain an appeal in an action for injunction restraining dangerous operation of a quarry & for \$100 damages.—LACHANCE v. CAUCHON (1915), 52 S. C. R. 223.—CAN.

k. Appeal from subordinate court—Jurisdiction of district judge.]—A petition praying for a temporary injunction in a suit was presented by pltf. in a subordinate ct. The judge refused to pass orders on it without hearing defts., & ordered notice to issue to them. Pltf. appealed to the district judge, who granted the injunction prayed for:—Held no appeal lay from the sub-

ordinate ct., & the district judge had purported to exercise a jurisdiction not vested in him by law.—**LUIS v. LUIS (1888), 1 L. R. 12 Mad. 186.—IND.**

l. Right to appeal—Effect of disobedience of injunction.]—The fact that a party to an action is in contempt is no bar to his proceeding with the action in the ordinary way; the contempt is only a bar to his asking the ct. for an indulgence. Where defts. received certain moneys in disobedience to an interim injunction, which was made perpetual by the judgment at the trial, a motion by pltf. to quash defts.' appeal from the judgment was refused.—FERGUSON v. COUNTY OF ELGIN (1893), 15 P. R. 399.—CAN.

m. Payment into court—Effect of appeal.]—Pltf's. having moved for an injunction to restrain the sale of goods under execution, the motion was enlarged & the sale permitted to proceed, the money arising therefrom being directed to be paid into ct. to the credit of the cause, there to abide the further order of the ct. The injunction was afterwards refused:—Held: the payment out of the fund was discretionary with the ct., & pending the appeal to the Ct. of Appeal the same should remain in ct., but might be paid out on proper security being given.—**KING v. DUNCAN (1881), 9 P. R. 61.—CAN.**

n. Where injunction expired—Subsequent action for contempt—Appeal against injunction.]—Where, after the expiration by effluxion of time of an interim injunction order, proceedings are taken against a party to the action to commit him for contempt for disobeying the order, an appeal by him against the interim order will lie.—MCLEOD v. NOBLE (1897), 24 A. R. 459.—CAN.

o. Obedience to injunction—Effect on right to appeal.]—A party obeying a mandatory injunction, for disobedience to which he is liable to attachment, is not thereby prevented from appealing against the injunction.—CONSOLIDATED CITY (1896), 5

p. Order granting injunction—How appeal obtained.]—No appeal lies from order granting injunction, but only from an order refusing to dissolve the injunction.—A.-G. v. MILNE (1892), 2 B. C. R. 196.—CAN.

q. Mandatory injunction—Grounds for appeal.]—In a suit by co-sharers for demolition of a building as having been recently erected without their consent on common land by another co-sharer the ct. found that the building had been erected as alleged by pltf's, but refused to grant them a mandatory injunction upon the ground that "the area was reclaimed by applt., deft., & that others, pltf's. included, who have done the same, have been allowed to build on the areas thus reclaimed without any objection, & that no special damage was done":—Held: this was not a valid reason for refusing to grant a mandatory injunction; & such refusal was under the circumstances a good ground of appeal within Code of Civil Procedure, s. 584.—**RAM BAHADUR PAL v. RAM SHANKAR PRASAD PAL (1905), 1 L. R. 27 All. 688.—IND.**

r. Suppression of facts on ex parte application—Full disclosure on motion to continue—Appeal refused.]—In an appeal from an order continuing an interim injunction on the ground of failure to disclose material facts on the ex p. application for the interim injunction the ct., where all the material facts were before the judge on the motion to discontinue, dismissed the appeal without considering whether or not all the material facts had been disclosed on the ex p. application.—MCDERMOTT v. OLIVER (1915), 43 N. B. R. 533.—CAN.

t. From ex parte order—Where no application in lower court—To rescind or vary.]—An appeal from an ex p. order made at chambers granting a mandatory injunction on the ground that the judge acted without jurisdiction was refused, because applt. had not, before taking his appeal, applied to the judge to vary or rescind his order, & it was held that the necessity for such an application was not obviated by Jud. 1909, Ord. 58,

1219. Striking out statement of claim.—Leave necessary.]—An order striking out a statement of claim as disclosing no reasonable cause of action & dismissing the action as frivolous & vexatious is an interlocutory order, & leave to appeal is necessary, & this is so though an injunction is claimed.—*BRIGHT & Co., LTD. v. RIVER PLATE CONSTRUCTION Co., LTD.* (1901), 17 T. L. R. 708, C. A.

1220. — Duty to set down promptly.]—*SHERWELL v. COMBINED INCANDESCENT MANTLES SYNDICATE, LTD.*, No. 464, *ante*.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49).

B. Suspension Pending Appeal.

1221. Whether court will suspend operation.]—Where the effect of the execution of an injunction to restrain a minister from officiating in a chapel where he had long performed the duties would be to break up the congregation, the ct. will stay such execution pending an appeal.—*A.-G. v. MUNRO* (1848), 11 L. T. O. S. 197; 12 Jur. 318, L. C.

1222. —.]—The ct. will not stay the execution of a decree, pending an appeal to the House of Lords, unless it can be satisfactorily proved that its being issued will create irreparable injury.—*A.-G. v. MURDOCH* (1852), 21 L. J. Ch. 694; 19 L. T. O. S. 173, L. JJ.

Annotation:—Mentd. *A.-G. v. Anderson* (1888), 57 L. J. Ch. 543.

1223. —.]—Where the issues directed to be tried in a suit to restrain infringement of a patent have all been found in favour of the patentee, the circumstance that appeals to the House of Lords have been lodged will not be allowed to interfere with his right to an immediate decree.—*PENN v. BIBBY, PENN v. JACK, PENN v. FERNIE* (1866), L. R. 3 Eq. 308; 36 L. J. Ch. 277; 15 W. R. 192
Annotation:—Mentd. *Boyd v. Tootal Broadhurst Lee Co.*, (1894), 11 R. P. C. 185.

1224. — Irreparable damage likely.]—The business of a solr. had been carried on by a succession of firms in a particular house for thirty years. Eventually, pltf. & deft., who were the last continuing partners, dissolved partnership, & pltf. filed a bill against deft., & obtained a decree, which he immediately enrolled, declaring that deft. had no interest in the house, & restraining him from entering it. Deft. being about to appeal to the House of Lords against the decree, moved to suspend the injunction pending the appeal:—*Held*: the case was one in which irreparable injury might be done to deft.; & deft. undertaking to proceed with the appeal, with due diligence & to abide by any order as to damages which the ct. might make, the ct. suspended the injunction pending the appeal.—*WALFORD v. WALFORD* (1868), 3 Ch. App. 812; 19 L. T. 233; 16 W. R. 1161, L. JJ.

Annotation:—Mentd. *Burdick v. Garrick* (1870), 5 Ch. App. 453.

r. 3.—*ST. JOHN RY. Co. v. ST. JOHN* (1915), 43 N. B. R. 498.—CAN.

a. Variation of injunction on appeal.—Where no application in lower court.]—The ct. declined to vary an injunction which had been granted by limiting it as to time, this not having been asked in the ct. below, & the ct. not having sufficient material before it.—*COLE-GROVE v. YOUNG* (1902), 22 N. Z. L. R. 491.—N.Z.

b. Injunction refused—But granted pending appeal.]—A bill of suspension & interdict against the exercise of powers of sale in a trust-deed having been refused, & the certificate of refusal issued, but an appeal to the House of

Lords having been taken, the ct. passed a new bill of suspension & interdict against a sale during the dependence of the appeal.—*INNES v. INNES* (1829), 7 Sh. (Ct. of Sess.) 762; 4 Fac. Coll. 1034.—SCOT.

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c. Payment of security.]—Where an injunction is ordered at the hearing of a cause, & the parties enjoined give the security required by R. S. O. 1877 (c. 38), s. 26, pending an appeal to the Ct. of Appeal, all proceedings to enforce the injunction are, by s. 27, thereupon stayed; & a writ of sequestration cannot therefore be obtained, pending

1225. — —.]—In an action to restrain the infringement of a patent for improvements in the method of making ornamental tin plates pltf. obtained an injunction. Defts., being about to appeal, moved to suspend the injunction pending the appeal, offering to give any undertaking as to damages that the ct. might think fit to impose, & to prosecute the appeal with diligence, & alleging that if they were prevented from carrying out the numerous contracts they had in hand the result would be to destroy their connection & to cause them irreparable damage:—*Held*: no ground for suspending the operation of the injunction, for defts. could buy the articles in the market & so fulfil their contracts.—*FLOWER v. LLOYD* (1877), 36 L. T. 444.

1226. — —.]—An application for a stay of an injunction pending an appeal on the ground that it would involve a very serious dislocation of deft.'s business was refused, deft. being a mere agent for sale & not a manufacturer.—*LANSTON MONOTYPE CORPN., LTD. v. SLATTERY* (1925), 42 R. P. C. 366.

1227. — Special reasons.]—Def. being desirous to appeal to the Ct. of Appeal the Lord Justices, on the application of deft. suspended the operation of the injunction until the hearing of the appeal, at the same time directing the cause to be advanced, though deft. had made no affidavit in support of his application.—*ROSKELL v. WHITWORTH* (1871), 19 W. R. 804, L. JJ.

1228. —.]—*HOCKING v. FRASER* (1885), *Griffin's Patent Cases*, 129.

1229. —.]—*KAYE v. CHUBB & SONS*, No. 1192, *ante*.

1230. —.]—*THOMSON v. HUGHES*, No. 190, *ante*.

1231. —.]—This was an action for infringement of two patents. An injunction with an inquiry as to damages was granted, but the injunction & inquiry were stayed pending appeal on defts. undertaking to keep an account, provided they gave security to pltf.'s satisfaction for the amount of the damages.—*NATIONAL OPALITE GLAZED BRICK & TILE SYNDICATE, LTD. v. CERALITE SYNDICATE, LTD.* (1896), 13 R. P. C. 649.

1232. —.]—*LEEDS FORGE Co., LTD. v. DEIGHTON'S PATENT FLUE & TUBE Co., LTD.* (1901), 18 R. P. C.

SECT. 6.—UNDERTAKING AS TO DAMAGES.

SUB-SECT. 1.—IN GENERAL.

1233. Whether court can compel undertaking.]—(1) An undertaking as to damages is the price which a person asking for an injunction has to pay for it; & such an undertaking should not be confined to the damages that may be sustained only by the party enjoined, but should extend to all defts. asking for it.

the appeal, on the ground of non-compliance with the injunction.—*MCGARVEY v. TOWN OF STRATHROY* (1884), 6 O. R. 138.—CAN.

d. —.]—The operation of an injunction awarded by a judgment of the ct. below was stayed pending an appeal to the Ct. of Appeal, after the perfecting of the security on appeal, by R. S. O. 1877 (c. 38), s. 27.—*TORONTO CITY v. TORONTO STREET RY. Co.* (1887), 12 P. R. 361.—CAN.

PART XI. SECT. 6, SUB-SECT. 1.

e. How enforced.]—The method of enforcing the undertaking as to damages contained in an injunction

Undertaking as to damages: Sub-sects. 1, 2, 3 & 4.]

(2) The ct. has no power to extend an undertaking given by pltf. so as to cover damages that may be sustained by a party who never asked for it when the injunction was granted.

(3) If pltf. refuses to give it [an undertaking] the ct. can refuse the injunction, but it cannot compel pltf. to give an undertaking (COTTON, L.J.).—TUCKER v. NEW BRUNSWICK TRADING CO. OF LONDON (1890), 44 Ch. D. 249; 59 L. J. Ch. 551; 63 L. T. 69; 38 W. R. 741, C. A.

1234. —.]—CHAPLIN v. BARNETT (1911), Times, Dec. 20, C. A.; subsequent proceedings (1912), 28 T. L. R. 256, C. A.

1235. Benefit extends to all dependants—Only one restrained.]—TUCKER v. NEW BRUNSWICK TRADING CO. OF LONDON, No. 1233, ante.

SUB-SECT. 2.—NECESSITY FOR GIVING UNDERTAKING.

See R. S. C. Ord. 52, r. 3.

1236. To protect from improper applications.]—

(1) An injunction to restrain deft. from building so as to prevent access of light & air to pltf.'s windows was granted *ex p.* on Nov. 4, 1879, & on Nov. 27, was continued until the trial or further order, pltf. giving the usual undertaking as to damages. On Feb. 18, 1880, the Ct. of Appeal discharged the order. On Nov. 11, 1880, a perpetual injunction as to access of air was granted; but on June 21, 1881, the Ct. of Appeal dismissed the action with costs. On Feb. 16, 1882, deft. gave notice of motion for an inquiry as to damages which was refused. The only damage alleged was that deft. had agreed to let part of the property with the new buildings to a tenant & was prevented from carrying this out by the injunction preventing his building. It was not proved, however, that there was any binding agreement to take a lease nor did it appear that the injunction interfered with the erection of the buildings to such an extent as would have entitled the intended tenant to throw up the agreement if binding:—*Held*: an inquiry as to damages ought not to be granted. *Qu.*: whether where an interlocutory injunction has been wrongly granted owing to a mistake of law by the judge without any misrepresentation, suppression, or other default on the part of pltf. an inquiry as to damages can be directed under the undertaking.

(2) The ct. is not bound to grant an inquiry as to damages whenever deft. has sustained some damage by the granting the injunction; but it

is by an inquiry as to damages, & where deft. obtains judgment he may proceed to enforce the judgment in the ordinary way.—PAULSON v. MURRAY, [1921] 2 W. W. R. 735; 31 Man. L. R. 258.—CAN.

1. To whom made.]—The undertaking usually inserted in an *interim* injunction order is one not to the party, but to the ct. to pay damages if the ct. should be of opinion that under the circumstances pltf. ought to pay damages, & he puts himself in the power of the ct. for that purpose independently of the suit.—MCBRATNEY v. SEXSMITH, [1924] 3 D. L. R. 84; 2 W. W. R. 455.—CAN.

PART XI. SECT. 6, SUB-SECT. 2.

1237 i. Condition of granting interlocutory injunction.]—*Held*: pltf. were not entitled to an injunction, as they did not admit their liability for

damages, & bring into ct. or offer to secure the amount.—GEORGIAN BAY TRANSPORTATION CO. v. FISHER (1880), 5 A. R. 383.—CAN.

1237 ii. —.]—Where a pltf. before prosecuting an action is required to give security for costs, as where he resides out of the jurisdiction, he must also give the undertaking for damages of a responsible person within the jurisdiction as one term of getting an interlocutory injunction.—DELAP v. ROBINSON (1898), 18 P. R. 231.—CAN.

1237 iii. —.]—An undertaking as to damages ought to be given by a pltf. who obtains an interlocutory order for an injunction, not only when the order is made *ex p.*, but even when it is made upon hearing both sides.—NEW VAN (1898), 6 B. C. R. 222.—CAN.

1237 iv. —.]—OLIVER v. SLATER (1910), 16 W. L. R. 107.—CAN.

has a discretion & may refuse any inquiry if the damage restrained is trivial or remote or if there has been great delay in making the application.

(3) The question considered at what time the application for an inquiry as to damages ought to be made:—*Held*: even if there had been a binding agreement by the proposed tenant to take a lease, & the injunction had so interfered with the building as to entitle the tenant to be off the bargain, damages ought not to be granted in respect of it, for that damages must be confined to the immediate natural consequences of the injunction under the circumstances which were within the knowledge of the party obtaining the injunction.

The damages must be confined to loss which is the natural consequence of the injunction under the circumstances of which the party obtaining the injunction has notice (COTTON, L.J.).

(4) The undertaking was not intended to apply where the injunction was wrongly granted (JESSEL, M.R.).—SMITH v. DAY (1882), 21 Ch. D. 421; 48 L. T. 54; 31 W. R. 187, C. A.

Annotations:—As to (1) *Consd.* Fenner v. Wilson, [1893] 2 Ch. 656; *Re* Hallstone, Hopkinson v. Carter (1910), 102 L. T. 877. *Reid.* A.-G. Albany Hotel Co., [1896] 2 Ch. 696; Howard v. Press Printers (1904), 74 L. J. Ch. 100. As to (2) *Consd.* *Re* Wood, *Ex p.* Hall (1883), 23 Ch. D. 644; Schlesinger v. Bedford (1893), 9 T. L. R. 370; *Re* Hallstone, Hopkinson v. Carter (1910), 102 L. T. 877. *Reid.* Hunt v. Hunt (1884), 54 L. J. Ch. 289. As to (4) *Expld.* Griffith v. Blake (1884), 27 Ch. D. 474.

1237. Condition of granting interlocutory injunction.]—An injunction ought only to be continued on the terms of pltf. undertaking to bring an action, & to be answerable in damages.

Semble: it is now almost universally the practice, on granting an interlocutory injunction, to require an undertaking to be answerable in damages.—CHAPPELL v. DAVIDSON (1856), 8 De G. M. & G. 1; 44 E. R. 289, L. JJ.

Annotation:—*Folld.* Wakefield v. Buccleugh (1865), 13 W. R. 856.

1238. —.]—Since Chancery Amendment Act, 1858 (c. 27), s. 2, empowering the ct. to award damages in cases in which it has jurisdiction to entertain an application for an injunction against the commission of any wrongful act, the ct. will be more strict than ever in requiring pltf., as a condition previous to his obtaining an *interim* injunction against the alleged infringement of a patent, to abide by any order it may make as to damages.—TUCK v. SILVER (1859), John. 218; 70 E. R. 403.

Annotation:—*Folld.* Wakefield v. Buccleugh (1865), 13 W. R. 856.

1239. —.]—Where an injunction is granted, either upon an *ex p.* application, or upon motion by notice, pltf. must give an undertaking as to

1237 v. —.]—DONNELL v. CHURCH (1842), 4 I. Eq. R. 630.—IR.

1237 vi. —.]—FLANAGAN v. SEAVER (1858), 10 Ir. Jur. 429.—IR.

1237 vii. —.]—If it appears that greater damage would result to appot. by refusing an interdict in the event of the legal right subsequently proving to be in his favour, than to resp. by granting the interdict in the event of it proving afterwards to have been wrongly granted, the interdict will issue, but the ct. will put the parties to terms by compelling appot. to undertake to pay resps. such damages sustained by the issue of the interdict as the ct. may award, if it should appear, at the trial that the interdict should not have been granted.—BURKS v. SPRINGS MUNICIPALITY & DICKENS (1917), W. L. D. 143.—S. AF.

g. To give court jurisdiction to award damages.]—The undertaking as

damages.—**WAKEFIELD v. BUCCLEUCH (DUKE)** (1865), 6 New Rep. 288; 12 L. T. 628; 11 Jur. N. S. 523; 13 W. R. 856; *subsequent proceedings* (1866), 36 L. J. Ch. 179; (1870), L. R. 4 H. L. 377, H. L.

1240. —.]—**WORMS v. SMITH** (1869), 18 W. R. 91.

1241. —.]—An undertaking as to damages ought to be given by pltf. who obtains an interlocutory order for an injunction, not only when the order is made *ex p.*, but even when it is made upon hearing both sides.—**TEIGN VALLEY RY. CO. v. SOUTHWOOD** (1871), 19 W. R. 690, L. J.

1242. —.]—**TOZER v. WALFORD**, [1875] W. N. 250; Bitt. Prac. Cas. 68; 1 Char. Cham. Cas. 16.

1243. —.]—**GRAHAM v. CAMPBELL**, No. 1028, *ante*.

1244. —.]—**TUCKER v. NEW BRUNSWICK TRADING CO. OF LONDON**, No. 1233, *ante*.

1245. —.]—**CHAPLIN v. BARNETT** (1911), *Times*, Dec. 20, C. A.; *subsequent proceedings* (1912), 28 T. L. R. 256, C. A.

1246. When undertaking not required—Where plaintiff's title clear.—On an ordinary interlocutory motion for an injunction the ct. before granting the injunction will require from pltf. an undertaking as to damages, unless his title be perfectly clear, or the damage, if any, which might accrue to defts. be of a vague & uncertain nature.—**ADAMSON v. WILSON** (1864), 3 New Rep. 368; 10 L. T. 24.

1247. — **Damage vague & uncertain.**—**ADAMSON v. WILSON**, No. 1246, *ante*.

1248. — **Final order.**—Defts., in an action for the alleged infringement of a patent, moved for an injunction to restrain pltf. until the trial of the action or further order from continuing the publication of newspaper advertisements threatening legal proceedings or liability in respect of any manufacture, use, sale, or purchase of the patented articles. On May 12, an injunction was granted. The registrar prefaced the order by an undertaking in damages on the part of defts. in the ordinary form. Defendants now moved to vary the minutes of order by omitting the undertaking as to damages:—*Held*: the object in insisting on an undertaking as to damages is, that if from the ct. not knowing all the facts it turns out that an injunction has been granted on an interlocutory application, which ought not to have been granted, then resp. is entitled to compensation, & the order being in the nature of a final order, the ordinary form was not applicable.—**FENNER v. WILSON**, [1893] 2 Ch. 656; 62 L. J. Ch. 984; 68 L. T. 748; 42 W. R. 57; 3 R. 629; 10 R. P. C. 283; *on appeal*, 9 T. L. R. 496, C. A.

Annotation:—**Mentd. Haskell Golf Ball Co. v. Hutchison & Main** (1904), 21 R. P. C. 497.

1249. — **Special circumstances.**—**CHAPLIN v. BARNETT** (1911), *Times*, Dec. 20, C. A.; *subsequent proceedings* (1912), 28 T. L. R. 256, C. A.

SUB-SECT. 3.—FORM OF UNDERTAKING.

1250. Final order.—**FENNER v. WILSON**, No. 1248, *ante*.

SUB-SECT. 4.—BY WHOM GIVEN.

1251. Crown.—The ct. will not, in favour of the Crown depart from established practice;

therefore in the case of an action by the Crown to restrain defts. from proceeding to construct certain tramways, the ct. refused to grant an *interim* injunction against defts. unless the Crown would consent to be bound in the usual undertaking in damages.—**SECRETARY OF STATE FOR WAR v. CHUBB** (1880), 43 L. T. 83.

Annotations:—**Distd. A.-G. v. Albany Hotel Co.**, [1896] 2 Ch. 696. **N.F. Secretary of State for War v. Cope**, [1919] 2 Ch. 339.

1252. —.]—**A.-G. v. SOUTH EASTERN RY. CO.** (1882), cited in, [1896] 2 Ch. at p. 700; 65 L. J. Ch. at p. 887; 75 L. T. at p. 141; 12 T. L. R. at p. 618.

Annotation:—**Refd. A.-G. v. Albany Hotel Co.**, [1896] 2 Ch. 696.

1253. —.]—**A.-G. v. MOORE**, [1893] 1 Ch. 676; 62 L. J. Ch. 607; 68 L. T. 574; 41 W. R. 294; 9 T. L. R. 144; 37 Sol. Jo. 132; 3 R. 213.

Annotation:—**Consd. A.-G. v. Albany Hotel Co.**, [1896] 2 Ch. 696.

1254. —.]—This was an action brought by the A.-G. on behalf of the Crown against the assignee of a lease of Crown property for an injunction to restrain him from selling intoxicating liquors by retail in breach of a covenant contained in the lease. The ct. held on the facts that the Crown was entitled to the injunction & deft. asked for the usual undertaking as to damages. The A.-G. refused to give any undertaking:—*Held*: the Crown, suing by the A.-G., never gives such an undertaking, & as a general rule, is entitled to an injunction without giving any undertaking.

Semble: cases might arise in which the ct. ought to refuse to grant an interlocutory injunction in favour of the Crown on the ground of the hardship to deft. caused by the absence of any undertaking.—**A.-G. v. ALBANY HOTEL CO.**, [1896] 2 Ch. 696; 65 L. J. Ch. 885; 75 L. T. 195; 12 T. L. R. 631, C. A.

Annotation:—**Refd. Secretary of State for War v. Cope**, [1919] 2 Ch. 339.

1255. —.]—The settled rule of the ct. that, in actions by the A.-G. on behalf of the Crown, an undertaking in damages will not be imposed when granting an interlocutory injunction also applies where the Secretary of State for War sues in respect of property vested in him, or under his control or disposition, on behalf of the Crown.—**SECRETARY OF STATE FOR WAR v. COPE**, [1919] 2 Ch. 339; 88 L. J. Ch. 522; 121 L. T. 547; 35 T. L. R. 666; 63 Sol. Jo. 725; 36 R. P. C. 273.

1256. Stranger—By signing registrar's book.—Undertaking, by way of agreement, to answer a possible liability, or to observe the order of the ct., entered into by a stranger to the cause, by signing the registrar's book.—**GURNEY v. BEHREND** (1853), 9 Hare, App. II., lxxxix; 68 E. R. 809.

1257. Plaintiff out of jurisdiction.—**SOLIGNAC v. DURDEN** (1859), 1 Seton's Judgments & Orders, 7th ed. p. 510.

1258. Solicitor.—**SOLIGNAC v. DURDEN** (1859), 1 Seton's Judgments & Orders, 7th ed. p. 510.

1259. —.]—**WALTER v. BROWN** (1885), 29 Sol. Jo. 435.

1260. Parties appearing in person.—**WALTER v. BROWN** (1885), 29 Sol. Jo. 435.

1261. Counsel.—**WALTER v. BROWN** (1885), 29 Sol. Jo. 435.

—.]—*See* No. 1264, *post*.

Married woman.—*See* **HUSBAND & WIFE**, Vol. XXVII., p. 250, Nos. 2202–2205.

1262. On behalf of company—Responsible person.—The ct. will not grant an injunction upon

to damages contained in an injunction order is not an undertaking to pay, but an admission of liability, its

purpose being to give the ct. jurisdiction to award damages to deft. if he should sustain any by reason of the

order made inst him.—**PAULSON v. MURRAY**, [1921] 2 W. W. R. 735; 31 Man. L. R. 268.—**CAN.**

Sect. 6.—Undertaking as to damages: Sub-sects. 4, 5, 6 & 7, A.]

the application *ex p.* of a limited co., except upon the undertaking of some responsible person to be answerable in damages.—*ANGLO-DANUBIAN, ETC. CO., LTD. v. ROGERSON* (1863), 3 New Rep. 185; 10 Jur. N. S. 87.

1263. — Officer of company.]—The ct. permitted the undertaking as to damages, on an *ex p.* injunction obtained by a co., to be signed by an officer of the co. on a separate piece of paper & transmitted to the registrar.—*PACIFIC STEAM NAVIGATION CO. v. GIBBS* (1865), 13 L. T. 431; 14 W. R. 218.

1264. — Counsel.]—The ordinary undertaking as to damages where pltf. obtains an injunction on an *ex p.* motion is properly given by pltf.'s counsel, although pltf. is a limited co.—*MANCHESTER & LIVERPOOL BANKING CO. v. PARKINSON* (1888), 60 L. T. 47.

1265. — In liquidation—Liquidator.]—*WESTMINSTER ASSOCN., LTD. v. UPWARD* (1880), 24 Sol. Jo. 690.

Annotation:—Reid. Rosling & Flynn v. Law Guarantee & Trust Co. (1903), 47 Sol. Jo. 255.

1266. — — — —.]—*ROSLING & FLYNN, LTD. v. LAW GUARANTEE & TRUST CO.* (1903), 47 Sol. Jo. 255.

Interim receiver.]—See *BANKRUPTCY*, Vol. IV., p. 204, No. 1883.

1267. On behalf of corporation—The corporation.]—Where an *interim* injunction is granted at the instance of pltf. corpn., the ct. will, in a proper case, allow the usual undertaking in damages to be given by the corpn. itself, & not require the undertaking to be given by some responsible individual on behalf of the corpn.; & the same practice may apply where pltf. is a local board (*KEKEWICH, J.*).—*EAST MOLESEY LOCAL BOARD v. LAMBETH WATERWORKS CO.*, [1892] 3 Ch. 289; 62 L. J. Ch. 82; 67 L. T. 493; 2 R. 88, C. A.

SUB-SECT. 5.—WHERE UNDERTAKING GIVEN IN LIEU OF INJUNCTION.

1268. Whether cross-undertaking by plaintiff implied—Form of order.]—(1) Where on an interlocutory motion for an injunction an undertaking is offered by deft. & accepted by pltf., there is no general practice that a cross-undertaking as to damages by pltf. is to be implied.

(2) An undertaking entered into with the ct. is the equivalent & will have the effect of an injunction to this extent that any infringement of the undertaking may be made the subject of an application to the ct. to enforce it (*VAUGHAN WILLIAMS, L.J.*).—*HOWARD v. PRESS PRINTERS, LTD.* (1904), 74 L. J. Ch. 100; 91 L. T. 718; 53 W. R. 98; 49 Sol. Jo. 67, C. A.

Annotation:—As to (1) Consd. Oberrheinische Metallwerke, G. M. B. H. v. Cocks, [1906] W. N. 127.

1269. — — —.]—The judges of the Ch. Div. have adopted the following resolution. In future whenever an undertaking to the ct. is given in lieu of an interlocutory injunction there shall be inserted in the order a cross-undertaking in damages by applt. unless the contrary is agreed &

expressed at the time.—*PRACTICE NOTE*, [1904] W. N. 203.

1270. — — —.]—*OBERRHEINISCHE METALLWERKE, G. M. B. H. v. COCKS*, [1906] W. N. 127.

SUB-SECT. 6.—EFFECT OF GIVING UNDERTAKING.

1271. Dissolution of injunction—Liability of plaintiff.]—Pltf. claiming copyright in a work by a foreigner & assigned to him, obtained an injunction on giving an undertaking to abide by any order the ct. might make respecting damages deft. might sustain by reason of the injunction. The House of Lords, after conflicting decisions in the cts. of law, decided, that a party in the situation of pltf. in this suit had no title to copyright; & the injunction was dissolved without opposition. Deft. moved for an inquiry as to damage:—*Held*: deft. was entitled to an inquiry what, if any, damage he had sustained.—*NOVELLO v. JAMES* (1854), 5 De G. M. & G. 876; 24 L. J. Ch. 111; 24 L. T. O. S. 165; 1 Jur. N. S. 217; 3 W. R. 127; 43 E. R. 1111, L. JJ.

Annotations:—Consd. Smith v. Day (1882), 21 Ch. D. 421. *Reid. Griffith v. Blake* (1884), 27 Ch. D. 474; *Re Hallstone, Hopkinson v. Carter* (1910), 102 L. T. 877.

1272. Dismissal of motion—Liability of plaintiff.]—An undertaking given by pltf. upon obtaining an injunction, to abide by any order the ct. may thereafter make as to any damages that may be occasioned to defts. by the injunction, remains in force notwithstanding the dismissal of the bill.

An inquiry as to damages will in such a case be granted where pltf.'s case fails by reason of his having no right to interfere with the act which he seeks to restrain, though deft. was a mere trespasser.—*NEWBY v. HARRISON* (1861), 3 De G. F. & J. 287; 30 L. J. Ch. 863; 5 L. T. 12; 7 Jur. N. S. 981; 9 W. R. 849; 45 E. R. 889, L. JJ.

Annotations:—Reid. Dare Valley Ry. v. Rhys (1869), 38 L. J. Ch. 417; *Newcomen v. Coulson* (1878), 7 Ch. D. 764; *Smith v. Day* (1882), 21 Ch. D. 421; *Re Wood, Ex p. Hall* (1883), 23 Ch. D. 644; *Griffith v. Blake* (1884), 27 Ch. D. 474; *Manchester & Liverpool Bank v. Parkinson* (1889), 60 L. T. 258; *Fenner v. Wilson*, [1893] 2 Ch. 656; *Re Hallstone, Hopkinson v. Carter* (1910), 102 L. T. 877. *Mentd. Carr v. Benson* (1868), 3 Ch. App. 524.

1273. — — —.]—Where pltf., undertaking to abide by any order as to damages, had obtained an interlocutory injunction to restrain defts., from proceeding with certain erections, but his bill was dismissed at the hearing, the ct. refused an application by defts., at the dismissal of the bill, for an inquiry as to damages sustained by them by reason of their having been restrained by the injunction for the space of a year, but without prejudice to any application they might make as to damages on pltf.'s undertaking, upon the production of sufficient evidence to justify an inquiry.—*BUTT v. IMPERIAL GAS LIGHT & COKE CO.* (1866), 14 L. T. 349; 14 W. R. 508; *on appeal*, 2 Ch. App. 158, L. C.

1274. Discharge of order—Liability of plaintiff.]—*ROSS v. BUXTON*, [1888] W. N. 55.

1275. Discontinuance of action—Liability of plaintiff.]—Where a pltf., upon obtaining an injunction, has given the usual undertaking to abide by any order the ct. may make as to damages, such

PART XI. SECT. 6, SUB-SECT. 6.

1271 i. Dissolution of injunction—Liability of plaintiff.]—Where pltf. on giving the usual undertaking as to damages obtained an *ex p.* injunction, which was subsequently dissolved, he was allowed to have his bill dismissed

without payment of damages recoverable under the undertaking.—*MOREHOUSE v. BAILEY* (1896), 1 N. B. Eq. Rep. 393.—*CAN.*

1271 ii. — — —.]—Where an *ex p.* injunction was dissolved before the

hearing of the suit which was for a declaration of title to land, the ct. postponed assessing deft.'s damages upon pltf.'s undertaking given on obtaining the injunction, to the hearing of the suit.—*MCLELLAN v. TURNER*, 23 C. L. T. 268.—*CAN.*

undertaking remains in force, notwithstanding pltf. has discontinued his action under R. S. C. Ord. 23, r. 1; & may be enforced against pltf., upon motion, within a reasonable time after the discontinuance of the action.

In such a case a delay after discontinuance of nearly eleven months was not held a bar to deft.'s right to an inquiry.—*NEWCOMEN v. COULSON* (1878), 7 Ch. D. 764; 47 L. J. Ch. 429; 38 L. T. 275; 26 W. R. 350.

1276. ———.]—In an action for infringement of a patent pltf. moved for & obtained an interlocutory injunction upon giving the usual undertaking as to damages; the injunction was subsequently dissolved by consent without prejudice to the undertaking, & pltf. gave notice to discontinue the action. Deft. then moved for an inquiry as to the damages sustained by him, & for an order for payment of the amount of such damages:—*Held*: deft. was entitled to what he asked for, & pltf. must be ordered to pay the costs of the motion & of the inquiry, & the costs of the inquiry ought not to be reserved.—*ROTHWELL v. KING* (1887), 4 R. P. C. 76.

1277. Injunction wrongly granted—By mistake of law.]—*SMITH v. DAY*, No. 1236, *ante*.

1278. ———.]—Where pltf. obtains an interlocutory injunction upon giving an undertaking in damages deft. is entitled to the benefit of the undertaking, even though it should afterwards be decided that the injunction was wrongly granted owing to the mistake of the ct. itself.—*GRIFFITH v. BLAKE* (1884), 27 Ch. D. 474; 53 L. J. Ch. 965; 51 L. T. 274; 32 W. R. 833, C. A.

Annotations:—*Consd. Re Hallstone, Hopkinson v. Carter* (1910), 102 L. T. 877. *Refd. A.-G. v. Albany Hotel Co.*, [1896] 2 Ch. 696.

1279. ———.]—*HUNT v. HUNT*, No. 1302, *post*.

1280. By mistake of fact.]—*HUNT v. HUNT*, No. 1302, *post*.

1281. Liability of solicitor—Suppression of facts—Bankruptcy of plaintiff.]—*SCHMETTEN v. FAULKS* (1893), 37 Sol. Jo. 389.

Liability of married woman.]—See *HUSBAND & WIFE*, Vol. XXVII., p. 250, No. 2203.

Direction as to damages.]—See Sub-sect. 7, *post*.

SUB-SECT. 7.—INQUIRY AS TO DAMAGES.

A. Jurisdiction of Court.

1282. Dissolution of injunction.]—*NOVELLO v. JAMES*, No. 1271, *ante*.

1283. Dismissal of motion.]—*NEWBY v. HARRISON*, No. 1272, *ante*.

1284. ———.]—An injunction having been awarded against deft. till the hearing, & pltf. having undertaken to abide by any order as to damages, at the hearing the bill was dismissed, but without costs. A motion to assess the damage sustained by deft. in consequence of the injunction was refused, with costs, the damage suffered being the consequence not of the injunction, but of the suit, which the ct. had held that pltf. was right in instituting.—*BINGLEY v. MARSHALL* (1863), 2 New Rep. 546; 9 L. T. 144; 11 W. R. 1018.

1285. ———.]—*BUTT v. IMPERIAL GAS LIGHT & COKE Co.*, No. 1273, *ante*.

1286. ———.]—*GRAHAM v. CAMPBELL*, No. 1028, *ante*.

1287. Discontinuance of action.]—*NEWCOMEN v. COULSON*, No. 1275, *ante*.

1288. ———.]—*ROTHWELL v. KING*, No. 1276, *ante*.

1289. Discharge of order.]—*ROSS v. BUXTON*, [1888] W. N. 55.

1290. Injunction wrongly granted—Default of plaintiff.]—*SMITH v. DAY*, No. 1236, *ante*.

1291. ———.]—*GRIFFITH v. BLAKE*, No. 1278, *ante*.

1292. ———.]—**Mistake of law.**]—*SMITH v. DAY*, No. 1236, *ante*.

1293. ———.]—*HUNT v. HUNT*, No. 1302, *post*.

PART XI. SECT. 6, SUB-SECT. 7.—A.

1282 i. Dissolution of injunction.]—Where a pltf., on obtaining an injunction, enters into the usual undertaking to abide by such order as the ct. may make as to damages, it is in the discretion of the ct. to grant or refuse a reference as to such damages where the injunction is afterwards not continued, or is dissolved. Where a person in the employment of the owner of a machine for which a patent had been granted, surreptitiously obtained such a knowledge thereof as enabled him to construct a similar machine for deft., the ct., although unable to continue the injunction in consequence of the invalidity of the patent, refused deft. a reference as to damages, he having availed himself of the knowledge which he knew had been so improperly obtained.—*HESSIN v. COPPIN* (1874), 21 Gr. 253.—CAN.

1282 ii. ———.]—An application for an order directing an inquiry as to & payment of the damages occasioned to deft. by reason of an *interim* injunction obtained by pltf. upon the usual undertaking as to damages, & dissolved by the judgment in the action, should be made to the trial judge. Such an application is in the discretion of the judge. Where the chief point at issue was, whether or not pltf. were liable to assessment & taxation for local improvements:—*Held*: the good faith of pltf., their duty as trustees to assert what they conceived to be their rights, the importance

of the issue as to assessment (involving, as it did, the right of defts., a city corpn. to pass the bye-law under which they acted), the arbitrary, though legal, conduct of defts. in laying out the work to the manifest disadvantage of pltf., & the equally manifest benefit of interested property-owners on the opposite side of the street, & the fact that the dismissal of the action was without costs, were circumstances which warranted the conclusion that, if defts. had suffered damages by reason of the injunction, they were not such damages as pltf. ought to pay; & defts.' application for an order for an inquiry & payment was dismissed with costs.—*UPPER CANADA COLLEGE v. CITY OF TORONTO* (1917), 40 O. L. R. 483.—CAN.

1282 iii. ———.]—If an interlocutory injunction obtained by pltf. is dissolved before or after trial, it does not necessarily follow that the successful deft. is entitled to damages. The test is, whether pltf., by the suppression of facts, or misrepresentation, or maliciously, improperly obtains the injunction. The discretion of the ct. will be exercised in favour of awarding damages only in case the issuance of the injunction or order was wrongful in the sense that it was prompted by malice or was without reasonable & probable cause or where the terms of the order were such that deft. could not reasonably be expected to act under it in such a way as to avoid damages. All the surrounding facts

& circumstances must be examined.—*MCBRATNEY v. SEXSMITH*, [1924] 3 D. L. R. 84; 2 W. W. R. 455.—CAN.

1283 i. Dismissal of motion.]—On obtaining an *ex p.* injunction restraining the sale of property, pltf. entered into the usual undertaking as to damages, & subsequently dismissed his bill; whereupon deft. moved for a reference to the master to inquire as to damages sustained by him, when, in answer to the application, it was shown, that, since the dismissal of the bill, an increased price had already been offered, & that it was probable a still greater advance in price would be obtained on a sale. The ct. refused the application, but without costs, & reversed to deft. liberty to renew his application, on which he should be at liberty to use depositions & affidavits read on the present motion.—*FEATHERSTONE v. SMITH* (1873), 20 Gr. 474.—CAN.

1287 i. Discontinuance of action.]—In an action in a county ct. which brought up the question of the existence of a partnership, pltf. obtained an injunction & then discontinued the action. Deft. applied for an order directing an inquiry as to the damages resulting from the injunction & the judge ordered a reference to the registrar, not only to inquire & report as damages, but also to decide whether a partnership existed:—*Held*: the appeal should be allowed.—*JOHN HING Co. v. SRT WAY*, [1918] 1 W. W. R. 978; 25 B. C. R. 153.—CAN.

Sect. 6.—Undertaking as to damages: Sub-sect. 7, A., B., C., D. & E. Part XII. Sect. 1: Sub-sect. 1.]

1294. ———.]—GRIFFITH v. BLAKE, No. 1278, *ante*.

1295. ——— Mistake of fact.]—HUNT v. HUNT, No. 1302, *post*.

1296. ——— Suppression of material fact.]—ROSS v. BUXTON, [1888] W. N. 55.

B. Grounds for Granting or Refusing.

1297. Delay.]—NEWCOMEN v. COULSON, No. 1275, *ante*.

1298. ———.]—GRAHAM v. CAMPBELL, No. 1028, *ante*.

1299. ———.]—SMITH v. DAY, No. 1236, *ante*.

1300. ———.]—An application to enforce an undertaking to be answerable in damages, given by a receiver in bkpcy. on the granting of an injunction to restrain proceedings in relation to property alleged to form part of bkpt.'s estate, ought to be made within a reasonable time after it is ascertained that the injunction has been improperly granted. Unexplained & unreasonable delay in making such an application will be a sufficient ground for refusing it, even if the bkpcy. proceedings are still pending & the receiver has not obtained his discharge:—*Held*: an unexplained delay of nearly four years in making such an application was a sufficient answer to it, though appct. had shown a *prima facie* case.—*Re* WOOD, *Ex p.* HALL (1883), 23 Ch. D. 644; 52 L. J. Ch. 907; 49 L. T. 275; 32 W. R. 179, C. A. *Annotations*.—*Consd.* Schlossinger v. Bedford (1893), 9 T. L. R. 370; *Re* Hallstone, Hopkinson v. Carter (1910), 102 L. T. 877.

1301. Damages remote.]—SMITH v. DAY, No. 1236, *ante*.

1302. ———.]—(1) Where an injunction is wrongly granted, an undertaking as to damages given by pltf. is equally enforceable whether the mistake was in point of law or in point of fact.

(2) In such a case the ct. has no discretion to refuse an inquiry as to damages unless the damages alleged would be too remote if deft. were suing in respect of them upon a breach of contract.

(3) In such a case a husband deft. is not prohibited from enforcing an undertaking given by a wife pltf. by reason of Married Women's Property Act, 1882 (c. 75), s. 12, debarring him from suing his wife in tort.

(4) A married woman who has given an undertaking as to damages since the Married Women's Property Act, 1882 (c. 75), will be dealt with on the same footing as that on which a married woman's next friend who had given such an undertaking would have been dealt with before the Act.

(5) An army surgeon, living apart from his wife, was under orders to sail for Egypt, & proposed to take some of his children with him. The wife obtained an injunction to restrain him from so doing, the judge considering that he would be

acting in contravention of the separation deed between them. The Ct. of Appeal took a different view of the effect of the separation deed & dissolved the injunction. The husband applied for an inquiry as to damages occasioned to him by the injunction, in enforcement of an undertaking as to damages given by the wife, alleging loss of free passage to Egypt for the children, loss of pay, & expenses caused by his stay in London:—*Held*: the inquiry must be granted.—HUNT v. HUNT (1884), 54 L. J. Ch. 289; 1 T. L. R. 149.

1303. Damages trivial.]—SMITH v. DAY, No. 1236, *ante*.

On dismissal or discontinuance of action.]—*See* Sub-sect. 7, A., *ante*.

C. When Application Made.

1304. Within reasonable time.]—SMITH v. DAY, No. 1236, *ante*.

1305. ——— Effect of delay.]—*Re* WOOD, *Ex p.* HALL, No. 1300, *ante*.

1306. Dissolution of injunction.]—An injunction was granted, on the usual undertaking to be answerable in damages. The injunction having been dissolved, deft. moved to dismiss for want of prosecution, & for a reference to ascertain the amount of damages. Pltf. undertook to speed:—*Held*: this was not the proper time for obtaining a reference as to damages.—SOUTHWORTH v. TAYLOR (1860), 28 Beav. 616; 29 L. J. Ch. 868; 54 E. R. 503.

1307. ———.]—SMITH v. DAY, No. 1236, *ante*.

1308. ———.]—Where an interlocutory injunction has been granted by the Probate Div. on the usual undertaking as to damages, & an application is subsequently made to enforce that undertaking such application should be to that Div., & not to the Ch. or K. B. Div.

Although it cannot be said that under no circumstances ought delay in making the application to be an element to be considered yet the right to enforce an undertaking as to damages is not lost if the application was not made when the injunction was dissolved or when the action came on for trial; but all the circumstances of the case must be taken into account.—*Re* HAILSTONE, HOPKINSON v. CARTER (1910), 102 L. T. 877, C. A.

1309. Trial of action.]—SMITH v. DAY, No. 1236, *ante*.

1310. ———.]—*Re* HAILSTONE, HOPKINSON v. CARTER, No. 1308, *ante*.

D. What Damages Awarded.

1311. Damages flowing from injunction.]—GRAHAM v. CAMPBELL, No. 1028, *ante*.

1312. ———.]—SMITH v. DAY, No. 1236, *ante*.

1313. ———.]—The real nature of an undertaking of this kind & the extent to which damages ought to be awarded thereunder were carefully explained in the well-known case of *Smith v. Day*, No. 1236, *ante*. It showed that all the remote

1296 i. Injunction wrongly granted—*Suppression of material fact.*]—MOBRATNEY v. SKESMITH, [1924] 3 D. L. R. 84; 2 W. W. R. 455.—CAN.

h. Discretionary.]—The jurisdiction to award an inquiry as to damages, or to assess damages without a reference, where an injunction has been granted & an undertaking as to damages given, is a discretionary one, to be exercised judicially & not capriciously. Where, in an action to set aside a sale of goods as fraudulent, a claim for damages by reason of an injunction was set up in the defence, & the trial judge was of opinion that

no damage was proved to have been occasioned by the injunction as distinct from the detriment arising from the litigation, & no additional evidence having been given, a div. ct., under the circumstances of this case, where the deft. was given his costs, although his conduct had been such as properly to provoke legal inquiry, refused to award a reference as to damages.—GAULT v. MURRAY (1891), 31 O. R. 458.—CAN.

k. ———.]—The order of a trial judge directing an inquiry as to damages arising from the postponement of a sale by injunction will not be interfered

with, as being a matter within his discretion unless the Ct. of Appeal is convinced that the judge was clearly wrong.—ROYAL BANK v. WHEELDON, [1917] 2 W. W. R. 58; 23 B. C. R. 436.—CAN.

PART XI. SECT. 6, SUB-SECT. 7.—D.

1. Measure of damages.]—Claims for small damages by some defts. ordered to be included in an order for assessment of damages by other defts. under an undertaking given on obtaining an interlocutory injunction, where they arose from the restraint of acts which the injunction was obtained to

consequences of obtaining an injunction which was afterwards dissolved, were not to be taken into account in assessing the damages to be paid to deft. under pltf.'s undertaking. It would be unduly straining such undertaking to include it in damages which did not naturally flow from the injunction (LINDLEY, L.J.).—SCHLESINGER v. BEDFORD (1893), 9 T. L. R. 370, C. A.

1314. Remote damage excluded.]—SCHLESINGER v. BEDFORD, No. 1313, *ante*.

1315. Measure of damages—Sale of shares restrained.]—Pltf. claiming certain shares as his property, obtained, on giving the usual undertaking as to damages, an interlocutory injunction restraining the shareholder & his mtgees. from parting with the shares. Before the trial, a summons by the mtgees., asking that the shares might be sold & the proceeds paid into ct., was successfully opposed by pltf. & the shareholder.

At the trial the action was dismissed:—*Held*: in ascertaining the amount of damages under the undertaking, all the facts must be considered, including the fluctuations of the market during the continuance of the injunction; & the amount payable by pltf. was not the difference between the price of the shares when the action was dismissed & the highest price at which they had been quoted during that period, but the difference between the price when the injunction was granted & the price when the summons asking for a sale was issued.—MANSELL v. BRITISH LINEN CO. BANK, [1892] 3 Ch. 159; 61 L. J. Ch. 696; 67 L. T. 171. —.]—*See, also*, No. 1313, *ante*.

E. To What Division Application Made.

1316. General rule—Division where undertaking given.]—*Re* HAILSTONE, HOPKINSON v. CARTER. No. 1308, *ante*.

Part XII.—Breach of Injunction and Remedies Therefor.

SECT. 1.—BREACH.

SUB-SECT. 1.—WHAT CONSTITUTES BREACH.

1317. General rule—Dependent on circumstances of case.]—Parties claiming to be equitable mtgees. in possession of certain freehold houses commenced pulling down the wall of one of them. The party claiming to have the legal estate thereupon filed his bill against the equitable mtgees., & obtained, *ex p.* an injunction to restrain them from pulling down, destroying, or damaging the houses or buildings, & from removing or carrying away the bricks or materials thereof, & from doing or committing any waste, injury or spoil to, in, or upon the premises, or any part thereof. Pltf. afterwards put workmen into the houses, who excluded defts. by shutting the doors & windows. Defts. thereupon obtained an entry by breaking a window in one of the houses, broke the lock of one of the doors, & ejected pltf.'s workmen:—*Held*: under the circumstances, no breach of the injunction had been committed.

The ct. must have regard to the circumstances under which & the object for which the injunction was obtained (ROLFE, V.-C.).—LODER v. ARNOLD (1850), 15 Jur. 117.

prevent the doing of.—WOOD v. LEBLANC (1905), 3 N. B. Eq. Rep. 116; 25 C. L. T. 90.—CAN.

m. —.]—Damages which should be paid deft. on pltf.'s undertaking on the issue of an injunction should be ascertained by inquiry directed only after the determination of all other questions in the action & fixed rather on equitable principles. A counterclaim for such damages is not justified by the practice.—NORSTRANT v. TOWN OF DRUMHELLER, [1920] 1 W. W. R. 818.—CAN.

PART XI. SECT. 6, SUB-SECT. 7.—E.

n. General rule.]—An application for an order directing an inquiry as to & payment of the damages occasioned to deft. by reason of an *interim* injunction obtained by pltf. upon the usual undertaking as to damages, & dissolved by the judgment in the action, should be made to the trial judge.—UPPER CANADA COLLEGE v. CITY OF TORONTO (1917), 40 O. L. R. 483.—CAN.

PART XII. SECT. 1, SUB-SECT. 1.

o. General rule.]—An injunction

while it stands should be obeyed; & where, after twelve weeks had elapsed from service of it, without the bill being served, deft. treated the injunction as gone, the ct., while refusing a motion to commit for breach of it, refused deft. his costs of resisting the application.—HERON v. SWISHER (1867), 13 Gr. 438.—CAN.

p. —.]—A municipal corpn. having been enjoined from purchasing a property for municipal purposes under a bye-law which was invalid, repealed such bye-law & proceeded to purchase the same property under a new bye-law valid on its face:—*Held*: in purchasing under the new bye-law the corpn. was not guilty of a breach of the injunction.—YOUNG v. TOWN OF RIDGETOWN (1889), 18 O. R. 140.—CAN.

q. —.]—An *ex p.* restraining order made by a local judge must be obeyed until set aside.—LEBERRY v. BRADEN (1900), 7 B. C. R. 403.—CAN.

r. —.]—Where an injunction is erroneously or improvidently granted, although only voidable, while it is in force nothing should be done in con-

1318. Exercise of antecedent right—By person not party to suit.]—If a person is not party to a suit, nor acquired any right *pendente lite* from any one as party, but is only exercising an antecedent right, inasmuch as he is not party, this is no breach of an injunction.—BOOTLE v. STANLEY (undated), 2 Eq. Cas. Abr. 528; 22 E. R. 446.

1319. Aiding & abetting breach.]—If a party who, together with others, has been restrained by injunction from doing a particular act, is afterwards present, aiding & abetting, when that is done which the injunction has prohibited, he is guilty of a breach of the injunction.—ST. JOHN'S COLLEGE, OXFORD v. CARTER (1839), 4 My. & Cr. 497; 8 L. J. Ch. 218; 41 E. R. 191; *sub nom.* ST. JOHN'S COLLEGE v. PRATT, 3 Jur. 187, L. C.

1320. —.]—SEAWARD v. PATERSON, No. 1171, *ante*.

1321. Acting contrary to spirit of injunction.]—The injunction having been granted, & made perpetual on the hearing of the cause, to restrain deft. from doing any act to impede the navigation of the Grand Junction Canal, deft. appealed from the order to the Lord Chancellor, who continued the injunction:—*Held*: deft. by employing a clerk to take the number of the barges

travention of its reasonable import.—DUNN v. TORONTO BOARD OF EDUCATION (1904), 24 C. L. T. 223; 7 O. L. R. 451; 3 O. W. R. 311, 393.—CAN.

1319 i. Aiding & abetting breach.]—Persons not named in an injunction are not liable to be committed for breach of it, unless, with knowledge of the injunction, they interfere & commit the act enjoined, in which case they are liable for contempt of ct.—DECOSMOS v. VICTORIA & ESQUIMALT TELEPHONE CO., LTD. (1894), 3 B. C. R. 347.—CAN.

1319 ii. —.]—The ct. will commit any one who wilfully disobeys an injunction order, or abets such disobedience.—TURNBULL REAL ESTATE CO. v. SEGEL & WARD (1914), 14 E. L. R. 539; 19 D. L. R. 525.—CAN.

1321 i. Acting contrary to spirit of injunction.]—Injunctions must be obeyed according to the spirit as well as letter.—BICKFORD v. WELLAND RY. CO. (1870), 17 Gr. 484.—CAN.

1321 ii. —.]—CANADIAN PACIFIC NAVIGATION CO., LTD. v. VANCOUVER CITY (1892), 2 B. C. R. 298.—CAN.

Sect. 1.—Breach: Sub-sects. 1, 2, 3 & 4.]

that passed on the canal, & to inform the barge-men that they were trespassers, had not thereby committed a breach of the injunction; but his having brought actions against the co. in respect of such barges having passed, was contrary to the tenour of the decree, & in that respect an injunction was granted to restrain the actions.—*GRAND JUNCTION CANAL CO. v. DIMES* (1849), 17 Sim. 38; 18 L. J. Ch. 419; 13 Jur. 779; 60 E. R. 1041; *on appeal, sub nom. DIMES v. GRAND JUNCTION CANAL (PROPRIETORS)* (1852), 3 H. L. Cas. 759, H. L.

Annotation:—*Reid. Hawkins v. Gathercole* (1852), 16 Jur. 650.

1322. —.—(1) Upon one of the sections of a railway, deposited with the Clerk of the Peace, & referred to by an Act, afterwards passed, authorising the formation of the line, there was a note to the effect that a particular road, therein delineated, was to be stopped up, & another, therein also delineated, was to be a substituted road for it:—*Held*: the public & the landowners were not thereby affected with notice, so as, upon the ground of acquiescence, to be precluded from obtaining an injunction, upwards of four years afterwards, on the co.'s proceeding to stop up the road.

(2) The works for stopping up the above-mentioned road were commenced in Oct. 1849, but the road was not rendered entirely impassable till Feb. 1850:—*Held*: an application for an injunction in Feb. 1850, was not too late.

(3) A bill stated that a railway co. was interfering with a public road, by digging a trench & lowering the level of it, & causing a permanent & complete obstruction. The bill prayed for an injunction restraining the co. from obstructing the road or rendering the same less convenient for the passage of carriages, etc., than it had previously been, until they had made a proper substituted road. An injunction to that effect was granted. The co. then changed their plan, & instead of lowering the road, carried the railway across it on a level, with posts & gates, which were closed only during a few short & ascertained periods in the day, when trains crossed:—*Held*: the general terms of the injunction were not restricted by reference to the particular nature of the injury complained of, but that it had, in spirit, as well as terms, been violated.—*A.-G. v. GREAT NORTHERN RY. CO.* (1850), 4 De G. & Sm. 75; 15 L. T. O. S. 362; 17 L. T. O. S. 23; 14 Jur. 684; 15 Jur. 387; 64 E. R. 741.

Annotations:—*Generally, Reid. A.-G. v. Barry Dock & Ry.* (1887), 35 Ch. D. 573. *Mentd. R. v. Wycombe Ry.* (1867), L. R. 2 Q. B. 310.

1323. —.—The ct. will interfere to restrain an action at law, the bringing which is against the spirit, although not within the letter, of a former injunction.—*BRENAN v. PRESTON* (1853), 1 W. R. 172.

1324. Acts provocative of breach.]—Where an injunction is granted to restrain a sale under a power or trust for sale in a mtge. deed, & notice of the order is given to the mtgee. after he had directed an auctioneer to advertise, & after the auctioneer has sent the advertisement to the

newspapers, it is not sufficient subsequently to insert another advertisement stating that the sale is postponed, but immediate steps must be taken to stop the advertisement itself. *Semble*: any proceeding which may result in a breach of an order of the ct. is tantamount to an actual breach.—*HARDING v. TINGEY* (1864), as reported in 10 L. T. 323; 12 W. R. 684.

1325. Form of prohibition not comprehensive—No enlargement to meet circumstances.]—C. trading as M. & co. had been restrained by injunction, in an action brought by E. against M. & co., from publishing, either verbally or otherwise, any statement to the effect that an injunction had been granted against E., restraining him from infringing certain letters patent, & also from threatening E. or any of E.'s customers with any legal proceedings or liability in respect of the manufacture, sale, or purchase of a certain machine. After the order M. & co. circulated amongst E.'s customers a pamphlet prepared by the A. co. which stated in effect that M. & co. were the special agents of the A. co. who were the exclusive makers of the machine in question under the licence of the patentee, & who intended to prosecute all infringers of their patents:—*Held*: the injunction was not so plainly worded to prohibit what C. had done, as to justify a judicial decision that a breach of the injunction had been committed.

The ct. will not strain the language of an injunction even to meet a case which would have been prohibited if foreseen (*LINDLEY, M.R.*).—*ELLAM v. MARTYN (H. F.) & Co.* (1898), 68 L. J. Ch. 123; 79 L. T. 510; 47 W. R. 212; 15 T. L. R. 107; 43 Sol. Jo. 112; 16 R. P. C. 28, C. A.

1326. Acts of omission or commission.]—*STANCOMB v. TROWBRIDGE URBAN COUNCIL*, No. 1339, *post*.

SUB-SECT. 2.—BREACH OF UNDERTAKING.

1327. Equivalent to breach of injunction—Interference by court.]—A co. were empowered by an Act of Parliament to do all works necessary & convenient for constructing a railway, & among others to cross canals & make embankments in the line; & in particular to cross a canal of which defts. were the proprietors, & to make an embankment over a valley near the same place. Subsequent clauses in the Act restricted the co. from doing anything which should obstruct the navigation of the canal, or any part thereof; & specified the height & dimensions of any bridge to be made & maintained for carrying the railway over the canal. The co., for the purpose of transporting earth from the higher lands on the south to the lower land on the north side of the canal for constructing an embankment, erected a temporary bridge over the canal, supported partly on piles driven into the bed of the canal. Defts. pulled down such bridge, & thereby destroyed the passage of communication for the carriage of the earth. Pltfs. having offered to undertake not to interfere with the canal, otherwise than as authorised by the Act, such undertaking was adopted by the ct., & will have the effect of an injunction, so far that the defendants will be

PART XII. SECT. 1, SUB-SECT. 2.

1327 i. Equivalent to breach of injunction—Interference by court.]—On the same day that an injunction restraining the felling of timber had been served, pltf. & principal deft. in the cause entered into a written agreement, by which the latter agreed to give up possession of the premises on a par-

ticular day, & to refrain from cutting or removing any timber cut in the meantime; & pltf. thereby agreed "that I, the said T. M., do hereby, upon the above conditions being complied with, withdraw all suits now pending," etc. Deft. still continued to cut down & remove the timber, & a motion was made to commit him for breach of the injunction:—*Held*: the

suit was still pending, the acts agreed to be done by the deft., being a condition precedent to the withdrawal of the suit.—*MULHOLLAND v. DOWNES* (1867), 14 Gr. 106.—*CAN.*

1327 ii. —.—[Failure to pay the damages awarded because of the making of an *interim* injunction order does not constitute a breach of pltf.'s

enabled to make any infringement thereof the subject of an application to the ct.—**LONDON & BIRMINGHAM RY. CO. v. GRAND JUNCTION CANAL CO.** (1835), 1 Ry. & Can. Cas. 224.

Annotations:—**Apld.** *Milburn v. Newton Colliery* (1908), 52 Sol. Jo. 317. **Mentd.** *Priestley v. Manchester & Leeds Ry.* (1840), 4 Y. & C. Ex. 63.

1328. ———.]—An estate was intersected by a canal under the powers of its Act, & an accommodation bridge was built by the co. over which a private road, leading across the property to a high road, was carried. Coal pits were opened upon the estate, which, when the canal was made, had been used as a farm. For some time the coals were carried down to the canal by a tramway which did not cross the bridge. The coal owners subsequently carried the tramway across the bridge, excavating the soil of the roadway on the bridge & approaches, in order to carry their coals to a line of railway on the other side of the property. An action for trespass having been commenced, & a writ of injunction applied for by the canal co., the coal owners submitted in the action to judgment for £1 damages & costs, & gave an undertaking not to repeat the trespasses complained of:—**Held**: the undertaking given by defts. formed a good ground for the interference of the ct.—**NEATH CANAL CO. v. YNISARWED RESOLVEN COLLIERY CO.** (1875), 10 Ch. App. 450, L. JJ.

1329. ——— **By attachment.**]—**HOWARD v. PRESS PRINTERS, LTD.**, No. 1268, *ante*.

Remedies available—Attachment.]—*See* Sect. 2, sub-sect. 1, A. (a), *post*.

— **Sequestration.**]—*See* Sect. 2, sub-sect. 1, B., *post*.

SUB-SECT. 3.—PROOF OF BREACH.

1330. Necessity for strict proof.]—On a bill alleging a case of prospective injury, an injunction was granted, restraining defts. from permitting certain injurious effects to be produced by certain given causes. The contemplated damage took place, & pltf. moved to commit for breach of the injunction, whereupon defts. denied that the damage was effected by their acts. The ct. refused to treat defts. as contumacious until the verdict of a jury had conclusively connected the acts of defts. & the damage alleged to have resulted therefrom as cause & effect.—**DAWSON v. PAVER** (1847), 5 Hare, 415; 16 L. J. Ch. 274; 11 Jur. 766; 67 E. R. 974.

Annotations:—**Mentd.** *East Lancashire Ry. v. Hattersley* (1849), 8 Hare, 72; *Goldsmid v. Tunbridge Wells Improvement Comrs.* (1865), 14 W. R. 92; *Lingwood v. Stowmarket Co.* (1865), L. R. 1 Eq. 77; *Re Wilton's S. E.*, [1907] 1 Ch. 50.

—.]—D. commenced an action against H. & the H. co. to restrain them from representing that D.'s Fire Queen Extinguishers were an infringement of deft.'s patent, or that persons using such extinguishers were liable to pay royalties, & from threatening legal proceedings in respect of the manufacture, use, sale, or purchase of such extinguishers. Defts. by consent submitted to an order restraining them from making such representations & threats. D. subsequently moved to commit deft. H. for breach of the order. D.'s evidence was to the effect that H. subsequently to the date of the order, told

persons that all conical-shaped fire-extinguishers were infringements of his patent, & that the manufacture by pltf. of an extinguisher similar in shape to theirs, was an infringement of their patent:—**Held**: this evidence was insufficient to justify a committal, as such an application involved a question of the liberty of the subject, & required the strictest accuracy of proof.—**DICK v. HASLAM** (1891), 8 R. P. C. 196.

1332. ——— **Admissions by defendant.**]—Pltf. brought an action against defts. for an injunction to restrain them from passing off goods alleged to be a colourable imitation of those of pltf.'s manufacture. Defts. made default in pleading, & the injunction was granted in due course. Later it appeared that a similar article to that complained of was being put upon the market by N., for whom defts. were acting as agents for sale. On a motion for attachment of defts. for breach of the injunction no direct evidence was forthcoming, & the case was rested on admissions by defts., which the ct. held to be insufficient, & on the fact that defts., having allowed judgment to go against them by default, were estopped from saying that the goods complained of were not an imitation of those of pltf.'s manufacture:—**Held**: in these circumstances an attachment could not issue.—**RIPLEY v. ARTHUR & Co.** (1902), 86 L. T. 735; 19 R. P. C. 443, C. A.

SUB-SECT. 4.—DEFENCES TO BREACH.

1333. Defendant government official.]—**WALKER v. CONGREVE** (1816), 1 Carp. Pat. Cas. 356, L. C.

Annotation:—**Mentd.** *Feather v. R.* (1865), 6 B. & S. 257.

1334. Injunction mistakenly granted.]—**WALKER v. CONGREVE** (1816), 1 Carp. Pat. Cas. 356, L. C.

Annotation:—**Mentd.** *Feather v. R.* (1865), 6 B. & S. 257.

1335. One of court dissenting.]—(1) Where a receiver of rents & profits is enjoined from further receiving, etc., the ct. will extend the injunction to his agent, an attorney in this case, & commit him also for a breach of the order, although he living at a distance in the country, have not been regularly served with the injunction, if sufficient circumstances can be shown, to afford fair & satisfactory evidence that such agent knew of the order, as if his principal have published the opinion delivered by the dissentient judge only, & a statement of the judgment of the ct. has appeared at the same time in the provincial papers.

(2) One of the ct. dissenting from an order for an injunction, & notice of an appeal from the decision having been given, are no excuse for disobeying the order.—**LEWES v. MORGAN & LEWIS** (1818), 5 Price, 518; 146 E. R. 681.

Annotation:—*As to* (1) **Refd.** *Seaward v. Paterson*, [1897] 1 Ch. 545.

1336. Notice of appeal lodged.]—**LEWES v. MORGAN & LEWIS**, No. 1335, *ante*.

1337. Breach not contumacious.]—**A.-G. v. WALTHAMSTOW URBAN DISTRICT COUNCIL** (1895), 11 T. L. R. 533.

Annotation:—**Consd.** *Stancomb v. Trowbridge U. C.*, [1910] 2 Ch. 190.

1338. ———.]—**FAIRCLOUGH & SONS v. MANCHESTER SHIP CANAL CO.** (1897), 41 Sol. Jo. 225, C. A.

Annotation:—**Consd.** *Stancomb v. Trowbridge U. C.*, [1910] 2 Ch. 190.

undertaking as to damages contained in the injunction order & therefore is not a ground for committing pltf. to gaol.—**PAULSON v. MURRAY**, [1921] 2 W. W. R. 735; 31 Man. L. R. 258.—**CAN.**

PART XII. SECT. 1, SUB-SECT. 4.

1334i. Injunction mistakenly granted.]—*As a general rule, while an injunction stands, it must be obeyed, though it may have been improperly granted, &*

would be dissolved on application.—**VALENTINE v. HAZELTON** (1870), N. B. Dig. 648.—**CAN.**

t. Grave inconvenience.]—The fact that a complete & literal compliance with an injunction, would

Sect. 1.—Breach: Sub-sect. 4. Sect. 2: Sub-sect. 1, A. (a), (b) & (c), & B.]

1339. — R. S. C., Order 42, r. 31.]—(1) Where a person or corpn. is restrained by injunction from doing a particular act, the person or corpn. commits a breach of the injunction, & is liable to process for contempt, if he or it in fact does the act, & it is no answer to say that the act was not contumacious, in the sense that in doing it there was no direct intention to disobey the order.

(2) The expression "wilfully" in above rule is intended to exclude only casual or accidental & unintentional disobedience to an order of the ct.

(3) In the case of a corpn., such as an urban district council, which can only act by its servants or agents, if the act is in fact done, the corpn. cannot escape liability for its commission by proving that it was done by its servant or agent through carelessness, neglect, or even in dereliction of his duty.—*STANCOMB v. TROWBRIDGE URBAN COUNCIL*, [1910] 2 Ch. 190; 79 L. J. Ch. 519; 102 L. T. 647; 74 J. P. 210; 26 T. L. R. 407; 54 Sol. Jo. 458; 8 L. G. R. 631.

1340. Breach resulting from act of third party—*Not bound by injunction.*]—Where an injunction has been granted restraining a party to an action from receiving certain moneys, he is guilty of a contempt if he receives the money while the injunction is in force, although the payment was made to him by the govt., who were not bound by the injunction.—*EASTERN TRUST CO. v. MCKENZIE, MANN & CO., LTD.*, [1915] A. C. 750; 84 L. J. P. C. 152; 113 L. T. 346, P. C.

SECT. 2.—REMEDIES.

SUB-SECT. 1.—NATURE OF REMEDIES.

A. Attachment.

(a) In General.

See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 6 et seq.

1341. On breach of injunction—Defendant in contempt.]—*BETTERTON'S CASE* (1695), Holt, K. B.

altogether stop defts. from working, is not an excuse from such compliance, a grave inconvenience of such a kind, is a proper ground for moving the ct. to modify such injunction, & such motion may be made by a deft. in contempt for disobedience.—*BONSHAW FREEHOLD G. M. CO. v. PRINCE OF WALES CO.* (1868), 5 W. W. & A'B. 140.—AUS.

a. Lack of evidence.]—Where a breach of an injunction was sworn to by a single deponent, & was denied by deft., & there was no corroborative evidence, the ct. refused a motion to commit.—*STEWART v. RICHARDSON* (1870), 17 Gr. 150.—CAN.

PART XII. SECT. 2, SUB-SECT. 1.—A. (a).

1341 i. On breach of injunction—*Defendant in contempt.*]—On an application for attachment for disobedience to an injunction the party against whom the attachment is sought cannot be permitted to raise the question whether the acts which constitute the disobedience are or are not injurious to the party who has obtained the injunction.—*STARR MANUFACTURING*

1341 ii. — — —.]—*ALLEY v. DUCHEMIN* (1880), 2 P. E. I. 360.—CAN.

1341 iii. — — —.]—A person who receives telegraphic notice of an

injunction & fails to conform his conduct thereto will be attached.—*CANADIAN PACIFIC NAVIGATION CO., LTD. v. VANCOUVER CITY* (1892), 2 B. C. R. 298.—CAN.

1341 iv. — — —.]—*POIRIER v. BLANCHARD* (No. 2) (1898), 1 N. B. Eq. Rep. 605.—CAN.

1341 v. — — —.]—When an injunction has been granted restraining a person from interrupting the access of light & air to certain windows, & the ct. considers that the injunction has been infringed, an attachment will issue, even though deft. has proceeded according to the advice of his surveyor & legal adviser in constructing the building complained of as a breach of the injunction. The ct. in such cases does not consider itself bound by the opinion of surveyors, but will form its own judgment as to the probable effect of the structure complained of.—*PRANJIVANAS HURJIVANDAS v. MAYARAM SALMALDAS* (1862), 1 Bom. 148.—IND.

1341 vi. — — —.]—The proper remedy for disobedience of an order of injunction passed by a civil ct. is committal for contempt.—*Re CHANDRAKANTA DE* (1880), 1 L. R. 6 Calo. 445; 7 C. L. R. 350.—IND.

1341 vii. — — —.]—A suit will not lie for damages for non-compliance with a mandatory injunction, to compel the performance of which pltf. has

538; 90 E. R. 1196; *sub nom. R. v.* 5 Mod. Rep. 142.

Annotations:—Mentd. Barber v. Penley, [1893] 2 Ch. Lyons v. Gulliver, [1914] 1 Ch. 631.

1342. — — —.]—Injunction against ploughing up meadow land & committing other waste therein, until deft. should fully answer the bill, or the ct. make other order to the contrary. Answer put in, & action brought by pltf. for injury sustained by the waste complained of. Deft. was committed to prison for breaking up such land a second time.—*ERPE v. SMITH* (1838), Coop. Pr. Cas. 113; 47 E. R. 425.

1343. — — —.]—D. was adjudicated a bkpt. under Bkpcy. Act, 1861 (c. 134). He subsequently presented a petition of right instituted in the Q. B. praying the recovery of a sum of £6 15s. due to him from the Lords Comrs. of the Admlty. An injunction staying all further proceedings in this petition was issued against him by the Ct. of Bkpcy. under Bkpcy. Act, 1869 (c. 71). The bkpt. disputed the validity of this order, & proceeded with his petition of right after service of the order.—*Held*: D. was guilty of a contempt of ct. in so doing, & ordered that D. be committed accordingly.—*Re DAVIS* (1872), 20 W. R. 767.

1344. — — —.]—Deft. was in custody for contempt of ct. under the following circumstances. In 1877 she had brought an action for the recovery of some houses which she supposed to be her property. It was decided that she had no title, but between this date & 1886 she continued to assert her claim by legal proceedings & attempted to take forcible possession of the premises. In 1885 an injunction was obtained by pltf. restraining deft. & her agents from further molesting the owner & tenants of the estate; but she, notwithstanding, again endeavoured to take possession, & was in consequence in Dec. 1886, imprisoned for contempt of ct. She was informed when sent to prison that if she would undertake to abandon her claim & to abstain from further efforts to take possession of the premises, she would be released. She refused to give this undertaking, & in consequence remained in custody till June, 1888:—*Held*: deft. might be discharged

his remedy in execution.—*JAWITHI v. EMILE* (1890), 1 L. R. 13 All. 98.—IND.

1341 viii. — — —.]—Where pltf. has once sued for & obtained a perpetual injunction directing deft. to refrain from certain acts, it is not necessary for pltf., if in future deft. ignores such injunction, to sue again, for a similar relief; in fact, such a suit would be barred by the principle of *res judicata*. When a ct. issues an order to a party in a suit for abstention from any particular act, & when the person to whom the order has been issued disobeys that order, he is guilty of contempt of ct., & the ct. can take proceedings to enforce its authority.—*RAM SARAN v. CHATAR SINGH* (1901), 1 L. R. 23 All. 465.—IND.

1341 ix. — — —.]—An attachment will not be awarded for breach of an injunction, unless the charging affidavit contain a specification of the time & place, when & where the act complained of was committed; nor if the party could have been, but was not served with the injunction.—*MORRIS v. MORRIS* (1825), 1 Hog. 238.—IR.

1341 x. — — —.]—An attachment may be issued for breach of an injunction, although no writ of injunction has been actually issued, when deft., after being served with the decree or order for injunction, has disobeyed it.—*MINING CO. OF IRELAND v. DELANY* (1887), 21 L. R. Ir. 8.—IR.

from custody on the terms of an order which had been assented to by the counsel for pltf. & which was read in her presence. The terms of the order were that the injunction should continue for the term for which pltf. held the premises & that in order to prevent any breach of the injunction by deft., a copy of the order should be given to the owner with a view to his obtaining the assistance of the police, should deft. again attempt to obtain possession; that in case of any breach of the injunction the official solr. should, upon the application of pltf., take the necessary steps to bring the offenders before the ct. & to enforce performance of the order; that deft. should not be allowed to issue any writ or summons, or make any application or motion without the leave of a judge at chambers, & that should notice of any application or motion be given without such leave, the official solr. might be informed by letter, & resp. should not be required to appear unless the ct. should otherwise order.—*Re DAVIES* (1888), 21 Q. B. D. 236; 37 W. R. 57, D. C.

Annotation :—*Reid. Lacon v. De Groat* (1893), 10 T. L. R. 24.

1345. ———.]—*WOODWORTH v. SUGDEN* (No. 2) (1888), 32 Sol. Jo. 743.

1346. ———.]—Pltfs. brought an action for infringement of a patent, & at the trial an injunction was granted. Defts. appealed, but the judgment was affirmed in June, 1893, & stay of execution was refused. An account of profits was taken in Dec. 1893. Pltfs., in June, 1894, discovered that defts. had sold an infringing machine in Nov. 1893, which was not disclosed on the account, & moved for committal or leave to issue attachment. Defts. stated that the infringing machine had been sent to Shanghai, & that it was sent in the belief that the injunction did not apply to goods sent to foreign countries. They disclosed that they had other machines in their possession. An order was made for a writ of attachment to issue, but to lie in the office for fourteen days, & not to issue at all if within that time defts. delivered up the machines in their possession, & paid the costs of the motion as between solr. & client. The machine complained of to be brought into the account.—*LYON v. GODDARD* (1894), 11 R. P. C. 113, D. C.

1347. ———.]—*BUTSON v. DAVIES* (1896), 40 Sol. Jo. 501, D. C.

1348. ——— Injunction erroneously granted.]—*WALKER v. CONGREVE* (1816), 1 Carp. Pat. Cas. 356; cited in 6 B. & S. at p. 275; 122 E. R. 1198. *Annotation* :—*Reid. Feather v. R.* (1865), 6 B. & S. 257.

—.]—*See, further*, CONTEMPT OF COURT, Vol. XVI., pp. 44, 45, Nos. 461–470.

1348 i. ——— Injunction erroneously granted.]—Attachment may issue for contempt for disobedience to an interim injunction, even if the injunction has been obtained irregularly & upon insufficient grounds, because it is a settled doctrine that it is the duty of every person to obey an injunction until it is dissolved.—*HERBERT v. THOMSON* (1875), 1 J. R. N. S. 92.—N.Z.

1349 i. ——— Breach not wilful.]—Where a judge sitting in equity, being satisfied that a breach of an injunction order by deft. was not wilful, declined to make an order for his imprisonment, the ct. on appeal refused to disturb the judgment of the ct. below.—*SAYRE v. HARRIS* (1879), 18 N. B. R. 677.—CAN.

b. ——— Interim injunction—Effect of delay.]—Resps. in 1879 obtained an interim injunction against a certain person, of whom applts. were the statutory successors. On application to dismiss, such injunction was dis-

missed, but resps. did not in accordance with the then existing practice establish their right to the injunction they claimed by the jury's verdict. Matters remained in abeyance until 1914, when resps. sought to attach applts. for breach of the interim injunction. The motion for attachment was not served on applts. personally, but only on their solr. :—*Held* : attachment could not issue upon the interim injunction.—*PARKER v. DODSON* (1914), 33 N. Z. L. R. 1313.—N.Z.

c. ——— Triviality of damage no defence.]—Where an injunction forbids cutting down trees, it is no answer to a motion to commit, that the trees cut down in contravention of the writ were of little value.—*BROWN v. SAGE* (1865), 12 Gr. 25.—CAN.

d. ——— Where interest of person enjoined has passed to another.]—Where an injunction is granted against one person & his servants, & that person's interest passes to another, the liability

1349. Breach not wilful.]—*LEONARD v. ATTWELL* (1810), 17 Ves. 385; 34 E. R. 149, L. C. *Annotation* :—*Reid. Re Martin, Ex p. Van Sandau* (1846), De G. 303.

1350. Mistake.]—A party guilty of a breach of an injunction through mistake will not be committed, but will have to pay the costs of the application bringing that breach under the notice of the ct.—*NEWMAN v. RING* (1846), 1 Coop. temp. Cott. 249; 7 L. T. O. S. 277; 10 Jur. 463; 47 E. R. 841, L. C.

1351. ——— Undertaking to obey injunction.]—*WARNE v. GOLDING* (1843), 2 L. T. O. S. 206.

1352. ——— Interim injunction—Effort of defendant to repair injury.]—The ct. will hesitate to commit deft. alleged to have committed a breach of an interim injunction, when it sees that he has endeavoured to set himself right in respect to the original charge against him of infringing pltf.'s copyright.—*CORNISH v. UPTON* (1861), 4 L. T. 862.

1353. ——— Apology by defendant.]—*EDISON BELL PHONOGRAPH CORPN., LTD. v. LOCOCK* (1897), 41 Sol. Jo. 756.

—.]—*See, also*, Sect. 1, sub-sect. 1 & 3, *ante*, & Sect. 2, sub-sect. 3–5, *post*.

— Committal refused—Defendant liable for costs of motion.]—*See* Nos. 1349–1353, *ante*.

Breach of undertaking.]—*See* CONTEMPT OF COURT, Vol. XVI., pp. 45, 46, 55, Nos. 471–486, 608–610.

(b) Necessity for Service of Order.

Personal service—Necessity for.]—*See* CONTEMPT OF COURT, Vol. XVI., p. 52, No. 563.

— When dispensed with.]—*See* CONTEMPT OF COURT, Vol. XVI., pp. 52, 53, 54, 55, Nos. 568, 574–587, 608–610.

Sufficiency of service.]—*See* CONTEMPT OF COURT, Vol. XVI., pp. 56, 57, Nos. 620–644.

Service of order generally.]—*See* Part XI., Sect. 5, sub-sect. 8, *ante*.

(c) Procedure.

See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 46 *et seq*.

B. Sequestration.

See, generally, EXECUTION, Vol. XXI., pp. 591 *et seq*.

When available—Breach of injunction.]—*See* COMPANIES, Vol. IX., p. 679, No. 4528; CORPORATIONS, Vol. XIII., pp. 426, 427, Nos. 1501–1506; EXECUTION, Vol. XXI., pp. 593, 594, Nos. 1740–1750, & Nos. 1337–1339, *ante*.

of attachment for breach of the injunction does not pass to that other until he is made a party to the bill, & a new injunction is issued against him.—*A.-G. v. ROGERS* (1870), 1 V. R. 132.—AUS.

e. ——— Breach not sufficiently serious.]—Planting potatoes in land previously ploughed is not such a breach of an injunction to stay waste as will be punished by attachment.—*BROPHY v. QUARRY* (1832), Hayes, 449.—IR.

PART XII. SECT. 2, SUB-SECT. 1.—B.

1. When available.—Breach by industrial union.]—Where an industrial union registered under Industrial Arbn. Act, 1901, by its own members & others committed illegal acts :—*Held* : the funds of the union were liable for payment of the costs occasioned in obtaining an injunction restraining the union & its agents from continuing to commit such illegal acts. Where an industrial union, by its agents committed a

Sect. 2.—Remedies: Sub-sect. 1, B. & C.; sub-sects. 2, 3, 4 & 5.]

1354. — Breach of undertaking—Breach unintentional.]—DAVIS v. RHAYADER GRANITE QUARRIES, LTD. (1911), 131 L. T. Jo. 79.

1355. — Willful breach.]—Where defts., on a motion for an injunction to restrain them for polluting a stream, gave an undertaking against discharging or allowing to be discharged any noxious or offensive matter so as to pollute the water of the stream, & pltf. subsequently moved to sequester deft. cos. on the ground that they had on several occasions committed breaches of the undertaking, the judge, while holding that the facts strictly entitled him to make the sequestration order, decided that he had a discretion to grant an injunction in the terms of the undertaking & to penalise defts. by ordering them to pay all the costs of the application as between solr. & client, & he made such order for an injunction & as to costs forthwith.—MARSDEN (CHARLES) & SONS, LTD. v. OLD SILKSTONE COLLIERIES, LTD. & OLD SILKSTONE CHEMICAL WORKS, LTD. (1914), 13 L. G. R. 342; 78 J. P. Jo. 220.

—.]—See, also, CONTEMPT OF COURT, Vol. XVI., p. 46, Nos. 485, 486, & No. 1339, *ante*.

Procedure.]—See EXECUTION, Vol. XVI., pp. 595 *et seq.*

C. Order under R. S. C., Ord. 42, r. 30.

See R. S. C., Ord. 42, r. 30.

1356. Undertaking not within the rule.]—At the trial of an action for specific performance of an agreement to make a road, deft. gave an undertaking that he would complete the road in question. An order was subsequently made fixing a date by which the road was to be completed. This not having been done, pltf. moved, under R. S. C. Ord. 42, r. 30, for an order that he might be at liberty to complete the road himself at the cost of deft. :—*Held*: the case did not fall within the rule; but nevertheless, the ct. would enforce the undertaking by permitting pltf. to do the works, with liberty to apply that deft. should pay the expenses so incurred in completing the road.—MORTIMER v. WILSON (1885), 33 W. R. 927.

SUB-SECT. 2.—EFFECT OF CONDUCT OF PLAINTIFF.

1357. Whether disentitled to relief—Acquiescence or delay.]—MILLS v. COBBY (1815), 1 Mer. 3; 35 E. R. 578, L. C.

1358. — .]—Where an injunction is granted to restrain the use of a trade mark & deft. disobeys & pltf. moves for a committal, acquiescence if set up as a defence against

breach of an injunction granted against such union the ct. sequestered the funds of the union.—KEOGH v. AUSTRALIAN WORKERS UNION (1902), 2 S. R. N. S. W. 265.—AUS.

g. — Injunction restraining nuisance—Effect of abatement.]—Upon an injunction restraining a co. from discharging drainage over pltf.'s land a *bond fide* attempt by defts. to carry such drainage over the land, under a bargain with pltf.'s tenant of such land, by means of a wooden channel constructed upon it, so as to do no injury to the soil, though a breach of the injunction, was not insisted by the ct. with sequestration of defts.' property, but with the costs of an application for such sequestration.—BONSHAW FREEHOLD G. M. Co. v. (1868), 3

h. — Injunction under repealed statute—No relief sought.]—An injunction was obtained restraining the sale, under a writ of *ven. ex.* of a married woman's inchoate right of dower, subsequently to which an Act was passed rendering such estates saleable at law, & pltf.'s in the action, without procuring a discharge of the injunction, sued out an *alias fi. fa.* & were proceeding to a sale of the widow's dower, the husband having, after the injunction had been granted, died. The ct. granted a sequestration to enforce the injunction; although, upon an application for that purpose, defts. might have been entitled to be relieved from the injunction.—ALLEN v. EDINBURGH LIFE ASSURANCE CO. (1879), 26 Gr. 192.—CAN.

PART XII. SECT. 2, SUB-SECT. 2. 1357 i. Whether disentitled to relief—

the motion to commit, must be shown to be such as to amount almost to a licence to use the mark & entitling deft. himself to a right in the use of the mark.—RODGERS v. NOWILL (1853), 3 De G. M. & G. 614; 22 L. J. Ch. 404; 20 L. T. O. S. 319; 17 Jur. 171; 1 W. R. 205; 43 E. R. 241, L. JJ.

Annotation:—Mentd. Churton v. Douglas (1858), John. 174.

1359. — Misrepresentation to public—As to nature of injunction obtained—Breach arising through correction of misrepresentation.]—BARFIELD v. NICHOLSON, No. 687, *ante*.

1360. — Breach of undertaking by plaintiff—Discretion of court.]—Pltf. having been appointed one of the co-pastors of the French Protestant Church in London, undertook in writing to discharge certain functions, & strictly to observe certain rules & to fulfil certain obligations imposed upon him. In consequence of disputes between the parties, he in 1860 obtained a decree for an injunction to restrain the then governing body & deft., M., his co-pastor, from hindering him in the discharge of his duties; & for breaches of that injunction he now moved to commit M., who was the only one of the original defts., the members of the governing body being no longer the same as in 1860:—*Held*: although it was clear that M. had been guilty of violating the injunction in the manner complained of, his committal was yet a question entirely in the discretion of the ct., & as very grave acts in contravention of his undertaking were proved against pltf. himself, he was disentitled to an order for committing M. for contempt.—DAUGARS v. RIVAZ (1866), 15 L. T. 196, L. JJ.

1361. Motion brought unnecessarily—Plaintiff deprived of costs.]—An action having been brought to restrain deft. from publishing an advertisement termed a "caution," as injurious to pltf., deft., on a motion for injunction, undertook not to publish the caution till the trial. A newspaper published an inaccurate account of the proceedings, & deft. then published an advertisement giving an accurate account, in which he stated that he had undertaken not to repeat the caution till the trial, but did not set out the terms of the caution.

A motion was made to commit deft. for contempt & for breach of the undertaking:—*Held*: the motion must be refused without costs.—BUENOS AYRES GAS CO. v. WILDE (1880), 42 L. T. 657; 29 W. R. 43.

SUB-SECT. 3.—ON BREACH BY SERVANT OR AGENT.

1362. Remedy against servant or agent—Proof of knowledge of order.]—LEWES v. MORGAN & LEWIS, No. 1335, *ante*.

Acquiescence or delay.]—Where a perpetual injunction has been granted, on each successive breach of it the decree may be enforced by an application made within three years of such breach. The decree-holder is not bound to take action in respect of every petty infringement & the injunction does not by his inaction become inoperative after three years from the date of the first petty breach so as to disentitle him to take action where a serious breach is afterwards committed.—VENKATACHALLAM CHETTY v. VEERAPPA PILLAI (1905), 1 L. R. 29 Mad. 314.—IND.

PART XII. SECT. 2, SUB-SECT. 3.

k. Remedy against servant or agent.]—Where an injunction has issued against a co. to restrain it from lowering sludge to flow upon pltf.'s

1363. —.].—An injunction was granted against A. restraining him, but not expressing his servants & agents, from cutting timber. B., who was A.'s agent, with knowledge of the injunction, cut the timber:—*Held*: B. might be committed for the contempt, though not for breach of the injunction.—*WELLESLEY (LORD) v. MORNINGTON (EARL)* (1848), 11 Beav. 181; 11 L. T. O. S. 286; 50 E. R. 785.

Annotations:—*Appld.* Seaward v. Paterson, [1897] 1 Ch. 545. *Refd.* Scott v. Scott, [1913] A. C. 417.

1364. ——— *Proof of agency—Successors of parties restrained.*].—A decree was made in 1875 against the Corpn. of Birmingham as the sanitary authority of Birmingham, granting a perpetual injunction to restrain them from allowing sewage to flow into a river, the injunction being suspended for five years to give the borough an opportunity to execute certain works. At the expiration of that period plffs. desired to enforce the injunction, but in the meantime the B. T. & R. Board had succeeded to the rights & liabilities of the Corpn. of Birmingham in respect of the sewage:—*Held*: the decree could only be enforced against the board by an action.—*A.-G. v. BIRMINGHAM CORPN.* (1880), 15 Ch. D. 423; 43 L. T. 77; 29 W. R. 127, C. A.

Annotations:—*Mentd.* Heard v. Borgwardt, [1883] W. N. 173; Keith v. Butcher (1884), 53 L. J. Ch. 640; The Duke of Buccleuch, [1892] P. 201.

1365. ———.].—Defts. trustees of a branch of a friendly society, were restrained by injunction from dividing certain money among the members of the branch. Shortly afterwards deft. trustees retired, & new trustees were appointed, who, being aware of the effect of the injunction, under an order of the branch society, divided the money among the members, including the old trustees. The ct. considered, on the facts, that the proceedings were an attempt on the part of the branch society & the old & new trustees to avoid the injunction, & a device for disobeying it, in which the new trustees co-operated:—*Held*: the new trustees, as well as the old, were guilty of contempt of ct.—*VERY v. ANDREWS* (1882), 51 L. J. Ch. 414; *sub nom.* *AVORY v. ANDREWS*, 46 L. T. 279; 30 W. R. 564.

Annotations:—*Consd.* Seward v. Paterson, [1897] 1 Ch. 545. *Distd.* Bosch v. Simms Manufacturing Co. (1909), 25 T. L. R. 419. *Refd.* United Telephone Co. v. Dale (1884), 25 Ch. D. 778; Scott v. Scott, [1913] A. C. 417.

1366. ——— *Reconstructed company.*].—An injunction was obtained by plff. against a co., restraining them, their servants & agents, from soliciting the custom of persons who before the sale of a certain part of their business to plff. were their customers. Thereafter the co. went into voluntary liquidation, & a new co. was formed under the same name, to which were transferred the assets & business of the old co.:—*Held*: as the reconstruction of the old co. had been regularly

carried out for the sake of obtaining new capital & not colourably for the sake of evading the order, the new co. became an independent co. & was in no sense the servant or agent of the old, & therefore in soliciting a customer of plff. the new co. committed no breach of the injunction which had been obtained.—*BOSCH v. SIMMS MANUFACTURING CO., LTD.* (1909), 25 T. L. R. 419.

1367. *Remedy against principal—No knowledge of agent's acts—Liability for costs of motion.*].—If a servant commits a breach of injunction, the master is liable to pay the costs of a motion to commit, although he was free from blame in the matter.—*RANTZEN v. ROTHSCHILD* (1865), 13 L. T. 399; 30 J. P. 85; 14 W. R. 96.

Annotation:—*Foll.* Stancomb v. Trowbridge U. C., [1910] 2 Ch. 190.

1368. ———.].—A sheriff's officer, who is not himself present at the sale, & who has no actual notice of the injunction, is not responsible for the act of his deputy who allows the sale to be continued after receiving notice by telegram.—*Re BISHOP, Ex p. LANGLEY, Ex p. SMITH* (1879), 13 Ch. D. 110; 49 L. J. Bcy. 1; 41 L. T. 388; 28 W. R. 174, C. A.

1369. ———.].—*PARKER MANUFACTURING CO., LTD. v. COOPER* (1901), 18 R. P. C. 319.

1370. ——— *Corporate body—Servants guilty of negligence.*].—*STANCOMB v. TROWBRIDGE URBAN COUNCIL*, No. 1339, *ante*.

SUB-SECT. 4.—ON BREACH BY STRANGER.

See CONTEMPT OF COURT, Vol. XVI., pp. 35, 36, Nos. 357–362.

SUB-SECT. 5.—ON BREACH BY HUSBAND OR WIFE.

1371. *Injunction against husband & wife—Breach by wife—Husband not in contempt.*].—After a decree against a husband & wife, who were living separate, she living abroad, & disobeying an order of the ct.:—*Held*: the husband was entitled on motion to an order that she should appear separately in all further proceedings in the suit, & he should not be responsible for any neglect on her part in relation to such proceedings, nor liable to any attachment or process in consequence of such neglect; & it was not necessary to serve notice of the motion upon his wife, service of notice of such a motion on plff. being sufficient; & leave was given to plff. to serve the order & any other proceedings on the wife abroad.—*HOPE v. CARNEGIE* (2) (1869), L. R. 7 Eq. 263; *sub nom.* *HOPE v. HOPE, HOPE v. CARNEGIE*, 38 L. J. Ch. 410; 20 L. T. 9; 17 W. R. 430.

Annotation:—*Mentd.* Davis v. Park (1872), 42 L. J. Ch. 204.

land, an attachment for breach of it will not be granted against the manager, directors or servants of the co., unless there is evidence that they have done some of it which they were commanded not to do. The utmost which the injunction means, as to them, is that, if they cause sludge to flow they must accompany it by some precaution to prevent mischief. Where, however,

mischief had been done, probably caused by such persons, the ct. refused their costs of resisting a motion for attachment. A subsequent motion for a sequestration of the co.'s property, for breach of the injunction, was granted.—*SEAL v. WEBSTER STREET FREEHOLD G. M. CO.* (1868), 5 W. W. & A'B. 129.—*AUS.*

1. ———.].—A servant who has

notice of an injunction may be committed for breach of it, though he has not been served with the writ. After leaving his master's service he continues bound by an injunction issued while he was a servant against the master & his servants to restrain waste.—*BROWN v. SAGE* (1865), 12 Gr. 25.—*CAN.*

Part XIII.—Dissolution of Injunction.

SECT. 1.—IN GENERAL.

1372. Dissolved upon motion—In open court.]—An injunction does not drop of course, on pltf.'s amending his bill.—*MASON v. MURRAY* (1777), 2 Dick. 536; cited in 1 East, at p. 361; 21 E. R. 378, L. C.

*Annotations:—*Consd. *Ferrand v. Hamer* (1838), 4 My. & Cr. 143. *Reid. Home v. Watson* (1827), 2 Sim. 85. *Mentd. Carnan v. Bowles* (1786), 2 Bro. C. C. 80; *Cary v. Longman* (1801), 1 East, 358.

1373. When effective.]—Pltf. obtained an injunction in this ct. Deft. moves to dissolve it, & obtained an order to dissolve it; before the order was drawn up deft. arrests pltf.:—*Held*: this was a contempt of ct., & deft. was ordered to be committed; for it is no order till it is drawn up & passed by the register, for the register's minutes are only a warrant for an order, & no order.—*ANON.* (1679), *Freem. Ch.* 46; 22 E. R. 1049.

1374. Motion by one co-defendant—Service of notice on others.]—Where an equitable claimant files his bill against the stakeholder & the other claimant, & obtains an injunction to restrain the stakeholder from paying, & the other claimant from receiving, the fund in dispute, the stake-

holder, on moving to dissolve the injunction, should serve his co-deft. with notice of the motion.—*SERVICE v. CASTANEDA* (1845), 2 Coll. 56; 1 New Pract. Cas. 17; 14 L. J. Ch. 315; 5 L. T. O. S. 143; 9 Jur. 367, 524; 63 E. R. 635.

Annotation:—Mentd. Fenton Textile Assocn. v. Krassin (1921), 38 T. L. R. 259.

1375. ———.]—Where an injunction has been granted in an interpleading suit, all defts. are interested in it, & all ought therefore to be served with notice of a motion to dissolve it.—*MASTERMAN v. LEWIN* (1847), 2 Ph. 182; 8 L. T. O. S. 357; 41 E. R. 911, L. C.

Annotation:—Mentd. Manby v. Robinson (1869), 17 W. R. 479.

1376. ——— Order limited to party applying.]—*BRAMWELL v. HALCOMB*, No. 202, *ante*.

1377. Ex parte injunction—Discharge without formal notice.]—*BOYCE v. GILL*, No. 1429, *post*.

1378. Motion to dissolve—Cross-examination of witnesses—Rights of parties.]—*NORMANVILLE v. STANNING*, No. 1087, *ante*.

1379. Order made in absence of party—Leave to move to discharge.]—Where an order has been made on motion & affidavit of service in the absence of parties, the ct. will, on proper application, give

PART XIII. SECT. 1.

*m. Effect of dissolution.]—*The order dissolving the injunction practically determined the sole issue raised in the action. It was in effect a judgment dismissing the action.—*BANK OF MONTREAL v. PELLETIER*, [1923] 4 D. L. R. 706; 3 W. W. R. 735.—*CAN.*

*n. ——— Right to damages.]—*Where a registered shareholder of a co. finding the annual reports of the co. misleading applies for a writ of injunction to restrain the co. from paying a dividend, & upon such application the co. do not deny even generally the statements & charges contained in pltf.'s affidavit & petition, there is sufficient probable cause for the issue of such writ, & consequently deft., who upon the merits has succeeded in getting the injunction dissolved, has no right of action for damages resulting from the issue of the injunction.—*MONTREAL STREET RY. CO. v. RITCHIE* (1889), 16 S. C. R. 622.—*CAN.*

*o.]—*An appeal by deft. from a judgment, awarding pltf. \$450 damages, upon the trial of an issue as to what damages, if any, had been sustained by pltf., by reason of an *interim ex p.* injunction obtained against her in a previous action, by deft. in the issue, which pltf., according to the practice of the ct., ought to pay, was dismissed, by reason of an equal division of opinion in the ct. composed of four judges.—*ALBERTSON v. SECORD* (1912), 20 W. L. R. 64; 1 D. L. R. 804; 1 W. W. R. 657; 4 Alta. L. R. 90.—*CAN.*

*p. ———.]—*A landlord having presented a note of suspension & interdict to prevent his tenant from taking a waygoing crop from 100 acres of his farm, the note was passed of consent on the landlord finding caution in common form. The ct. ultimately repelled the reasons of suspension & recalled the interdict. An action of damages subsequently raised by the tenant was sent to trial on an issue whether defender had by means of the interdict wrongfully prevented pursuer from taking the said crop. The jury returned a verdict for pursuer with \$1,068 damages. On a motion by defender for a new trial on the ground

that the verdict was against evidence & that the damages were excessive:—*Held*: the judgment of the ct. recalling the interdict was in a case of this nature conclusive evidence, that the interdict was wrongful in the sense of the issue, & the fact that the landlord obtained the interdict in good faith & upon probable cause did not absolve him from responsibility for the damage thereby occasioned; but the application having been proved to have been made in *bona fide* & on probable cause, the damage should have been measured by the actual loss sustained by the tenant & not by his possible gains, & in this view the damages given were excessive & new trial granted.—*MILLER v. HUNTER* (1865), 3 Macph. (Ct. of Sess.) 740; 37 Sc. Jur. 381.—*SCOT.*

*q. ———.]—*An action of damages against police comrs. of a burgh who had obtained *interim* interdict against an inhabitant of the burgh carrying on certain building operations in contravention of an order issued by them, which order was subsequently found by the Ct. of Session to have been made in excess of their statutory powers:—*Held*: to be relevant although there was no averment of malice & want of probable cause.—*KENNEDY v. FORT-WILLIAM POLICE COMRS.* (1877), 5 R. (Ct. of Sess.) 302; 15 Sc. L. R. 191.—*SCOT.*

*r. ———.]—*A. having brought a suit against B. obtained & issued, on July 24, 1868, an injunction against him under Act VIII, 1859, s. 92. The suit was, on Aug. 18, 1868, dismissed; but no compensation was awarded to B. under Act VIII, 1859, s. 96, in respect of the injunction which had been issued against him. A. & B. both appealed; the former against the decision dismissing his suit, the latter for compensation. Both appeals were dismissed on Nov. 23, 1869; B.'s because it was engrossed on a stamp paper of the value of eight annas only. B. on Dec. 16, 1869, then instituted a suit against A. for damage in consequence of the injunction which A. had caused to issue against him in his suit:—*Held*: B. was not debarred, by Act VIII, 1859, s. 96, from instituting a suit against A. for damages, there not having been an award of compensation under that sect. The

cause of action accrued from the time at which pltf. was first damaged by the wrongful injunction, continued as long as the injunction remained in force, & limitation began to run as soon as the injunction was at an end.—*NANDA KUMAR SHAHA v. GAUR SANKAR* (1870), 5 B. L. R. App. 4; 13 W. R. 305.—*IND.*

*t. ———.]—*Civil Procedure Code, 1859, s. 96, allowed the power of bringing a suit for damages, leaving that remedy to those who did not wish to take advantage of the remedy provided by that sect.—*WILSON v. KANHYA SAHOO* (1869), 11 W. R. 143.—*IND.*

u. ———.]—Held: a person could not claim damages for being prevented by interdict from proceeding with a building which it was ultimately found that he had no right to erect although the interdict was recalled as not being the proper remedy in the circumstances.—*JACK v. BEGG, BEGG v. JACK* (1875), 3 R. (Ct. of Sess.) 35; 13 Sc. L. R. 17.—*SCOT.*

*b. ———.]—*A co. engaged in making an underground railway took possession of the subsoil of a public street, in the exercise of statutory powers to appropriate & use the same without purchase, subject to liability for compensation for damage resulting from their operations. The proprietors of the *solum* presented a petition for interdict against the railway co. entering on their ground, their contention being that the co. were not entitled to take possession without notice, & payment of the price of the land, in terms of Land Clauses Act, 1845, & in Apr. 1883, before a record was made up, moved for & after parties were heard, obtained *interim* interdict. On appeal the interdict was recalled in May, 1883, & the petition dismissed, on the ground that the railway co. had acted entirely within their statutory powers. In an action of damages brought by the railway co. against the proprietors:—*Held*: they were entitled to damages for wrongous interdict.—*GLASGOW CITY & DISTRICT RY. CO. v. GLASGOW COAL EXCHANGE CO.* (1885), 12 R. (Ct. of Sess.) 1287; 22 Sc. L. R. 903.—*SCOT.*

*c. Motion to dissolve—Cause against.]—*Exceptions to an answer

the absent party leave to move to discharge the order.—*MAPP v. ELCOCK* (1853), 22 L. J. Ch. 707 ; 17 Jur. 370.

1380. Refusal to hear motion—Pending motion on notice for production of documents.]—The ct. refused to hear a motion to dissolve an injunction, pending a motion, of which pltf. had given notice, for production of documents mentioned in a schedule to the answer, no unnecessary delay having taken place in giving notice of the latter motion.—*STORER v. JACKSON* (1842), 12 Sim. 503 ; 59 E. R. 1225.

1381. — Ex parte on ex parte injunction.]—*SPANISH GENERAL AGENCY CORPN. v. SPANISH CORPN., LTD.*, No. 1404, *post*.

SECT. 2.—WHEN APPLICATION MADE.

1382. In chancery division—On a motion day—Otherwise notice irregular.]—Where notice of motion to dismiss was given for a day not a seal day, & before the next seal pltf. filed replication, the ct., considering the notice to be irregular, refused to give defts. the costs of the motion.—*STEDMAN v. POOLE* (1846), 8 L. T. O. S. 273 ; *sub nom. STEEDMAN v. POOLE*, 11 Jur. 555.

1383. — During long vacation.]—The common injunction may be dissolved in the long vacation.—*LANE v. BARTON* (1843), 1 Ph. 363 ; 13 L. J. Ch. 25 ; 41 E. R. 670, L. C.

1384. Delay in moving to dissolve—Ground for refusal.]—Pltf. having obtained an injunction upon the terms of trying his right at law, & having neglected to try his right for more than a year, deft. having taken no steps to urge pltf. to trial, applied, previous to the coming assizes, to compel pltf. to go to trial or have the injunction dissolved. Motion refused, on the ground that deft. having used no diligence himself, had no right to press pltf. to a disadvantageous trial.—*BICKFORD v. SKEWES* (1839), 4 My. & Cr. 498 ; 8 L. J. Ch. 188 ; 3 Jur. 379 ; 41 E. R. 192, L. C.

1385. — —.]—An injunction was obtained before answer. Deft. filed his answer, but delayed moving to dissolve until several months after replication, & at a period when the evidence would have been published but for deft. having obtained an enlargement of the publication. The motion was on that ground refused.—*FEISTEL v. KING'S COLLEGE, CAMBRIDGE* (1846), 10 Beav. 491 ; 7 L. T. O. S. 222 ; 50 E. R. 671.

SECT. 3.—WHO MAY APPLY.

1386. Interested parties—Injunction thirty years old.]—Where, by a decree made thirty years ago, an account had been directed of testator's personal estate & of his debts & testamentary expenses, & an injunction had been granted to restrain the

cannot be shown as cause against dissolving a special injunction ; for if the answer be insufficient, it may still be used as an affidavit.—*HARRISON v. BABY* (1850), 1 Gr. 247.—CAN.

d. — Discharge of receiver.]—Deft. may move to dissolve an injunction without moving at the same time to discharge a receiver, previously appointed, of the funds to which the injunction related.—*SANDERS v. CHRISTIE* (1850), 1 Gr. 137.—CAN.

e. — County court order.]—A deft. on moving to dissolve an injunction from a county ct., is not bound to have the proceedings returned

from the county ct. office.—*ABRAHAM v. SHEPHERD* (1854), 4 Gr. 260.—CAN.

f. Dissolution by effluxion of time—No motion necessary.]—Where an interim injunction has been granted until a day certain, & a motion to continue it must be made if it is desired to extend it beyond such day, no motion to dissolve is necessary, except where it is sought to get rid of it in the meantime.—*MCCUAIG v. CONMER* (1899), 19 P. R. 45.—CAN.

g. Dissolution of interim injunction.]—Where, on a note of suspension & interdict, interim interdict has been

bank from permitting the transfer of a small sum of stock belonging to testator's estate, but no further proceedings had been had in the suit ; the ct., upon the petition of the only party interested, dissolved the injunction, so that an immediate transfer of the stock might be made to petitioners, without carrying the suit any further.—*DE BEAUFORT v. ARCHDEACON* (1835), 1 Y. & C. Ex. 549 ; 5 L. J. Ex. Eq. 72 ; 160 E. R. 224.

1387. Stranger to the suit.]—A person, though not a party to a suit, may apply in it by motion, stating his title in the notice of motion, unless a long statement of facts is required to show his title ; & then he must apply by petition.—*JONES v. ROBERTS* (1841), 12 Sim. 189 ; 59 E. R. 1104.

1388. —.]—Upon a bill filed to restrain the gaveler & deputy gavelers from granting a gale for working an iron mine to a person [under 1 & 2 Vict. c. 43] :—*Held* : upon a motion by that person to dissolve the injunction, he not being a party against whom the injunction was sought, the injunction must be continued to the hearing of the cause.—*MATTHEWS v. CARLISLE (EARL)* (1849), 14 L. T. O. S. 306.

1389. —.]—A person not a party to a suit, in which an injunction has been made will properly proceed by petition to set aside the injunction.—*BOURBAUD v. BOURBAUD* (1861), 4 New Rep. 496 ; 10 L. T. 781 ; 12 W. R. 1024.

1390. One of several co-defendants—In absence of others.]—*Qu.* : whether, where a special injunction is granted against several defts., one of them can move to dissolve in the absence of the rest.—*THOMPSON v. GEARY* (1842), 5 Beav. 131 ; 49 E. R. 527 ; *subsequent proceedings* (1843), 1 L. T. O. S. 359.

1391. Third party—Giving security for costs.]—An injunction having been granted to restrain defts., who were carriers, from parting with goods which infringed a trade mark, the owner of the goods, resident out of the jurisdiction, gave notice of motion for liberty to remove the goods, & that, if necessary, he might be added as deft. :—*Held* : he must give security for the costs of the motion, as in the motion, he stood in the position of pltf.—*APOLLINARIS CO. v. WILSON* (1886), 31 Ch. D. 632 ; 55 L. J. Ch. 665 ; 54 L. T. 478 ; 34 W. R. 537 ; 2 T. L. R. 355, C. A.

Annotations :—*Expld. Re Miller's Patent* (1894), 63 L. J. Ch. 324. *Mentd. Moser v. Marsden*, [1892] 1 Ch. 487.

1392. Injunction against one defendant—Motion by other defendant—If injuriously affected.]—*DODSON, MOLLE & CO. v. ELLERMAN WILSON LINE, LTD. & GREIN* (1920), 150 L. T. Jo. 244.

SECT. 4.—TO WHAT COURT APPLICATION MADE.

1393. Court granting injunction.]—A motion before the Master of the Rolls, upon the coming

granted :—*Held* : the interim interdict subsists until the passed note has been finally disposed of in the Ct. of Session ; & the note can only be finally disposed of in one of two ways, either by the interlocutor of the Lord Ordinary which disposes of the cause becoming final by it being allowed to stand for the currency of the reclaiming days without being reclaimed against ; or where a reclaiming note is taken by the judgment of the Inner House.—*CLIPPENS OIL CO., LTD. v. EDINBURGH DISTRICT WATER TRUSTEES* (1906), 8 F. (Ct. of Sess.) 731 ; 43 Sc. L. R. 540 ; 13 S. L. T. 957, 985.—SCOT.

Sect. 4.—To what court application made. Sect. 5: Sub-sects. 1 & 2.]

in of the answer, to dismiss an order for an injunction, granted *ex p.* by the Vice-Chancellor upon affidavits, refused with costs, it being a motion to vary the order of one judge by another jurisdiction.—**GEORGE v. WATMOUTH** (1835), 4 L. J. Ch. 61.

1394. —.]—Where an injunction had been granted during the long vacation by the Master of the Rolls, in the absence of the Vice-Chancellor of England, in a cause which was marked for the Vice-Chancellor's ct., a motion to dissolve it should be made before the Master of the Rolls, & not before the Vice-Chancellor.—**HAMMOND v. SMITH** (1845), 15 L. J. Ch. 40, L. C.

1395. —.]—The Vice-Chancellor, by permission of the Lord Chancellor, granted an injunction in a cause attached to the Rolls Ct.:—**Held**: the Master of the Rolls had no authority to dissolve it.—**PAEDES v. LIZARDI** (1846), 9 Beav. 490; 50 E. R. 433.

1396. Action transferred to another division—Application to that division.]—Where a cause has been transferred from one branch of the ct. to another, the latter will not question the correctness of the exercise of judicial authority by the former on a previous application. But where it appears that a pltf. on obtaining *ex p.*, an injunction from one branch of the ct., had withheld information which might have induced that branch of the ct. to make a different order, the injunction so obtained may be dissolved on that ground by another branch of the ct., to which the cause has been transferred.—**STURGEON v. HOOKER** (1847), 1 De G. & Sm. 484; 63 E. R. 1158; *previous proceedings*, 2 Ph. 289, L. C.

1397. Court of Appeal.]—**A.-G. v. BIRMINGHAM, TAME & REA DISTRICT DRAINAGE BOARD**, No. 1140, *ante*.

SECT. 5.—GROUNDS FOR DISSOLUTION.

SUB-SECT. 1.—IN GENERAL.

1398. Delay in prosecuting action.]—**PENNEY v. EDGAR** (1793), 1 Anst. 276; 145 E. R. 871.

1399. —.]—Pltf. having obtained *ex p.* an injunction under C. L. P. Act, 1854 (c. 125), s. 82, pending an action for a nuisance, & afterwards neglecting to proceed with the action as promptly as he might, such neglect is a sufficient ground for dissolving the injunction.—**DUNN v. NAYLOR** (1858), 30 L. T. O. S. 285.

1400. Powers available to plaintiff not exercised.]—On a bill by some directors of an insurance co., constituted by deed, against another director, alleging misconduct, the ct. refused to interfere, by continuing an injunction, pltf. not having made use of the powers of regulation given them by the deed.—**ELLISON v. BIGNOLD** (1821), 2 Jac. & W. 503; 37 E. R. 720, L. C.

Annotation:—Mentd. **Rose & Frank Co. v. Crompton**, [1923] 2 K. B. 261.

1401. Non-compliance with orders of court—Security for costs.]—Pltf., resident abroad, having

made default in giving security for costs, the ct. ordered that he should give the security within four days, or that an injunction which he had obtained *ex p.*, should be dissolved; but it refused to order the bill to be dismissed.—**FORT v. BANK OF ENGLAND (GOVERNOR & Co.)** (1840), 10 Sim. 616; 59 E. R. 754.

Annotation:—Mentd. **Giddings v. Giddings** (1847), 10 Beav. 29.

1402. Special directions for speedy trial.]—When the ct. grants an injunction, the order ought not merely to direct that an action shall forthwith be brought, with liberty to the parties to apply in case of delay, but to give such directions of its own, in the first instance, as will insure the speedy trial of the action. An injunction granted pending an action to be brought by pltf., for the speedy trial of which special directions were given, was dissolved on the ground of pltf. not having duly complied with those directions.—**STEVENS v. KEATING** (1847), 2 Ph. 333; 2 Web. Pat. Cas. 175; 41 E. R. 971, L. C.

Annotations:—Refd. **Purser v. Brain** (1848), 17 L. J. Ch. 141; **Sweeting v. Cowan** (1850), 17 L. T. O. S. 20; **Lister v. Leather** (1857), 5 W. R. 550.

1403. Directing attendance for cross-examination.]—**O'CALLAGHAN v. BARNAD**, [1875] W. N. 37.

1404. — **To add party as plaintiff.]**—The ct. declined to hear *ex p.* a motion to dissolve an *ex p.* injunction.

An *ex p.* injunction was obtained by pltf. shortly before two o'clock on a Saturday afternoon on condition that a party should be added as pltf. for the purpose of his counsel giving on his behalf the usual undertaking as to damages. The writ was not amended until the following Tuesday morning whilst a motion was being made to dissolve the injunction. The ct. dissolved the injunction without deciding the merits, on the ground that pltf. had not fulfilled the terms on which the injunction was granted & had thereby left deft. without the protection of the undertaking as to damages.—**SPANISH GENERAL AGENCY CORPN. v. SPANISH CORPN., LTD.** (1890), 63 L. T. 161.

1405. Material variations between claim & affidavits.]—If after injunction obtained there appears to be any material variation between the allegations in the bill or the aid thereby sought, & the affidavits in support of pltf.'s case, the ct. will, upon application of deft., dissolve the injunction with costs.—**STOCKING v. LLEWELLYN** (1844), 3 L. T. O. S. 33.

1406. —.]—**BURGESS v. HORNE**, No. 1102, *ante*.

1407. Ambiguity of order.]—**DALGLISH v. JARVIE**, No. 58, *ante*.

1408. — **Dissolved on terms.]**—**Low v. INNES**, No. 1154, *ante*.

1409. On undertaking to keep an account.]—**COVENTRY MACHINISTS Co. v. HELSBY, COVENTRY MACHINISTS Co. v. GIBSON** (1897), 13 T. L. R. 161, C. A.

1410. Termination of grievance.]—**A.-G. v. BIRMINGHAM, TAME & REA DISTRICT DRAINAGE BOARD**, No. 1140, *ante*.

PART XIII. SECT. 5, SUB-SECT. 1.

1398 i. Delay in prosecuting action.]—Where an *ex p.* injunction was served on Dec. 24, & the bill was not served up to May 13 following the injunction was dissolved.—**HERON v. SWISHER** (1867), 13 Gr. 438.—**CAN.**

1398 ii. —.]—The ct. exercises a

wide discretion as to keeping up or dissolving injunctions; & where pltf., who had obtained an injunction, became an insolvent, & delay occurred in appointing an assignee, & the suit was thereby retarded, on an application by deft., the injunction was ordered to stand dissolved, unless a supplemental bill in a week.—**CAIRD v. CAMPBELL** (1828), 1 Mol. 484.—**IR.**

1410 i. Termination of grievance.]—An injunction restraining a corpn. from permitting certain buildings to be completed under a contract was dissolved, it appearing that the contract which had been entered into between the corpn. & the contractor had been cancelled.—**EDINBURGH LIFE ASSURANCE Co. v. TOWN OF ST. CATHARINES** (1864), 10 Gr. 379.—**CAN.**

1411. Balance of convenience.]—DODSON, MOLLE & CO. v. ELLERMAN WILSON LINE, LTD., & GREIN (1920), 150 L. T. Jo. 244.

1412. —.]—Pltf., who had been in negotiation with deft. council with a view to their acquiring certain land belonging to him for small holdings, advertised the land for sale by auction in small lots. The council then expressed their intention of taking the land compulsorily under Small Holdings & Allotment Act, 1908 (c. 36), & Land Settlement (Facilities), Act, 1919 (c. 59). On the application of pltf. the ct. granted an interlocutory injunction, restraining the council from serving a notice to take compulsorily, or from asserting at

the sale that a good notice had been served. The Ct. of Appeal, on the balance of convenience, dissolved the injunction, & allowed the action to proceed to trial.—GASKELL v. SOMERSETSHIRE COUNTY COUNCIL (1920), 84 J. P. 93; 18 L. G. R. 245, C. A.

SUB-SECT. 2.—SUPPRESSION OR MISREPRESENTATION OF MATERIAL FACTS.

1413. Injunction dissolved—Ex parte injunction.]—An injunction obtained *ex p.*, dissolved with costs, on account of pltf. not having stated in his

1411 i. Balance of convenience.]—Motion to continue injunction herein restraining defts. from entering upon or working a certain mining claim on the ground that pltf. were the assignees of the exclusive licences from the owners. Defts. had been granted a subsequent licence from the owners who claimed the prior licence had been forfeited:—*Held*: on the balance of convenience the injunction should be dissolved as the work might establish the value but not the want of value of the claim, & in any event there was serious doubt as to the validity of pltf.'s title from a legal point of view.—UNITED NICKEL CO. v. DOMINION NICKEL CO. (1912), 23 O. W. R. 619; 4 O. W. N. 480, 1132; 11 D. L. R. 88.—CAN.

h. No legal right to injunction.]—Under 41 Vict. c. 14 (Que.), the co., in Nov. 1881, as proprietors in possession of lands, obtained an *ex p.* injunction, restraining applt. from prosecuting lumbering operations begun in virtue of a licence from the Govt., dated May 3, 1881, which was a renewal of a former licence. By order-in-council, dated Apr. 7, 1881, the Comr. of Crown Lands was authorised to sell the lands in question to the co., & the co. deposited \$12,000 on account of the intended purchase. On May 9, the co. gave a contract for the clearing of a portion of the land, & on July 19 the comr. executed a grant in favour of the co., subject to the current licences to cut timber on the lots:—*Held*: the co. had not acquired title to the lands in question prior to July 19, 1881; by the grant of that date their rights were subordinated to all current licences, & applts. having established their right to possess the lands for the purposes of their lumbering operations under the licence from the Crown, the injunction was dissolved.—HALL v. DOMINION OF CANADA LAND & COLONIZATION CO., LTD. (1883), 8 S. C. R. 631.—CAN.

k. —.]—A tenant obtained *interim* injunction against a firm of timber merchants from erecting a saw mill on a site which he alleged to be included in subjects let to him. The interdict was subsequently recalled on the ground that the tenant was not in possession of the site, which, by decree of the Land Ct. had been declared to form part of a statutory small tenant's holding.—MACDONALD (JOHN), LTD. v. BLYTHSWOOD (LORD), [1914] S. C. 930; 2 S. L. T. 150.—SCOT.

l. Rights of parties in doubt—Damage not irreparable.]—An *interim* injunction dissolved where there was serious doubt as to the respective rights of the parties & where pltf.'s damage in case deft. were to proceed with the works complained of was not irreparable.—BALDWIN v. CHAPLIN (1913), 24 O. W. R. 860; 4 O. W. N. 1574; 12 D. L. R. 387.—CAN.

m. Where no grounds for granting injunction.]—LANKIN v. WALKER (1909), 12 W. L. R. 320.—CAN.

n. —.]—CURRY v. LAWLESS, HOW. C. 132.—IR.

o. — Allegations inadequate.]—A motion to continue until trial an *interim* injunction granted *ex p.* was refused, effect being given to certain preliminary objections as to the insufficiency of the material used in obtaining it.—COX v. WINNIPEG CITY, [1922] 3 W. W. R. 376; 70 D. L. R. 305.—CAN.

p. Where no damage shown—Actual or prospective.]—Where no damage either present or future had been shown, *interim* injunction dissolved.—TAYLOR v. PELOF (1912), 20 O. W. R. 927; 3 O. W. N. 571; 1 D. L. R. 212.—CAN.

q. Where damages adequate remedy.]—On the facts:—*Held*: pltf. should be left to his claim for damages, if any, arising from the alleged breach of the contract, & the injunctions should be dissolved.—CASS v. COUTURE, CASS v. MCCUTCHEON (1903), 14 Man. L. R. 458.—CAN.

r. —.]—The ct. will exercise its discretion to dissolve an *interim* injunction where it appears that pltf. has a full & complete remedy at law.—PRAIRIE STOCK FARM, LTD. v. MCFATRIDGE (1912), 11 E. L. R. 514.—CAN.

t. Restraint of unauthorised act—Authority subsequently procured.]—The injunction was granted to restrain deft. trustees from spending money voted for erecting a school-house on a certain site without a further vote of the rate-payers. That vote has been taken & the trustees now have the authority which they lacked in the first instance. The only objections urged against this motion are based upon considerations of policy with which we have nothing to do. If pltf. represents opinions which the Department of Education thinks should be allowed to prevail, the Department has the power to take the appropriate action. That is a question of policy & not of law. The injunction will therefore be dissolved.—ROBERTSON v. SPRINGBANK S. D. No. 50 OF SASKATCHEWAN TRUSTEES, [1917] 3 W. W. R. 970; 36 D. L. R. 777; 10 Sask. L. R. 267.—CAN.

u. —.]—Where a perpetual injunction has been granted prohibiting acts which are subsequently made lawful by Act of Parliament, the injunction will be dissolved.—QUINN v. MERCURY BAY TIMBER CO., LTD. (1885), 3 N. Z. L. R. 352 (S. C.).—N.Z.

b. Where same facts adduced—As for original application.]—An *ex p.* injunction order granted by a judge cannot be dissolved by the judge in equity upon the same facts only on which the order was made. Such an appln. is in the nature of an appeal.—GOODACRE v. RANNEY (1886), 26 N. B. R. 62.—CAN.

PART XIII. SECT. 5, SUB-SECT. 2.

1413 i. Injunction dissolved—Ex parte injunction.]—Although the ct. will upon motions to dissolve them, punish want of candour in persons obtaining *ex p.* injunction it will not so punish persons having obtained injunctions for a time determined, when applying

on notice for a continuance of such injunctions.—BROADBENT (ESSEX GOLD-MINING CO.) v. MARSHALL (GARIBALDI GOLD-MINING CO.) (1863), 2 W. & W. 115.—AUS.

1413 ii. —.]—Upon an application for an *ex p.* injunction, the ct. requires a full disclosure of the facts which probably may become material; & where an injunction is obtained without such full disclosure, the ct. will discharge it, although ultimately the facts suppressed may not be material.—ADELAIDE S.S. CO. v. MARTIN (1879), 5 V. L. R. 45.—AUS.

1413 iii. —.]—Where an injunction restraining a corpn. from accepting tenders for contracts was obtained *ex p.* upon a statement that tenders had been called for, when, in fact, instructions to call for tenders had been given to its officer which he had not carried out:—*Held*: as there was no pressing urgency & an omission to state all the facts the injunction should be dissolved.—A.-G. v. WIMMERA (PRESIDENT, ETC. OF THE SHIRE OF) (1880), 6 V. L. R. 24.—AUS.

1413 iv. —.]—The affidavits on which an *ex p.* injunction is applied for must, to guard against abuse of that process, present a candid statement of the whole case, & must set forth not only the facts which pltf. thinks to be, but such as are in truth material to the determination of the application. An injunction obtained on affidavits in which this rule is not observed, will be dissolved on that ground alone, independently of the merits.—LEY v. McDONALD (1851), 2 Gr. 398.—CAN.

1413 v. —.]—On an application for an injunction *ex p.*, all the facts should be fully disclosed; but the injunction will not be dissolved on the ground of the suppression of facts, if the facts suppressed would not have altered the decision of the judge.—HAMILTON v. BROWN (1866), 2 Old. 260.—CAN.

1413 vi. —.]—Pltf. having obtained an injunction to restrain the sale of a mining property in which he was interested, defts. made answer under oath negating all the allegations on which pltf.'s claim to relief was founded:—*Held*: credit must be given to the answer & the injunction must be dissolved, fraud not having been shown.—HAMILTON v. NORTHUP (1871), 8 N. S. R. 463.—CAN.

1413 vii. —.]—Where a party applies for an *ex p.* injunction he is bound to state all the facts which are important to be brought before the ct., & which might influence it in determining upon the application, & if important facts within the knowledge of the party are omitted, the injunction will be dissolved without regard to the merits.—ST. JOHN CORPN. v. BROWN (1872), 1 Pug. 100.—CAN.

1413 viii. —.]—An *ex p.* order of injunction was obtained from a judge at chambers to restrain injury to land, & an action at law was commenced shortly after. The injunction having been dissolved & the decree of dissolution appealed from:—*Held*: where a new

Sect. 5.—Grounds for dissolution: Sub-sect. 2.]

bill material facts, which were within his knowledge at the time of filing his bill.—*HATCH v. BORSLEY* (1835), 4 L. J. Ch. 160.

1414. ———.]—(1) A bill, praying for an injunction to stay an ejectment, stated that pltf. in equity had no defence at law; the bill was supported by an affidavit which contained the same statement; & an *ex p.* injunction was granted upon the bill & affidavit. An order was afterwards made dissolving the injunction; & a further order was subsequently made, by which pltf., in equity, were directed to give judgment in the ejectment:—*Held*: the principles & practice of the ct. did not warrant the last mentioned order.

The ct. can have no ground upon which it can proceed in granting an *ex p.* injunction, but a faithful statement of the case; & when the ct. has found a party misstating his case, either by misrepresentation or suppression, the ct. has always exercised its jurisdiction, for the purpose of repressing that practice. . . . But the question is whether there was any such suppression or misstatement as to lead the ct. to grant the injunction (*LORD COTTENHAM, C.*).

(2) A party against whom an attachment has issued for disobedience to an order may, notwithstanding the attachment, move to discharge the order.—*BROWN v. NEWALL* (1837), 2 My. & Cr. 558; 6 L. J. Ch. 348; 1 Jur. 422; 40 E. R. 752, L. C.

Annotations:—*As to* (1) *Refd.* *Small v. Attwood* (1838), 3 Y. & C. Ex. 105; *Haig v. Homan* (1841), 8 Cl. & Fin. 320; *Hanson v. Keating* (1844), 4 Hare, 1; *Humphries v. Horne* (1844), 3 Hare, 276.

1415. ———.]—A contractor for railway works deposited a quantity of clay on the C. road, near the entrance to pltf.'s wharf; on Mar. 10, pltf. filed his bill, to restrain the railway co. from laying down, or causing to be laid down any clay on the road; & upon an affidavit made the same day, verifying the facts, obtained on Mar. 12, an *ex p.* injunction prohibiting such further deposit.

state of facts is presented, the power of an equity judge to dissolve an injunction is not affected by there being an action at law pending to try the title.—*SMITH v. MORROW* (1873), 2 Pug. 24.—CAN.

1413 ix. ———.]—The service of a copy of an order of injunction, even though alleged to have been made maliciously, whereby pltf. were prevented from selling certain property to the party served, affords no ground of action, unless there has been some misrepresentation of law or fact.—*GORDON v. MCGIBBON* (1875), 3 Pug. 49.—CAN.

1413 x. ———.]—Injunction dissolved on the ground that all the material allegations on which the writ was granted were denied by defts.—*MCKAY v. SUTHERLAND* (1879), R. E. D. 332.—CAN.

1413 xi. ———.]—It is the duty of a party applying for an *ex p.* injunction to state all of the facts within his knowledge, & other facts cannot be brought forward to sustain the injunction in an application to dissolve it.—*DOMVILLE v. CRAWFORD* (1881), N. B. Dig. 656.—CAN.

1413 xii. ———.]—On a motion to continue an injunction deft. may bring forward such facts as he might if he were moving to dissolve the injunction, & may show suppression of facts by pltf. as a ground for dissolving it, & may thereupon move to dissolve it.—*HYNES v. FISHER* (1883), 4 O. R. 60.—CAN.

1413 xiii. ———.]—Pltf. applied *ex p.* & obtained an order to restrain defts. from laying water pipes through her land. It was not disclosed, but subsequently appeared that the land through which defts. were proceeding to lay the pipes had been used for many years as a public highway, & that pipes had been laid therein twenty-five years previously for the same purpose, & the then proprietors had been compensated for the damage:—*Held*: on appeal from a decision dissolving the injunction, the omission of pltf.'s counsel, when he obtained the restraining order, to bring before the ct. the existence of the highway & its relation to the injury complained of, was sufficient ground for dismissing the appeal.—*KEARNEY v. DICKSON* (1885), 6 R. & G. 65; 6 C. L. T. 140.—CAN.

1413 xiv. ———.]—The non-disclosure of material facts on the application for an *ex p.* injunction for a limited time, although a ground for discharging it, will not necessarily disentitle pltf. to succeed on a motion to continue the expiring injunction when both sides present their cases fully, & the ct. is not bound to specifically discharge the *interim* injunction or to award costs to the defts.—*MILLER v. CAMPBELL* (1903), 14 Man. L. R. 437.—CAN.

1413 xv. ———.]—Where it appears that an order of injunction was obtained by a statement which was false, the injunction will be dissolved.—*HART v. BROWN* (1913), 23 W. L. R. 295; 9 D. L. R. 560.—CAN.

The railway co. had begun to remove the clay on Mar. 9, of which fact pltf. was ignorant at the time of making his affidavit:—*Held*: although pltf. might, if he had made inquiries, have known, that the clay was in course of removal, yet his ignorance of that fact, owing to which, it was not made known to the ct., was not equivalent to concealment or misrepresentation, & the *ex p.* injunction was therefore not improperly obtained.

Whatever title pltf. may have to an *ex p.* injunction (which is the mode in which this ct. affords extraordinary relief to parties injured) if it subsequently turn out that it was obtained through means of misrepresentation or concealment on his part, he ought to have no benefit from it, but it should be discharged with costs. That is quite unconnected with merits; & if the ct. is imposed upon, it will subsequently so watch its jurisdiction as to take away the advantages which the party would derive from an abuse of its process. . . . The mere ignorance of what a party might have known, is not equivalent to concealment, so as to amount to improper conduct (*LORD COTTENHAM, C.*).—*SEMPLE v. LONDON & BIRMINGHAM RY. CO.* (1838), 1 Ry. & Can. Cas. 480; 2 Jur. 560, L. C.

Annotation:—*Refd.* *Pickford v. Grand Junction Ry.* (1844), 3 Ry. & Can. Cas. 538.

—.]—A married woman divorced her husband & entitled to alimony under the sentence of the Ecclesiastical Ct., accepted a bill of exchange for articles of dress supplied to her by the drawer, & made it payable at her banker's, to whom her alimony was paid:—*Held*: she did not thereby charge her alimony.

As pltf. has mis-stated his case by representing that the £300 a year was separate property of the wife, I shall dissolve the injunction, with costs (*SHADWELL, V.-C.*).—*VANDERGUCHT v. DE BLAQUIERE* (1838), 8 Sim. 315; 7 L. J. Ch. 270; 2 Jur. 738; 59 E. R. 125.

Annotations:—*Mentd.* *Cartwright v. Cartwright* (1853), 10 Hare, 630; *Ex p. Bremner* (1866), L. R. 1 P. & D. 254; *Re Robinson* (1884), 27 Ch. D. 160; *Anderson v. Hay* (1890), 7 T. L. R. 113; *Re Meyrick's Settlement*, *Meyrick v. Meyrick*, [1921] 1 Ch. 311.

1413 xvi. ———.]—*WOTHERSPON v. DOBSON* (1892), 11 N. Z. L. R. 283.—N.Z.

1413 xvii. ———.]—If a pltf. applying *ex p.* for an injunction, suppress a material fact, it will be a ground for dissolving the injunction with costs.—*HEMPHILL v. M'KENNA* (1842), 3 Dr. & War. 183; 2 Con. & Law. 76; 6 I. Eq. R. 57.—IR.

1413 xviii. ———.]—Injunction order in a possessory suit set aside because pltf. had not fully & fairly stated his case in the first instance.—*DEASE v. PLUNKETT* (1843), *Drury temp. Sug.* 255.—IR.

1413 xix. ———.]—Injunction dissolved on the ground of suppression of material facts, & because the case on which it was obtained was fully met by deft.—*GRIFFIN v. TAYLOR* (1881), R. E. D. 427.—CAN.

a. *Materiality of facts.*—*Held*: the injunction would not be disturbed on account of misrepresentations in the affidavits on which it was obtained unless the case were such that if the facts had been stated accurately, the injunction would have been refused.—*CAFFERY v. CAMERON* (1879), R. E. D. 370.—CAN.

d. ———.]—In order to entitle a deft. to have an *ex p.* injunction dissolved on the ground of suppression of fact by the party obtaining it, the facts relied on must be material to the case as presented in pltf.'s bill.—*WATTS v.*

1417. ———.]—*BELL v. HULL & SELBY RY. Co.*, No. 1033, *ante*.

1418. ———.]—(1) Where a *pltf.*, upon an application for an *ex p.* injunction, suppresses material facts, the injunction will be dissolved on that ground alone; & *pltf.* will not be allowed, on a motion to dissolve, to maintain it on the merits then disclosed.

(2) Where the rights of *pltf.* & *deft.* are legal, *pltf.*, in asking for an injunction to protect him from a violation of his alleged legal rights, ought to show that the right has been established, or that, having had no means of establishing it, but the right being *prima facie* well founded, the interference of this *ct.* is necessary, to prevent that species & extent of mischief which this *ct.* calls irremediable, before the right can be established by legal proceeding.—*HILTON v. GRANVILLE (LORD)* (1841), 4 *Beav.* 130; 10 *L. J. Ch.* 398; 49 *E. R.* 288; *affd.* *Cr. & Ph.* 283, *L. C.*

Annotations:—*As to* (1) *Consd.* *Albert (Prince) v. Strange* (1849), 1 *H. & Tw.* 1. *As to* (2) *Refd.* *Ridgway v. Roberts* (1844), 4 *Hare*, 106. *Generally*, *Mentd.* *Hall v. Byron* (1877), 4 *Ch. D.* 667.

1419. ———.]—*GRAY v. MARRIAN* (1843), 1 *L. T. O. S.* 227.

1420. ———.]—*BARWELL v. BROOKES* (1843), as reported in 1 *L. T. O. S.* 75.

1421. ———.]—It is the duty of those who apply for instantaneous relief by a special injunction to inform the *ct.* of every material fact belonging to the case, otherwise it will be deemed a fraud upon the *ct.*, & the injunction dissolved with costs.—*ROWLEY v. GRAVES* (1848), 11 *L. T. O. S.* 239.

1422. ———.]—(1) In answer to the bill & affidavits for an *ex p.* injunction which had been obtained to restrain the sailing of a ship, at the instance of *pltfs.*, who were part owners, until security given for the value of *pltf.*'s shares, it was sworn by *deft.*, the master, & part owner also, that he did not intend to take out the ship. On motion to dissolve the injunction, it was dissolved on the ground that the bill also praying an account of the profits of previous voyages as against the master & part owner, the account was not so connected with the sailing of the ship as to warrant the *ct.* in interfering to prevent the sailing of the ship; & no relief being prayed against the other part owners who had been made *defts.* to the bill.

(2) The rule as to *ex p.* applications that parties making them are considered as coming under a species of contract with the *ct.* to state the whole case fully & fairly to the *ct.* If they fail to do that, then when the other parties apply to dissolve the injunction & show that something has been improperly suppressed the *ct.* refuses to try the case upon the merits, upon the ground that *appls.* have broken faith with the *ct.*, & then the injunction is dissolved. If the case really is brought fairly before it, & there has been no improper concealment, the *ct.* considers itself as blameable if it has not looked carefully into the case, & the *ct.* hears the motion to dissolve, & deals with it according to the merits (*WIGRAM, V.C.*).—*CASTELLI v. COOK* (1849), 7 *Hare*, 89; 18 *L. J. Ch.* 148; 13 *L. T. O. S.* 524; 13 *Jur.* 675; 68 *E. R.* 36.

Annotation:—*As to* (2) *Refd.* *R. v. Kensington Income Tax Comrs.*, *Ex p.* *Edmond de Polignac (Princess)*, [1917] 1 *K. B.* 486.

1423. ———.]—Where an injunction has been obtained upon a misstatement of facts it will be dissolved without reference to the merits of the case.—*FITCH v. ROCHFORD* (1849), 13 *L. T. O. S.* 61, *L. C.*

1424. ———.]—On an application for an *ex p.* injunction, *pltf.* omitted to state a material fact. A motion being made to dissolve it, *pltf.* swore that he had forgotten the circumstances:—*Held*: it was no excuse for the suppression.—*CLIFTON v. ROBINSON* (1853), 16 *Beav.* 355; 51 *E. R.* 816.

1425. ———.]—Where an injunction is granted *ex p.*, the *ct.* will reserve leave to the opposite side to dissolve it within a certain time; & if the facts do not then appear to be such as originally stated, or if there are new facts adduced material to the question upon which the *ct.* may at the hearing be called to decide, the injunction will be dissolved.—*BELFIELD v. JONES* (1855), 25 *L. T. O. S.* 78.

1426. ———.]—Where *pltf.* applies *ex p.* for a special injunction, he is bound to state in his bill every material fact, & set out every material document bearing upon the subject matter of the litigation. Where therefore, *pltf.* had omitted a material letter written by *deft.*, & the attention of the *ct.* was not pointedly called to such letter on the application for the *ex p.* injunction, the *ct.* immediately discharged the order for the injunction, & directed restitution of possession of certain premises, the question in the suit.—*HARBOTTLE v. POOLEY* (1869), 20 *L. T.* 436.

1427. ———.]—A motion to discharge an *ex p.* injunction on the ground of its having been obtained by misrepresentation, is proper, though the injunction is about to expire.—*WIMBLEDON LOCAL BOARD v. CROYDON RURAL SANITARY AUTHORITY* (1886), 32 *Ch. D.* 421; 55 *L. T.* 106; 2 *T. L. R.* 616.

Annotation:—*Consd.* *Boyce v. Gill* (1891), 64 *L. T.* 824.

1428. ———.]—*ROSS v. BUXTON*, [1888] *W. N.* 55.

1429. ———.]—Without motion by defendant.]—This was a motion by *pltfs.* for an injunction, or in the alternative to continue an *interim* order already obtained *ex p.* The *interim* order was irregularly obtained on suppression of material facts. No cross notice of motion to discharge the *interim* order was given by *deft.*:—*Held*: the *ct.* may discharge an *ex p.* order without the formal notice of motion to discharge being given by *deft.*

The *ct.* on the evidence granted an injunction in the terms of the *interim* order, but discharged the *interim* order, *pltfs.* to pay the costs of it in any event.—*BOYCE v. GILL* (1891), 64 *L. T.* 824.

1430. Defendant not appearing on notice.]—*Pltf.* applying for an injunction should fairly state his case both where the application is *ex p.* & where, on notice, the opponent does not appear; but the *ct.* does not hold him so strictly to the rule in the latter case as in the former.—*MACLAREN v. STANTON* (1852), 16 *Beav.* 279; 22 *L. J. Ch.* 274; 20 *L. T. O. S.* 150; 1 *W. R.* 70; 51 *E. R.* 786; *on appeal, sub nom.* *CARRON IRON CO. v. MACLAREN* (1855), 5 *H. L. Cas.* 416, *H. L.*

Annotations:—*Consd.* *Pennell v. Roy* (1853), 22 *L. J. Ch.* 409. *Refd.* *Venning v. Loyd* (1859), 1 *De G. F. & J.* 193; *Re Boyse, Crofton v. Crofton* (1880), 15 *Ch. D.* 591; *McHenry v. Lewis* (1882), 22 *Ch. D.* 397; *Pena Copper*

SOUTH-WEST BOOM CO. (1880), 19 *N. B. R.* 646.—*CAN.*

•. ———.]—It is not a ground for the dissolution of an *ex p.* injunction that *pltf.* suppressed facts relating to the subject-matter of the suit, which, though

material as between *pltf.* & a person not a party to the suit, are not material to the suit with *deft.*—*POIRIER v. BLANCHARD* (1896), 1 *N. B. Eq. Rep.* 322.—*CAN.*

1. *Balance of convenience.*—An *ex p.*

order for an injunction to last for a few days, & until a motion to continue it had been disposed of, was obtained upon a misstatement of a fact material to one of the grounds upon which, in the bill, *pltf.*'s right was founded. Upon an application to

Sect. 5.—Grounds for dissolution: Sub-sects. 2 & 3.

Sect. 6: Sub-sect. 1.]

Mines v. Rio Tinto Co. (1911), 105 L. T. 846. *Mentd.* *Walker v. Brooks* (1856), 4 W. R. 347; *Maunder v. Lloyd* (1862), 2 John. & H. 718; *Newby v. Colts Patent Firearms Co.* (1872), L. R. 7 Q. B. 293; *Hyman v. Helm* (1883), 24 Ch. D. 531; *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 460, n.; *Nutter v. Messageries Maritimes De Franco* (1885), 54 L. J. Q. B. 527; *Haggin v. Comptoir D'Escompte de Paris, Mason & Barry v. Comptoir D'Escompte de Paris* (1889), 23 Q. B. D. 519; *La Bourgogne*, [1899] P. 1; *De Beers Consolidated Mines v. Howe*, [1905] 2 K. B. 612; *Saccharin Corp'n. v. Chemische Fabrik Von Heyden Akt.*, [1911] 2 K. B. 516; *Okura v. Forsbacka Jernverks Akt.*, [1914] 1 K. B. 715; *New York Life Insce. v. Public Trustee*, [1924] 2 Ch. 101; *Swedish Central Ry. v. Thompson*, [1924] 2 K. B. 255.

1431. Whether new circumstances may be adduced—To support injunction.]—(1) The ct. will not grant an injunction to restrain parties from proceeding to deal with property whose right, if it exists, depends upon the construction of a doubtful statute, where the granting of the injunction would for ever deprive them of an opportunity of exercising the right especially if no irreparable mischief is to be apprehended from allowing them to proceed.

(2) A very wholesome rule has been established in this ct. that if a party comes for an *ex p.* injunction & misrepresents the facts of the case, he shall not then be permitted to support the injunction by showing another state of circumstances in which he would be entitled to it (PEPYS, M.R.).—*A.-G. v. LIVERPOOL CORPN.* (1835), 1 My. & Cr. 171; 40 E. R. 342.

Annotations:—As to (1) Consd. *Greenhalgh v. Manchester & Birmingham Ry.* (1838), 3 My. & Cr. 784; *Galbreath v. Armour* (1845), 4 Bell, Sc. App. 374. *Refd.* *A.-G. v. Wigan Corp'n.* (1854), 23 L. T. O. S. 43. *As to (2) Refd.* *R. v. Kensington Income Tax Comrs.*, *Ex p. Edmond de Polignac (Princess)*, [1917] 1 K. B. 486. *Generally.* *Mentd.* *Ex p. Hythe Corp'n.* (1840), 4 Y. & C. Ex. 55; *A.-G. v. Avon Corp'n.* (1863), 33 Beav. 67; *Mill v. Hawker* (1874), L. R. 9 Exch. 309.

1432. ———.]—HILTON v. GRANVILLE (LORD), No. 1418, ante.

1433. ———.]—CASTELLI v. COOK, No. 1422, ante.

1434. Whether further application may be made—On dissolution.]—Where an *ex p.* injunction has been dissolved on the ground of misrepresentation or even concealment, pltf. is not thereby precluded from applying again for an injunction on the merits.—*FITCH v. ROCHFORD* (1849), 1 Mac. & G. 184; 1 H. & Tw. 255; 18 L. J. Ch. 458; 13 L. T. O. S. 113; 13 Jur. 351; 47 E. R. 1406, L. C.

1435. Materiality of facts—Determined by court.]—BROWN v. NEWALL, No. 1414, ante.

1436. ———.]—DALGLISH v. JARVIE, No. 58, ante.

See, also, No. 1091, ante.

1437. ——— Whether materiality need be shown.]—P., a debtor, in prison at the suit of R., in order to obtain his release, agreed to give to R. a new judgment for the amount, & that the amount should be paid out of any moneys which he should receive on a contested claim against a railway co. P., having recovered judgment against the railway co. on that claim, proceeded to attach a sum found due to the railway co. from certain canal cos. The canal cos. thereupon paid into ct. the amount of P.'s judgment:—*Held*: R. was entitled to an

continue the injunction:—*Held*: having in view the great importance to pltf. of maintaining the *status quo* & the absence of damage to deft., the injunction might be continued, notwithstanding the misstatement in respect of a portion of the property in question upon an equitable ground not affected by the fact misstated; but pltf. was ordered to pay the costs of the motion.—

WINNIPEG & HUDSON'S BAY CO. v. MANN (1890), 6 Man. L. R. 409.—CAN.

PART XIII. SECT. 5, SUB-SECT. 3.

*g. Injunction granted on affidavits only.]—*If an injunction is granted *ex p.* on affidavits only, deft. may, before answer, apply to dissolve it, though notice of the application for injunction

injunction to prevent P. or any persons claiming under him, from dealing with or getting possession of the fund so paid into ct. But in another suit, almost exactly similar, in which pltf., who had formerly been the solr. of P., had obtained a similar injunction *ex p.*, & it turned out that an alteration in the arrangement between himself & P., had not been mentioned to the ct. on the *ex p.* application, the *ex p.* injunction was dissolved, with costs, although it was not shown that the alteration was material; but payment of the costs was stayed & leave was given to pltf. the solr. to move again the next day.—*RICCARD v. PRICHARD* (1855), 1 K. & J. 277; 69 E. R. 462; *sub nom.* *PHILLIPS v. PRICHARD*, *RICCARD v. PRICHARD*, 1 Jur. N. S. 750.

Annotation:—Mentd. *Parish v. Poole* (1884), 53 L. T. 35.

1438. ——— Facts raising point of law.]—The Bristol Improvement Act, 1840, enacts that no opening shall be made in any party wall except for communication from one building to another. Pltf. had a house, one wall of which was, to the height of the first storey, a party wall between pltf.'s house & a building belonging to defts., but above that height had ancient windows opening to the external air. Pltf. pulled down his house, & proposed to rebuild it with windows in the same position as before. Before doing this, he gave notice to defts., under the Act, that the wall, which he described as a party wall, was out of repair, & a certificate of two surveyors was given directing the party wall to be rebuilt at the joint expense of pltf. & defts. Defts. afterwards proceeded to erect a building which would obstruct the light coming to the ancient windows of pltf. An injunction was granted, restraining defts. from obstructing pltf.'s ancient lights. Pltf. had obtained an *ex p.* injunction upon the filing of the bill; but no mention was made in the bill, or in the affidavit in support of the motion, of the notice to pull down the wall, or the certificate of the surveyors:—*Held*: inasmuch as these facts were only important as raising a point of law, based on an unreasonable construction of the Act, they were not material facts, & pltf. was justified in omitting them.—*WESTON v. ARNOLD* (1873), 8 Ch. App. 1084; 43 L. J. Ch. 123; 22 W. R. 284, L. JJ.

Annotations:—Mentd. *Knight v. Pursell* (1879), 11 Ch. D. 412; *Drury v. Army & Navy Auxiliary Co-op. Supply*, [1896] 2 Q. B. 271.

SUB-SECT. 3.—IRREGULARITIES.

1439. Delay in service.]—Motion to discharge an injunction for irregularity.—*MORICE v. BANK OF ENGLAND* (1732), Kel. W. 43; 25 E. R. 487, L. C.

1440. Omission of notice to defendant answering.]—An injunction to stay proceedings at law dissolved for irregularity; pltf. having obtained the injunction as of course for want of the answer of the two defts. who resided abroad, without notice to the other deft., who was the sole pltf. at law, & had put in his answer in time.—*COOPER v. FLINDT* (1811), Wight, 409; 145 E. R. 1310.

1441. Injunction against co-defendants—Some not having answered.]—A common injunction obtained against two defts. after one had answered,

was given to him & he did not oppose.—*GOSLIN v. GOSLIN* (1888), 27 N. B. R. 221.—CAN.

*h. Affidavit & statement of claim inconsistent.]—*The case made out by the affidavit on an *ex p.* motion for an *interim* injunction must correspond with the allegations in the statement of claim. Where the case made out by

discharged for irregularity.—*JEYES v. FOREMAN* (1833), as reported in 3 L. J. Ch. 97.

1442. ———.]—An injunction will not be dissolved upon the answer of one of defts., the other defts. being parties to the transactions out of which the suit arises.—*NANNY v. NANNY* (1837), 1 Jur. 526.

1443. ———.]—An injunction against proceeding at law obtained by pltf. in an interpleading suit will not be dissolved on the coming in of the answer of one set of defts., & before the other interpleading defts. have put in their answer, on the application of those defts. who have answered.—*EAST & WEST INDIA DOCK CO. v. LITTLEDALE* (1848), 7 Hare, 57; 12 L. T. O. S. 26; 68 E. R. 23.

Annotations:—*Mentd. G. S. & W. Ry. v. Corry*, Turquand, etc. (1867), 15 W. R. 650; *Manby v. Robinson* (1869), 17 W. R. 479; *Credits Gerundeuse v. Van Weede* (1884), 12 Q. B. D. 171.

1444. Order omitting condition precedent to issue.]—By the common order for an injunction in an interpleading suit, the injunction is directed to issue upon bringing the fund in question into ct.; & if, without the special direction of the ct., the order is so drawn up that it does not make the bringing the fund into ct. a condition precedent to the issuing of the injunction, the order will be discharged for irregularity. *Semble*: if there is not time to bring the fund into ct. a special order will be made to provide for the emergency.—*SIEVEKING v. BEHRENS* (1837), 2 My. & Cr. 581; 1 Jur. 50; 40 E. R. 761, L. C.

Annotation:—*Refd. Prudential Assco. v. Thomas* (1867), 3 Ch. App. 74.

1445. Affidavits irregular.]—*JACKSON v. CASIDY*, No. 1117, *ante*.

1446. ———.]—*ELSEY v. ADAMS*, No. 1118, *ante*.

1447. Misjoinder of parties.]—Bill filed for an injunction. Injunction granted *ex p.* Motion made to discharge the injunction, on the ground of misjoinder of parties. Motion granted, on the ground that, as the relief could not be continued at the hearing, it would be absurd to grant relief upon an interlocutory application.—*HUDSON v. MADDISON* (1841), 12 Sim. 416; 11 L. J. Ch. 55; 5 Jur. 1194; 59 E. R. 1192.

Annotation:—*Refd. Soltau v. De Held* (1851), 2 Sim. N. S. 133.

1448. Cause wrongly entitled.]—Motion to discharge an order for an injunction, on the ground that it was in a cause wrongly entitled. The title of the order mentioned three of the defts. only, whereas there was a fourth, but who was out of the jurisdiction, & had never appeared:—*Held*: to be an injunction in a non-existing cause, & deft. was entitled to have it discharged with costs.—*JONES v. HANSON* (1843), 1 L. T. O. S. 358.

1449. New injunction irregularly granted.]—Where, upon a motion to dissolve an injunction which had been granted *ex p.* in the terms of the prayer of the bill, the ct. discharged its former order, & awarded a new & totally different injunction, which had not been prayed by the bill, of which no notice had been given & which was not within the scope of the relief originally prayed, the order was, on appeal, discharged, on the ground of irregularity, apart from the merits, & deft. allowed his costs in the ct. below as well as upon appeal.—*BURDETT v. HAY* (1863), 4 De G. J. & Sm. 41; 33 L. J. Ch. 41; 9 L. T. 429; 9 Jur. N. S. 1260;

the affidavit on an *ex p.* motion for an *interim* injunction does not correspond with the allegations in the statement of claim, the injunction will be dissolved, but pltf. will not be precluded from amending the statement of claim & applying for an injunction on the merits.—*MICKELSON SHAPIRO CO. v. MICKEL-*

SON DRUG & CHEMICAL CO. (1915), 30 W. L. R. 798; 8 W. W. R. 153.—*CAN.*

k. Defect in affidavit.]—An *ex p.* injunction dissolved on account of an incurable defect in the affidavit on which it was obtained will be dissolved with costs. *Secus*, if the irregularity was

12 W. R. 61; 46 E. R. 829, L. C.; *subsequent proceedings, sub nom.* *BURDELL v. HAY*, 33 Beav. 189.

Annotation:—*Refd. Rothwell v. King* (No. 2) (1887), 4 R. P. C. 76.

1450. Waiver of irregularity—By subsequent conduct.]—There are many cases, both at law & in equity, where a matter is irregular originally, & yet that defect is cured by what is done subsequently to it (*HARDWICKE*, L.C.).—*DAVILE v. PEACOCK* (1740), Barn. Ch. 25; 27 E. R. 540, L. C.

1451. — Affirmation.]—If injunction be dissolved on the merits, another cannot be obtained as of course on an amended or supplemental bill. The injunction having issued irregularly:—*Held*: deft. had not waived the objection by a mere application for time to answer the bill. Objections as to irregular process can only be waived by a party doing some act expressly founded on it, or amounting to a clear affirmance.—*TRAVERS v. STAFFORD (LORD) & FURNESS* (1750), 2 Ves. Sen. 19; Amb. 104; 28 E. R. 13, L. C.

Annotation:—*Refd. Edwards v. Edwards* (1792), Dick. 756.

1452. — Subsequent appearance of defendant.]—Where an order had been obtained, that service of a subpoena on the attorney of deft., who resided abroad, & had brought an action at law against pltf., should be good service; but such order was obtained, & the subpoena issued & served two days before the filing of the bill, the ct. refused to discharge the order for irregularity, holding that the irregularity, if any, had been waived by a subsequent appearance of deft.

In injunction bills, where deft. resides abroad, & an application is made that service of process on his attorney at law may be good service, the ct. of Ch. requires the bill to be accompanied by an affidavit by pltf., of merits. In this ct. the affidavit is not required until the motion is made for the injunction.—*ROYAL EXCHANGE ASSURANCE CO. v. SHORT* (1827), 1 Y. & J. 570; 148 E. R. 798.

1453. — Acquiescence.]—The Ct. of Ch. has no jurisdiction to order the incumbent of a church, who had made certain alterations in the building by removing the pews, etc., & substituting chairs, to take the necessary proceedings to obtain a faculty from the bishop of the diocese for the restoration of the church. An injunction was granted to restrain the alteration of the walls or brickwork of the church without the authority of the archdeacon or bishop, on pltf.'s undertaking to apply to the proper ecclesiastical ct. for authority to restore the church to its original state.

I think that defts. have shown acquiescence in respect of the injunction & therefore that part of the order of the Vice-Chancellor will not be disturbed. . . . Pltf. must undertake to apply to the proper ecclesiastical ct. for authority to complete the restoration of the interior of the church, & on his doing that, the order for the injunction may continue (*LORD WESTBURY*, C.).—*CARDINALL v. MOLYNEUX* (1861), 4 De G. F. & J. 117; 4 L. T. 605; 7 Jur. N. S. 854; 45 E. R. 1128, L. C.

SECT. 6.—ORDER MADE BY CONSENT.

SUB-SECT. 1.—INTERLOCUTORY ORDER.

1454. Jurisdiction to discharge order—On ground of mistake.]—The ct. has jurisdiction to discharge

one which might have been waived.—*MACHIN v. WALKER* (1873), 1 J. R. 8.—*N.Z.*

PART XIII. SECT. 6, SUB-SECT. 1.

1. Jurisdiction to discharge order.]—Where there has been no hearing & no decree of the ct. concluding a deft.'s

Sect. 6.—Order made by consent: Sub-sects. 1 & 2. Sects. 7, 8 & 9. Part XIV. Sect. 1: Sub-sect. 1, A. & B.]

an order made on an interlocutory application by consent when it is proved to have been made under a mistake, though that mistake was on one side only. Where on motion for a mandatory injunction an order was made by consent pursuant to the terms of a previous agreement by which deft. gave an undertaking to remove certain obstructions, & it appeared that deft. had by mistake consented to a more extensive undertaking than he intended to do, the ct. refused to enforce that part of the undertaking which had been given by mistake.—*MULLINS v. HOWELL* (1879), 11 Ch. D. 763; 48 L. J. Ch. 679.

*Annotations:—*Refd. *Ainsworth v. Wilding*, [1896] 1 Ch. 673; *Neale v. Gordon Lennox*, [1902] 1 K. B. 838.

SUB-SECT. 2.—PERPETUAL INJUNCTION.

See R. S. C., Ord. 28, r. 11.

1455. Withdrawal of consent—Fresh application necessary.]—An action was brought against a local board to restrain them from pulling down certain houses of pltf.'s & for damages. On a motion for an injunction coming on, defts.' counsel by the authority of his clients, consented to an order for a perpetual injunction with costs, & an inquiry as to damages, & such order was taken by consent without opening the case to ct. Before the order had been passed, the defts. formally withdrew their consent, & the registrar thereupon declined to pass the order without the direction of the ct. Pltf. moved that he might be directed to proceed to perfect the order. Defts. alleged that their instructions to consent had been given under a misapprehension, but did not enter into any evidence in support of that allegation:—*Held*: where counsel by the authority of their clients consent to an order, the clients cannot arbitrarily withdraw such consent, & the registrar must be directed to proceed to perfect the order, without prejudice to any application which defts. might make to the ct. below to be relieved from their consent, on the ground of mistake or surprise or for other sufficient reason.—*HARVEY v. CROYDON UNION RURAL SANITARY AUTHORITY* (1884), 26 Ch. D. 249; 53 L. J. Ch. 707; 50 L. T. 291; 32 W. R. 389, C. A.

*Annotations:—*Consd. *Lewis's v. Lewis* (1890), 45 Ch. D.

rights, & deft., before an application for an *interim* injunction is heard, agrees in a certain event to consent to an injunction being obtained *ex p.*, the ct. will dissolve a perpetual injunction obtained on such agreement in absence of the clearest evidence that deft.'s consent extended to a perpetual injunction.—*LEARY v. UNITED HERCULES HYDRAULIC SLUICING CO. (No. 1)* (1891), 10 N. Z. L. R. 415.—N.Z.

PART XIII. SECT. 7.

m. Replevin action.]—An *ex p.* injunction to restrain defts. from cutting timber & removing timber already cut, on lands, the title to which was claimed by pltf. & defts. by possession, was dissolved, where a jury in an action of replevin by pltf. to recover timber cut by defts. on the land, had found in their favour, though a motion for a new trial was undisposed of.—*WOOD v. LEBLANC* (1902), 2 N. B. Eq. Rep. 427; 23 C. L. T. 157.—CAN.

PART XIII. SECT. 8.

1459 i. Whether injunction dissolved.]—Where a deft., upon filing his answer,

obtains & serves an order *nisi* to dissolve a common injunction, & pltf. thereupon, at any time before the actual dissolution, amends his bill, deft. before proceeding with the application to dissolve must answer the amendments, or be prepared to contend that even admitting them to be true the injunction ought to be dissolved.—*FISHER v. WILSON* (1850), 1 Gr. 218.—CAN.

1459 ii. —.]—A pltf. having obtained the common injunction for want of answer, upon a bill defective for want of parties, deft. put in his answer & obtained an order *nisi* to dissolve the injunction. Before the motion was heard, & on the morning of the day on which it was heard, pltf. amended the bill by adding the necessary parties:—*Held*: such amendment was an answer to the objection, made on the motion, of want of parties.—*NEWTON v. DORAN* (1850), 1 Gr. 473.—CAN.

1459 iii. —.]—After service of an injunction pltf. amended his bill & added a new deft., who was a mere trustee for pltf., without however altering the frame of the bill or prayer. Subsequently to the amendment defts. committed a breach of the injunction, &

281. Apld. Re Wedge, Wedge v. Pantet (1908), 98 L. T. 436. **Refd. Re West Devon Great Consols Mine** (1888), 38 Ch. D. 51; *Neale v. Gordon Lennox*, [1902] 1 K. B. 838; *Shepherd v. Robinson*, [1919] 1 K. B. 474. **Mentd.** *Wiedegemann v. Walpole* (1889), 53 J. P. 614.

1456. —.]—An action was brought for an injunction to restrain deft. from selling certain buttons alleged to be an infringement of pltf.'s registered trade mark. Deft., believing that he had no defence to the action, consented to an order for a perpetual injunction with costs. Before the order was drawn up, he received a letter from the manufacturer of the buttons which were made in Germany, wherefrom it appeared, that the buttons had been sold in this country long before the registration of pltf.'s trade mark. On motion by deft. that he might be relieved from the consent so given:—*Held*: a party who has deliberately consented to a perpetual injunction cannot be permitted to withdraw his consent merely because he has subsequently discovered that he might have a good defence to the action, the case was not one of mistake, & the motion must be refused.—*ELSAS v. WILLIAMS* (1884), 54 L. J. Ch. 336; 52 L. T. 39; 1 T. L. R. 144.

See, also, BARRISTERS, Vol. III., p. 344, No. 341.

SECT. 7.—BY DISMISSAL OF ACTION.

1457. No order necessary—Injunction ipso facto dissolved.]—Petitions of appeal ought not to suppress material facts, especially steps of procedure. A party having acquiesced in the cause being heard below, on the question of costs only, cannot afterwards be permitted to appeal from the decree. Bill being dismissed, an injunction falls with it, without special order.—*WILLIS v. YATES* (1834), *Coop. temp. Brough*. 498; 47 E. R. 177, L. O.

1458. —.]—On dismissal of a bill an injunction falls of course.—*GREEN v. PULSFORD* (1839), 2 Beav. 70; 48 E. R. 1105.

*Annotations:—*Mentd. *Grove v. Bastard* (1848), 2 Ph. 619; *Grove v. Bastard* (1851), 1 De G. M. & G. 69; *Boyse v. Rossborough* (1854), 23 L. J. Ch. 305; *Cockcroft v. Sutcliffe* (1856), 27 L. T. O. S. 34; *Carver v. Richards* (1860), 6 Jur. N. S. 410.

SECT. 8.—EFFECT OF AMENDMENT.

See R. S. C., Ord. 28; PRACTICE.

1459. Whether injunction dissolved.]—*MASON v. MURRAY*, No. 1372, *ante*.

ptlf. moved to commit defts.:—*Held*: the amendment was not a waiver of the injunction.—*MCDONELL v. MCKAY* (1866), 12 Gr. 414.—CAN.

1459 iv. —.]—An *ex p.* injunction having been dissolved on the ground that the questions involved were of such difficulty that they should be decided at the hearing only, the bill was amended & a new *ex p.* injunction granted. Upon motion to continue it:—*Held*: pltf. were entitled to have a full consideration of all the questions involved; & a more deliberate argument having solved the difficulties, the injunction was continued.—*CANADIAN PACIFIC RY. CO. v. NORTHERN PACIFIC & MANITOBA RY. CO.* (1888), 5 Man. L. R. 301.—CAN.

1459 v. —.]—Although irregular to file an amended bill without leave, after an order to continue an injunction on the terms of speeding the cause, yet the amendment being material, & such as the ct. would have allowed, & pltf. offering terms which tended to prevent delay, the injunction was continued, pltf. paying the costs of deft.'s motion to dissolve it.—*WELSH v. HANNAN* (1805), 2 Sch. & Lef. 518.—IR.

1460. — Where record not altered.]—The common injunction is not dissolved by pltf. obtaining an order to amend without saving the injunction, unless the record is altered.—*DAVIS v. DAVIS* (1829), 2 Sim. 515; 57 E. R. 881.

Annotation:—*Reid. Ferrand v. Hamer* (1838), 4 My. & Cr. 143.

1461. —.]—The mere fact of amending a bill does not of itself dissolve or discharge the common injunction though it may furnish a ground for dissolving or discharging it on an application for that purpose.—*BROOKS v. PURTON* (1842), 1 Y. & C. Ch. Cas. 271; 11 L. J. Ch. 122; 6 Jur. 94; 62 E. R. 885.

Annotations:—*Mentd. Lynch v. Lecesne* (1842), 1 Hare, 626; *Hunter v. Nockolds* (1847), 6 Hare, 12; *Read v. Barton* (1857), 3 K. & J. 166.

1462. — Where new plaintiff added.]—A. obtained a special injunction, until answer or further order, in a suit in which he was sole pltf., & then amended the bill by making B. a co-pltf.:—*Held*: the injunction was gone by the amendment.—*A.-G. v. MARSH* (1849), 16 Sim. 572; 18 L. J. Ch. 272; 13 L. T. O. S. 63; 13 Jur. 317; 60 E. R. 996.

1463. —.]—An injunction, if granted upon merits, is not dissolved by amendment of the bill, though the amendment be without saving the injunction.—*HARVEY v. HALL* (1870), L. R. 11 Eq. 31; 23 L. T. 391.

Annotations:—*Mentd. Mickelthwaite v. Fletcher* (1879), 27 W. R. 793; *Re Fereday*, [1895] 2 Ch. 437.

Effect of amendment of pleadings—Pending motion for injunction.]—See Part XI., Sect. 2, sub-sect. 6, *ante*.

SECT. 9.—EFFECT OF DEATH OF EITHER PARTY.

See, now, R. S. C., Ord. 17, r. 8; PRACTICE.

1464. Perpetual injunction—Remains effective.]—Where a perpetual injunction is decreed, it is not necessary to revive upon the death of a party, for the purpose of keeping on foot the injunction.—*ASKEW v. TOWNSEND* (1772), 2 Dick, 471; 21 E. R. 353, L. C.

Annotations:—*Consd. Morgan v. Soudamore* (1796), 3 Ves. 195; *Andrews v. Lockwood* (1847), 2 Ph. 398.

1465. Interlocutory order—Representative must revive in given time—Or injunction dissolved.]—When an injunction has been obtained in a cause, which afterwards abates by the death of deft., the practice is to move on the part of deft.'s representatives that pltf. may revive within a reasonable time, a week generally, or the injunction may be dissolved.—*STUART v. ANCELL* (1787), 1 Cox, Eq. Cas. 411; 29 E. R. 1226, L. C.

1466. — — —.]—Where deft. dies pending an injunction against him to restrain proceedings in an ejectment, the heir-at-law may move that pltf. in equity may revive within a week or the injunction be dissolved.—*HILL v. HOARE* (1788), 2 Cox, Eq. Cas. 50; 30 E. R. 24, L. C.

1467. — — —.]—*BROWNE v. WARNER* (1809), 3 Beav. 296, n.; 49 E. R. 116; *previous proceedings* (1808), 14 Ves. 409, L. C.

Annotations:—*Consd. Chowick v. Dimes* (1840), 3 Beav. 290. *Reid. Wheeler v. Malins* (1818), 4 Madd. 171. *Mentd. Lee v. Lee* (1842), 1 Hare, 617.

Part XIV.—Costs.

SECT. 1.—GENERAL RULES.

SUB-SECT. 1.—SUCCESSFUL PLAINTIFF GETS COSTS.

A. In General.

1468. General rule.]—Where defts. imitated a trade mark not knowing it to be pltf.' & when served with a copy of the bill, instead of engaging to give up the practice of imitation contested pltf.' rights, costs were ordered to follow the injunction.—*M'ANDREW v. BASSETT* (1864), 4 De G. J. & Sm. 380; 4 New Rep. 123; 33 L. J. Ch. 561; 10 L. T. 442; 10 Jur. N. S. 550; 12 W. R. 777; 46 E. R. 965, L. C.

Annotations:—*Mentd. Leather Cloth Co. v. American Leather Cloth Co.* (1865), 35 L. J. Ch. 53; *Maxwell v. Hogg*, *Hogg v. Maxwell* (1867), 2 Ch. App. 307; *Wotherspoon v. Currie* (1872), 42 L. J. Ch. 130; *Raggett v. Findlater* (1873), L. R. 17 Eq. 29; *Kelly v. Byles* (1880), 13 Ch. D. 682; *Mouson v. Boehm* (1884), 26 Ch. D. 398; *Re Alpine Trade Mk., Stapley & Smith's Appln.* (1885), 54 L. J. Ch. 727; *Re Schmidt's Trade Mk., Jackson v. Napper* (1886), 35 Ch. D. 162; *Borthwick v. Evening Post* (1888), 37 Ch. D. 449; *Licensed Victuallers' Newspaper Co. v. Bingham* (1888), 38 Ch. D. 139; *Re Paine's Trade Mks., Paine v. Daniel's Breweries* (1893), 68 L. T. 801; *Re Salt's Appln.*, [1894] 3 Ch. 166; *Re Densham's Trade Mk.* (1895), 43 W. R. 515.

1469. —.]—*COOPER v. WHITTINGHAM*, No. 39, *ante*.

PART XIII. SECT. 9.

1464 i. Perpetual injunction—Remains effective.]—When a deft. dies after injunction obtained against him, upon revival of the suit against his personal representative, the injunction stands continued without further order.—*KENNEDY v. LLOYD* (1845), 8 I. Eq. R. 581.—IR.

PART XIV. SECT. 1, SUB-SECT. 1.—

A.

1468 i. General rule.]—*CAMPBELL v.*

SUN PRINTING & PUBLISHING CO., [1921] 2 W. W. R. 287.—CAN.

1468 ii. —.]—The costs of an injunction order await the event of the cause, & are taxed with the costs of the cause. They are never given in the first instance.—*ANON.* (1818), 2 Mol. 327.—IR.

1468 iii. —.]—In a possessory suit for an injunction, the rule that costs of suit are not given, does not apply to the costs of the motion showing cause; & if the cause is deemed insufficient, deft. becomes liable to pay the costs of

B. No Application prior to Action.

1470. Plaintiff not deprived of costs—If successful.]—An *interim* injunction having been granted deft., instead of submitting, insisted on his right to continue the publication of his song:—*Held*: he must pay the costs of a motion against him to continue the injunction, although it appeared that no application had been made to him by the pltf. previously to the filing of the bill.—*CHAPPELL v. DAVIDSON* (1855), 2 K. & J. 123; 69 E. R. 719; *on appeal* (1856), 8 De G. M. & G. 1, L. JJ.

Annotation:—*Mentd. Wakefield v. Buccleugh* (1865), 13 W. R. 856.

1471. — — —.]—A suit was instituted to restrain the user of a trade mark, & for an account. No application was made to deft. before suit, & deft. said he would have desisted if applied to. At the hearing the account was abandoned, but a perpetual injunction was granted:—*Held*: deft. must pay the costs.—*BURGESS v. HATELEY* (1858), 26 Beav. 249; 53 E. R. 894.

1472. — — —.]—*COOPER v. WHITTINGHAM*, No. 39, *ante*.

1473. — — —.]—*GOODHART v. HYETT*, No. 342, *ante*.

the motion.—*COPPINGER v. CARNEGIE* (1849), 1 Ir. Jur. 27.—IR.

1468 iv. —.]—Suits for injunctions to restrain waste should not be brought to a hearing when no account is sought, or the account is waived, if an injunction has been obtained, & the right to continue it is not disputed. If, however, resp.'s conduct forces the case to a hearing, petitioner will, if successful, be entitled to his costs of suit.—*DUNN v. DUNNE* (1864), 15 L. Ch. R. 278.—IR.

Sect. 1.—General rules: Sub-sect. 1, B., C., D., E. & F.; sub-sect. 2.]

1474. ———.]—UPMANN v. FORESTER, No. 1532, *post*.

1475. ———.]—The proprietor of a registered design instructed the manufacturer who made for him the articles to which the design was applied, to stamp the proper mark upon them, & furnished him with a die for the purpose. By inadvertence the manufacturer marked some of the articles with a mark which belonged to another design registered by the same proprietor, the copyright of which had expired, using for the purpose by mistake an old die which remained in his possession, & the proprietor, after Patents, Designs & Trademarks Act, 1883 (c. 57), came into operation, sold some of the articles thus wrongly marked without observing the error. The letters Rd. formed part of both the marks:—*Held*: an innocent infringer of a registered design must pay the costs of a motion for an injunction to restrain him from infringing, though pltf. had given him no notice of the infringement before serving him with the writ in the action.—WITTMAN v. OPPENHEIM (1884), 27 Ch. D. 260; 54 L. J. Ch. 56; 50 L. T. 713.

Annotation:—Distd. Smith v. Lewis Roberts (1888), 5 R. P. C. 611.

1476. ———.]—Where pltf., in anticipation of a wrongful act on the part of deft., commenced an action & obtained an injunction upon an *ex p.* application without previous notice to deft. not to commit the wrong:—*Held*: there was no misconduct on the part of pltf. to disentitle him to his costs.—RUSKIN v. ROBINSON (1885), 2 T. L. R. 18.

C. Wrongful Act Discontinued before Hearing.

1477. Plaintiff entitled to costs.]—The lessee of a theatre held liable for obstruction to access to adjacent premises, by reason of the assembling of a crowd previously to the opening of the doors of the theatre. The ct. refused an injunction to the occupier of the adjacent premises, where such obstruction existed at the time of action brought, but had since ceased by reason of the action of the police; but gave pltf. costs.—BARBER v. PENLEY, [1893] 2 Ch. 447; 62 L. J. Ch. 623; 68 L. T. 662; 9 T. L. R. 359; 37 Sol. Jo. 355; 3 R. 489.

Annotations:—*Folld.* Wagstaff v. Edison Bell Phonograph Corp. (1893), 10 T. L. R. 80. *Mentd.* Riess v. The Oxford (1893), 37 Sol. Jo. 842; Germaine v. London Exhibitions (1896), 75 L. T. 101; Anglo-Algerian S.S. Co. v. Houlder Line, [1908] 1 K. B. 659; Lyons v. Gulliver, [1914] 1 Ch. 631.

1478. ———.]—WAGSTAFF v. EDISON BELL PHONOGRAPH CORPN., LTD. (1893), 10 T. L. R. 80. *Annotation*:—*Refd.* Lyons v. Gulliver, [1914] 1 Ch. 631.

1479. ———.]—CARR & CO. v. BATH GAS LIGHT & COKE CO., [1899] W. N. 265, n.

Annotations:—*Folld.* Dunning v. Grosvenor Dairies, [1900] W. N. 265. *Refd.* Chester (Dean & Chapter) v. Smelting Corp. (1901), 85 L. T. 67.

1480. ———.]—DUNNING v. GROSVENOR DAIRIES, LTD. (1900), 45 Sol. Jo. 101.

Annotation:—*Refd.* Chester (Dean & Chapter) v. Smelting Corp. (1901), 85 L. T. 67.

D. Interlocutory Injunction granted and Plaintiff proceeds.

1481. When extra costs allowed—Proceedings for costs only.]—On an interlocutory application, an injunction was granted, which determined the principal subject of dispute between the parties. The ct. held, that pltf. was not justified in afterwards proceeding in the cause for the costs only, & gave him no costs subsequent to that time.—TAYLOR v. DAVIS (1838), 7 L. J. Ch. 179.

1482. ——— Proceedings for perpetual injunction.]—Where the general merits of pltf.'s bill, praying an injunction to restrain the infringement of pltf.'s copyright have not been displaced by the defence, pltf. will be entitled to his costs for bringing such cause to a hearing to obtain a perpetual injunction after an *interim* injunction has been obtained in such cause.—MAYHEW v. MAXWELL (1861), 3 L. T. 847; *previous proceedings* (1860), 1 John. & H. 312.

Annotations:—*Mentd.* Smith v. Johnson (1863), 4 Giff. 632; Cox v. Land & Water Journal Co. (1869), L. R. 9 Eq. 324; Clark v. Bishop (1872), 25 L. T. 908; Affalo v. Lawrence & Bullen, [1903] 1 Ch. 318.

1483. ——— Application to defendant—To dispose of costs on motion.]—On deft. submitting to pltf.'s demands, pltf. ought not to bring the cause to a hearing without first applying for deft.'s consent to have the costs disposed of on motion. But if deft. objects to that course, a motion that deft. may pay the costs of the suit, will be refused.—MORGAN v. GREAT EASTERN RY. CO. (1863), 1 Hem. & M. 78; 2 New Rep. 60; 8 L. T. 270; 11 W. R. 662; 71 E. R. 35; *subsequent proceedings*, 1 Hem. & M. 560.

Annotations:—*Consd.* Tanqueray v. Bowles (1872), L. R. 14 Eq. 151; Sonnenschein v. Barnard (1887), 57 L. T. 712. *Mentd.* Smith v. Whitmore (1863), 1 Hem. & M. 576.

1484. ———.]—Where upon an interlocutory motion in an action pltf. obtains the relief which he seeks, he is bound to make an application to deft. to have the costs disposed of on motion, & unless he does so is precluded from having the extra costs occasioned by going on to trial. But if deft. refuses to allow the matter to be disposed of on motion, or if there is any question remaining open between the parties to be decided, the case cannot be so dealt with.—SONNENSCHN v. BARNARD (1887), 57 L. T. 712.

E. Defendant an Agent only.

1485. Knowledge of infringement by principal.]—Several boxes of cigars, bearing forged brands, were forwarded from correspondents abroad to agents in this country. The makers, whose brand had been forged, applied to the agents for information, & they gave names of the consignors, & offered either to send back the cigars or erase the brands. They were not previously aware that the brands were false:—*Held*: a bill for injunction would lie against the agents, but under the circumstances, they were not ordered to pay costs.—UPMANN v. ELKAN (1871), 7 Ch. App. 130; 41 L. J. Ch. 246; 25 L. T. 813; 36 J. P. 295; 20 W. R. 131, L. C.

Annotations:—*Expld.* Upmann v. Forrester (1883), 24 Ch. D. 231. *Refd.* Moet v. Pickering (1878), 8 Ch. D. 372; Fennessy v. Day & Martin (1886), 55 L. T. 161. *Mentd.* Catterson v. Anglo-Foreign Manufacturing Co. (1910), 28 R. P. C. 74.

1486. ———.]—TWINBERROW v. BRAID & CO., [1878] W. N. 169.

F. Exceptions.

1487. Extra costs—Untrue allegation in claim.]—As a general rule, costs follow the result; but where the costs of an injunction suit had been increased by an allegation in the bill which was untrue, although the substantial case of pltf. was established, the ct. directed such increased costs to be paid by pltf.—PIERCE v. FRANKS (1846), 15 L. J. Ch. 122; 10 Jur. 25; *sub nom.* PEARCE v. FRANKS, 6 L. T. O. S. 314.

1488. ——— Mistake as to plaintiff's title.]—A wrongdoer cannot be heard to complain that in proceedings hurriedly taken to stop the wrong pltf. has not accurately stated his title, & in such a case deft. will not be relieved from the payment

of the extra costs occasioned by pltf.'s mistake as to his title.—*A.-G. v. TOMLINE* (1877), 5 Ch. D. 750; 46 L. J. Ch. 654; 36 L. T. 684; 25 W. R. 803.

Annotation.—*Mentd. Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562.

1489. Plaintiff morally wrong.]—LANDED ESTATES CO., LTD. v. WEEDING, No. 598, *ante*.

1490. Injunction granted involving hardship.]—BRODER v. SAILLARD, No. 1133, *ante*.

1491. Defendant only technically wrong.]—On Sept. 18, 1857, a piece of land was conveyed to the minister & churchwardens of a district church as a site for a church school under the inspection of Govt. The deed provided that the management of the school, & selection, appointment, & dismissal of the schoolmaster & mistress & their assistants should be vested in & exercised by a committee consisting of the vicar & curate or curates & the churchwardens of the district church & five other named persons, subscribers to the school. Vacancies among these five were to be filled up by election by the subscribers to the school for the current year. The deed contained a proviso "that no default of election nor any vacancy during any current year shall prevent the other members of the committee from acting until the vacancy be filled up." The five subscribers appointed by the deed had long since died or left the neighbourhood, & no one had ever been elected in their place. On Sept. 14, 1891, a meeting of the committee was held, at which the vicar, curate, & one of the churchwardens were present, & also a sidesman, who was not properly a member of the committee. No notice had been sent to the other churchwarden. At this meeting a resolution was passed to terminate the engagements of all the existing staff, in order to make new arrangements. The reason given was, that new arrangements were necessary in consequence of Elementary Education Act, 1891 (c. 56). No charges of misconduct or inefficiency were brought against the master. The master brought an action to restrain the committee from dismissing him on the grounds that the committee was improperly constituted, & he ought to have been heard in his own defence:—*Held*: (1) the committee were competent to proceed, notwithstanding that the vacancies of elected members had never been filled up; but the absence of notice to one churchwarden & the presence of a sidesman at the committee were fatal objections, & an injunction must be granted to restrain the dismissal; (2) the ct. refused to decide whether pltf. ought to have been heard, but granted the injunction without costs on the ground that the committee were substantially right, though they had made a technical mistake.—*LANE v. NORMAN* (1891), 61 L. J. Ch. 149; 66 L. T. 83; 40 W. R. 268.

Annotations: *As to* (1) *Distd. Harries v. Crawford* (1919), 83 J. P. 197. *Reid. Pottle v. Sharp* (1896), 65 L. J. Ch. 908; *Meyers v. Hennell*, [1912] 2 Ch. 256.

1492. Infringement of plaintiff's right inconsiderable.]—WALTER v. STEINKOPFF, No. 1540, *post*.

1493. Payment into court by defendant—With denial of liability—Sum paid adequate compensation—R. S. C., Ord. 22, r. 6.]—Deft. had erected on his land a pilaster which, at a height of some 12 feet above the private road, projected about

20 inches over. Pltf. asked for a mandatory injunction for the removal of the pilaster, but deft. while denying liability paid £5 into ct., & pleaded that that was enough to satisfy pltf.'s claim in respect of the projection:—*Held*: damages should be awarded in lieu of a mandatory injunction, & as damages to the amount of more than £5 had not been shown & the judge was not satisfied that there were reasonable grounds for not accepting the sum paid in, pltf. must, under above rule, pay the costs of the issue as to liability in respect of the pilaster.—*PETTER v. PARSONS*, [1914] 1 Ch. 704; 84 L. J. Ch. 81; 30 T. L. R. 328; *on appeal*, [1914] 2 Ch. 653, C. A.

SUB-SECT. 2.—WHEN PLAINTIFF ONLY PARTLY SUCCESSFUL.

See, now, R. S. C., Ord. 65, r. 2.

1494. No costs on either side.]—ROCHDALE CANAL CO. v. KING, No. 527, *ante*.

1495. —.]—Where a bill, filed to restrain the obstruction of ancient lights, claimed five windows as ancient lights, &, on an issue directed, pltf. failed to establish their claim to all the windows, it appearing that the new windows could not be obstructed without obstructing the old ones:—*Held*: pltf. on their present bill were not entitled to any relief; but on their offering to restore their windows to their former position, an injunction was granted, but with costs against pltf., except as to the issue.

No costs given of an issue in which neither party were completely successful.—*WEATHERLEY v. Ross* (1863), 1 Hem. & M. 349; 1 New Rep. 228; 32 L. J. Ch. 128; 27 J. P. 388; 71 E. R. 152.

1496. Part costs to plaintiff.]—Pltf. were purchasers in perpetuity of graves & vaults in a private burial ground, of which they had been in possession for upwards of twenty years. The burial ground was closed under the provisions of Burial Act, 1852 (c. 85), & thereupon defts. the trustees of the burial ground, commenced levelling the graves, filling in the vaults, & removing the tomb stones, which they used for the purposes of paving the courtyard surrounding the chapel. Pltf. filed their bill to restrain defts., praying an injunction which extended to the whole of the graves & vaults in the churchyard. An interlocutory injunction was granted restraining defts. from obliterating, removing or defacing the graves & monuments belonging to pltf. individually, & from applying the ground to any other purposes, but the ct. refused to extend the injunction to the graves & tombstones of persons who were not parties to the suit. The injunction was afterwards made perpetual, although defts. claimed, as standing in the place of mtgees. of the burial-ground, in whom the legal estate was vested.

Pltf. having claimed greater rights than they were entitled to, no costs were given up to, & including the interlocutory motion, but defts. were ordered to pay the costs subsequently incurred.—*MORELAND v. RICHARDSON* (1857), 24 Beav. 33; 26 L. J. Ch. 690; 21 J. P. 741; 3 Jur. N. S. 1189; 53 E. R. 269.

Annotations:—*Mentd. Foster v. Dodd* (1866), L. R. 1 Q. B. 475; *Thomas v. Jennings* (1896), 66 L. J. Q. B. 5.

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1492 I. Infringement of plaintiff's right inconsiderable.]—Pltf. was ordered to pay the costs of an interim injunction obtained by him, because the facts

proved at the trial showed no anticipation of such immediate & serious damage as to justify the application for it.—*SKLITZKY v. CRANSTON* (1892), 22 O. R. 590.—CAN.

n. Misrepresentation in obtaining

injunction.]—WINNIPEG & HUDSON'S BAY CO. v. MANN (1890), 6 Man. L. R. 409.—CAN.

o. Discretion of judge.]—THORNTON v. M'TAGGART (1910), 44 I. L. T. 119.

Sect. 1.—General rules: Sub-sects. 2 & 3.]

1497. Costs set off as between parties.]—B. alleged that in 1864, he had obtained the consent of the A. co., the owners of an adjoining tenement to open two windows in a party wall separating the two tenements. B. had previously opened three other windows in the party wall. In 1875 the A. co. served B. with notice under Metropolitan Building Act that they intended blocking up all five windows. The three windows in 1875 had been opened up eighteen years. Evidence of consent upon the A. co.'s part to B.'s opening the two windows was admitted by the Vice-Chancellor, who held that such consent was fully proved as to the two windows, & that as to the other three after eighteen years a previous consent to open them must be implied:—*Held*: the evidence of consent was inadmissible, & as the other three windows were not ancient lights pltf.'s case as to the five windows failed, & that part of his bill must be dismissed with costs.

The Vice-Chancellor had also granted an injunction as to eight other windows as to which there was no appeal:—*Held*: that as the pltf. had succeeded as to part of his suit & failed as to the rest, the costs of the part as to which he had failed must be taxed & set-off against those of the part as to which he had succeeded, & the balance of such costs only paid to the party entitled to most costs.—*BOURKE v. ALEXANDRA HOTEL CO., LTD.* (1877), 25 W. R. 782, C. A.

1498. —.]—Pltf. claiming an injunction in respect of three separate subjects of complaint, succeeded as to one, but failed as to the remainder. By the order, taxation was directed of the costs of deft. of so much of the action as had been dismissed, & of pltf. of the rest of the action, with a set-off of the costs of pltf. against those of deft. The taxing master taxed pltf.'s & deft.'s costs of the whole action, & allowed one-third to pltf. & two-thirds to deft. Upon a summons by pltf., to vary the certificate, by ordering each item to be considered separately, & according to the subject of complaint, in respect of which each item might turn out to have been incurred, to be paid by pltf. or deft., as the case might be:—*Held*: that the taxing master had proceeded upon the usual principle, & the certificate was correct.—*KNIGHT v. PURSELL* (1879), 49 L. J. Ch. 120; 41 L. T. 581; 28 W. R. 90.

*Annotations:—*Consd. *Sparrow v. Hill* (1881), 7 Q. B. D. 362. *Apld.* *Jenkins v. Jackson*, [1891] 1 Ch. 89. *Refd.* *Holloway & Webb v. Crompton*, [1916] 2 Ch. 436.

1499. —.]—*SELLORS v. MATLOCK BATH LOCAL BOARD* (1885), 14 Q. B. D. 928; 52 L. T. 762.

*Annotations:—**Refd.* *Graham v. Newcastle-upon-Tyne Corpn.* (1892), 67 L. T. 260; *Parish v. London City Corpn.* (1901), 67 J. P. 55.

1500. —.]—In an action for nuisance by vibration & by offensive behaviour, judgment was given for defts. on so much of the statement of claim as related to offensive behaviour, & damages were given to pltf. on the ground of nuisance by vibration, which was the point on which pltf. mainly relied. The judgment referred it to the taxing master to tax defts.' costs of so much of the action as related to offensive behaviour & to tax pltf.'s costs of the rest of the action, & the taxing master was to set off the costs of defts. against the costs of pltf., & to certify the balance; & defts. were ordered to pay such balance to pltf.

The taxing master, in taxing the bill of costs brought in by pltf., allowed him one moiety of each item which related to both the issues, & allowed him in full the items which related solely to the issue on which he had succeeded, & followed the same rule in taxing the bill brought in by defts. The result was that pltf. had a small balance to receive. Pltf. appealed from this taxation:—*Held*: this taxation was correct, & though in the Q. B. Div. this form of order would probably have been construed as giving pltf. his costs of the action except so far as they had been increased by the issue on which he had failed, the settled practice in the Ch. Div. was that under this form of order the general costs should be apportioned ratably between the issues.—*JENKINS v. JACKSON*, [1891] 1 Ch. 89; 60 L. J. Ch. 206; 63 L. T. 688; 39 W. R. 242, C. A.

*Annotations:—**Apld.* *Todd v. N. E. Ry.* (1903), 87 L. T. 710. *Refd.* *Holloway & Webb v. Crompton*, [1916] 2 Ch. 436.

1501. —.]—In 1890 H. registered a trade mark. In 1896 P., who had infringed the trade mark without knowing of H.'s registration or user of it, communicated with H., asking for the date of registration & disclaiming any intention to infringe. Negotiations ensued between the parties, in which P. was ready to give the undertaking asked for by H. subject to a condition that H. should not advertise it. H. was ready to agree to such condition on P. agreeing to disclose the names of his customers to whom he had supplied the goods. P. would not so agree, & the negotiations fell through. H. issued a writ asking for an injunction, damages or an account of profits, & costs. P., by his defence, offered an undertaking, but made no offer as to costs. At the trial it was admitted that H. was not entitled to damages or an account of profits:—*Held*: H. was entitled to an injunction & the costs of the action so far as it sought relief by way of injunction, but deft. was entitled to the costs of the action so far as it asked for damages or an account, such costs to be set off.—*HIPKINS (G. F.) & SON v. PLANT (W. & J.)* (1898), 15 R. P. C. 294.

1502. —.]—Pltfs. had claimed an injunction to restrain defts. from altering the level of a road so as to interrupt an access to pltfs.' premises; also an injunction to restrain defts. from entering on pltfs.' premises, & damages against defts. for having entered upon pltfs.' premises & pulled down a wall. Defts. having paid £60 into ct. in respect of pltfs.' claim for damages, pltfs. accepted the same in full satisfaction of such claim. At the trial of the action the ct. ordered that the £60 should be paid out of ct. to pltfs. in satisfaction of the cause of action arising out of the entry, & that defts. should pay to pltfs. their costs of the action so far as related to the claim; further, that the rest of pltfs.' action should be dismissed without costs. On taxation pltfs. were allowed the general costs of the action. This was a summons to vary the taxing master's certificate by directing an apportionment of such general costs:—*Held*: R. S. C., Ord. 65, r. 2, as altered in 1902, made no change in the practice of the Ch. Div. as established by *Jenkins v. Jackson*, No. 1500, *ante*. The addition to that order was intended to remove the doubt whether a judge had power to avoid the expense of an apportionment of each item of costs by directing that one party should pay a

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1497 i. Costs set off as between parties.]
—In ordinary cases where the facts are disputed, the costs are generally made

costs in the cause; the failure of defts. to deny the allegations upon which the application is based may take the case out of the ordinary course; but where pltf. does not obtain the whole of the

relief for which he applies in his notice of motion, costs should be made costs in the cause.—*FRANKLYN v. PEOPLES' HEAT & LIGHT CO.* (1899), 32 N. S. R. 44.—CAN.

fractional part of the entire costs.—*TODD v. NORTH EASTERN RY. CO.* (1903), 87 L. T. 710; 51 W. R. 333; 47 Sol. Jo. 239; *affd.*, 88 L. T. 112, C. A.
Annotation:—*Consd. Holloway & Webb v. Crompton*, [1916] 2 Ch. 436.

1503. —.—.]—Defts. deposited on land claimed by pltf. quantities of mud, sillage & timber, & as was alleged by pltf., thereby damaged his roads & crops. Defts. in their statement of defence justified the acts complained of on the ground that they were owners of the lands in question, & alternatively alleged that they had done the acts complained of under statutory authority. Pltf. claimed (*inter alia*) a declaration that defts. were not entitled to make such deposit upon his lands, an injunction, & damages. Defts., while denying liability, brought into ct. the sum of £5, & said that that sum was enough to satisfy the claim in respect of the matters pleaded. Pltf. thereupon gave notice that he accepted the sum paid into ct. "in satisfaction of the claim in respect of which it was paid in." On an appeal by defts. from a decision of the master awarding pltf. his costs in the action:—*Held*: R. S. C., Ord. 22, r. 7, could not apply in the case of a claim for a declaration of title to land or for an injunction. The costs, therefore, were in the discretion of the ct., & as it appeared doubtful whether an injunction could in any event have been granted, pltf. should have his costs, except in so far as they had been increased by the claim for an injunction, & so far as defts.' costs had been increased by such claim they were to be paid by pltf.—*YOUNG v. BLACK SLUICE COMRS.* (1909), 73 J. P. 265.

1504. —.—.]—The addition made in 1902 to R. S. C., Ord. 65, r. 2, made an alteration in the practice of the Ch. Div., & is a rule of construction of orders in the form referred to in the first part of the added words. Where, therefore, an order is made giving a pltf. part of the relief asked for & ordering taxation of his costs of the action, except so far as it relates to specified claims on which he has failed, & ordering taxation of deft.'s costs of those claims, with a direction as to set-off, pltf. is entitled to the general costs of the action & deft. is not entitled to have them apportioned.—*HOLLOWAY (GEORGE) & WEBB, LTD. v. CROMPTON*, [1916] 2 Ch. 436; 86 L. J. Ch. 364; 115 L. T. 521.

1505. Plaintiff deprived of costs—Liability for part of defendant's costs.—*COPESTAKE v. WEST SUSSEX COUNTY COUNCIL*, [1911] 2 Ch. 331; 80 L. J. Ch. 673; 105 L. T. 298; 75 J. P. 465; 9 L. G. R. 905.

SUB-SECT. 3.—SUCCESSFUL DEFENDANT GETS COSTS.

1506. General rule.—I cannot find, in the assertion of a legal right to do a certain thing which it is contended is not & has not hitherto been actionable, any threat or expression of intention to do that thing in the event of its being decided that the doing of it would be actionable; & in the absence of evidence of any such threat or intention, I come to the conclusion that pltf.'s case fails as to an injunction, as well as damages. I have given judgment, dismissing the action without costs. I adopt entirely the general rule that costs ought to follow the result, & when an action is brought for an injunction & damages with respect to what is not

an actionable wrong, the successful deft. ought to receive his costs from pltf. But to this general rule there are exceptions, & I think this case an exception for several reasons, of which it is sufficient for me to mention two. In the first place, if I gave deft. the general costs of the action, I should certainly make him pay the costs of each issue which he has set up as to infringement & copying, upon every one of which he had failed. If this were done, deft. certainly would have to pay at least as much in costs as he would be entitled to receive; & to avoid a very troublesome & difficult apportionment of costs on taxation, I cut the knot by giving no costs to either party (*NORTH, J.*).—*SUGG v. BRAY* (1884), 54 L. J. Ch. 132; 51 L. T. 194; *Griffin's Patent Cases*, 210.

Annotation:—*Mentd. Sharp v. Brauer* (1886), *Griffin's Patent Cases*, 205.

1507. Exceptions to general rule—Defendant's conduct dubious.—If a trader imitates another person's label or trade mark, & sails so near the wind as just to avoid an injunction, though the ct. does not grant the injunction it will not willingly give him any costs of the proceedings.—*BASS v. DAWBER* (1869), 19 L. T. 626.

1508. —.—.]—*HARRISON v. GOOD*, No. 616, *ante*.

1509. —.—.]—If it is proved that a trade mark was adopted with a fraudulent intention, the ct. will not refuse to grant an injunction to restrain the use of it, on the ground that many years have elapsed since its adoption. But after a trade mark has been used for many years the ct. will require clearer proof that it was first used for the purpose of fraud than if it had been recently adopted. In such a case it is not sufficient to show that a trade mark was calculated to deceive, but pltf. must distinctly prove that he has been actually injured by its use.

As some doubt is thrown on defts.' motive . . . I think the bill should be dismissed without costs (*MELLISH, L.J.*).—*RODGERS v. RODGERS* (1874), 31 L. T. 285; 22 W. R. 887, L. J.J.

Annotation:—*Mentd. Re Heaton's Trade Mk.* (1884), 27 Ch. D. 570.

1510. —.—.]—*WYLAM v. CLARKE*, [1876] W. N. 68.

1511. —.—.]—Pltfs. were old-established manufacturers of "B. Warsop's Cricket Bats." Deft. A. W., who was formerly in pltfs.' employ, commenced to sell "A. Warsop's World-renowned Cricket Bats," stamped with his initial & surname, & with a device somewhat similar to that which appeared on pltfs.' bats. The word "registered" appeared on both bats, pltfs.' device being in fact registered as a trade mark, but not defts.' although steps had been taken to obtain registration. On pltfs.' motion for an *interim* injunction, no order was made on deft. undertaking to sell his bats without any mark except his name & the address "Marylebone":—*Held*: the markings on the two bats were so distinct that it was impossible for an average man about to purchase a cricket bat to be deceived into thinking that deft.'s bat was pltfs.'; & the action was dismissed, but without costs, by reason of deft.'s wrongful user of the word "registered."—*WARSOP (B.) & SONS, LTD. v. WARSOP* (1904), 21 R. P. O. 481.

1512. —.—.]—An old turnpike road passed over the waste of a manor, & between the metalled road & an ancient fence on its north side there was

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15061.

— deft. succeeding in substantially varying an *ex p.* order on motion to set aside, will be given any event.—*CLINTON v. SELLARS* (1908), 6 W. L. R. 788; 1 Alta. L. R. 129.—CAN.

Sect. 1.—General rules: Sub-sects. 3, 4 & 5. Sect. 2: Sub-sects. 1 & 2.]

a narrow strip of waste land about 350 yards in length & varying from 12 feet to 33 feet in width. An irregular footpath ran along the strip of waste, & for over forty years the public had walked over the strip of waste & footpath without restriction. For many years the lord had received small annual payments for the road trimmings, including the strip of waste, & for permitting the erection of telephone posts on the strip of waste. In an action by pltf., as lord of the manor, to restrain deft. council, the road authority, from converting the strip of waste into a public gravelled footway, deft. council pleaded that the strip of waste was part of the highway vested in them under Local Government Act, 1888 (c. 41):—*Held*: the above acts of ownership by the lord were insufficient to rebut the presumption that the strip of waste had been dedicated to the use of the public, & the action was dismissed. But it was dismissed without costs, inasmuch as deft. council had by their previous correspondence & acts admitted the title of pltf. & led him to believe that he had a good cause of action.—*EAST v. BERKSHIRE COUNTY COUNCIL* (1911), 106 L. T. 65; 76 J. P. 35.

1513. — Defendant only partially successful.] —*SUGG v. BRAY*, No. 1506, *ante*.

SUB-SECT. 4.—WHEN BOTH PARTIES AT FAULT.

1514. No costs given.]—A landowner filed his bill & applied for an injunction to prevent a railway co. from prosecuting their works on his land, upon which they had entered without notice & without consent, & which lay without the limits of deviation. On the hearing of the motion, it was ordered to stand over for the decision of the Board of Trade. The Board of Trade decided in favour of the co. The ct. refused to give pltf. the costs of the motion.

The ct. can make an order as to the costs of a motion, although the motion may not have included any mention of costs.

Having regard to the two views—the one in favour of the co. from the decision of the Board of Trade, the other of pltf., by reason of no notice having been given of the deviation, . . . I ought simply to make an order referring to the previous order in this ct., & to the decision of the Board of Trade, but to give no costs on this motion (*KINDERSLEY, V.C.*).—*PEARCE v. WYCOMBE RY. CO.* (1853), 7 Ry. & Can. Cas. 902; 1 Eq. Rep. 332; 21 L. T. O. S. 224; 17 Jur. 660.

1515. —.]—Pltf. who was only entitled to an injunction & costs insisted also on an account. Deft. offered to submit to the injunction without costs. Pltf. having brought his cause to a hearing, the ct. held both parties in the wrong, & gave no costs to either side.—*MOET v. COUSTON* (1864), 33 Beav. 578; 4 New Rep. 86; 10 L. T. 395; 29 J. P. 69; 10 Jur. N. S. 1012; 55 E. R. 493.

1516. —.]—Where, in an injunction suit to restrain deft. from obstructing pltf.'s light & air, a motion for a decree was made nearly three years after the filing of the original bill & other proceedings in the suit, & after various acts on the part of both pltf. & deft. whereby it appeared to the ct. that each party had to some considerable extent injured the other:—*Held*: although pltf. sought the injunction & damages against deft., & deft. was to some extent to blame, still, upon the evidence the proper course was simply to dismiss

the bill without costs.—*COCKS v. ROMAINE* (1866), 14 L. T. 390.

1517. —.]—*WOOD v. SAUNDERS* (1875), 10 Ch. App. 582, L. JJ.

Annotations:—*Mentd.* *New Windsor Corpn. v. Stovell* (1884), 27 Ch. D. 665; *Milner's Safe Co. v. G. N. & City Ry.*, [1907] 1 Ch. 208; *White v. Grand Hotel, Eastbourne* (1912), 82 L. J. Ch. 57.

1518. —.]—Goods seized by a sheriff under a *fi. fa.* belonged, not to B. against whom the writ had been issued, but to O., his father, the endorsement being improperly worded. O. at once verbally informed the officer of the mistake, & commenced an action the same day against the sheriff for an injunction & damages. The next day the sheriff interpleaded. O. nevertheless proceeded with his action, & obtained from the Vice-Chancellor an injunction on giving an undertaking as to damages. No notice had been given to the execution creditor, who, in the meantime, had admitted that the goods seized did not belong to B.:—*Held*: no costs of the motion could be given to either party, either below or on appeal, both having been wrong; O. because he ought not to have brought his action without waiting for the result of the interpleader summons, which must, therefore, protect the sheriff in the usual way, & the sheriff because, though not guilty of misconduct, he had in fact been a mere trespasser.—*HILLIARD v. HANSON* (1882), 21 Ch. D. 69; 47 L. T. 342; 31 W. R. 151, C. A.

SUB-SECT. 5.—WHEN PARTIES GUILTY OF MISCONDUCT OR DELAY.

1519. No costs awarded—Misleading conduct.]—A suit was instituted to restrain an alleged improper use by defts. of pltf.'s trade name. Both pltf. & defts. were engaged in the manufacture of a compound intended for sale to brewers, & to be used by them in the making of beer in the place of hops. Upon the merits the ct. decided that pltf. had failed to make out any case for relief. But inasmuch as defts. as well as pltf. were engaged in the manufacture & sale of an article which was intended to enable brewers to deceive the public:—*Held*: the bill must be dismissed without costs.—*ESTCOURT v. ESTCOURT HOP ESSENCE CO.* (1875), 10 Ch. App. 276; 44 L. J. Ch. 223; 32 L. T. 80; 23 W. R. 313, L. C. & L. JJ.

Annotations:—*Refd.* *Rotch v. Crosbie* (1909), 54 Sol. Jo. 30. *Mentd.* *Goodfellow v. Prince* (1887), 35 Ch. D. 9; *Eno v. Dunn* (1890), 15 App. Cas. 252.

1520. — Unreasonable conduct—In conducting proceedings.]—*MILLINGTON v. FOX*, No. 1530, *post*.

1521. —.]—A bill for an injunction to restrain the diversion of a public road by a co. was dismissed; but, having regard to the conduct of the litigating parties, without costs.

As to costs, this litigation has been carried on in a manner not at all creditable to either party (*STUART, V.C.*).—*PHILLIPPS v. LONDON, BRIGHTON & SOUTH COAST RY. CO.* (1862), 4 Giff. 46; 7 L. T. 663; 9 Jur. N. S. 348; 66 E. R. 614.

Annotation:—*Mentd.* *Wilkinson v. Hull Ry. & Dock Co.* (1882), 51 L. J. Ch. 788.

1522. —.]—A perpetual injunction will be granted to restrain a trader from filling & sending out to the public articles of his own manufacture in bottles, casks or other receptacles having indelibly impressed thereon the name of another trader who manufactures an article of a like description, even although such trader place on such bottles, casks or receptacles a label having his own name thereon.

I am quite satisfied that deft. has not intended to commit any impropriety. . . . Ought he under those circumstances to have been dragged into this ct. in this litigation? To some extent he has brought it on himself by . . . not taking a reasonable course. Therefore . . . I think the whole justice of the case will be met by deft. giving an undertaking not to repeat the act, & that there should be no costs on either side (MALINS, V.-C.).—ROSE v. LOFTUS (1878), 47 L. J. Ch. 576; 38 L. T. 409.

Annotation:—*Reid. Thwaites v. McEvilly* (1903), 20 R. P. C. 663.

1523. — — — — —.]—A creditor having obtained judgment for his debt in the Q. B. Div. proceeded to execution, & the sheriff seized, under the *fi. fa.*, on Aug. 20, 1881, furniture in the house of the judgment debtor. The judgment creditor had already received formal notice that the furniture was comprised in a marriage settlement, & a similar formal notice was given to the sheriff's officer on Aug. 22. On Aug. 23 the trustee of the marriage settlement issued the writ in this action in the Ch. Div., to which the sheriff only was made deft., claiming an injunction to restrain him from selling the furniture & damages for the entry & seizure. On the same day a judge in chambers granted, *ex p.*, an injunction to restrain the sale until Aug. 26. On Aug. 25, the sheriff took out an interpleader summons. On Aug. 26, the vacation judge made an order in the Chancery action, that all further proceedings be stayed until the interpleader summons should be disposed of. The interpleader summons having resulted in the admission of the trustee's title by the judgment creditor, the motion for an *interim* injunction was reserved to be dealt with at the hearing:—*Held*: the sheriff ought to have applied to have the Chancery action disposed of together with the interpleader summons; but, the ct. being of opinion that the sheriff had in other respects properly discharged his duty, therefore no case for damages was made out, & the further prosecution of the action in the Ch. Div. was vexatious, the action was dismissed without costs to either side.—AYLWIN v. EVANS (1882), 52 L. J. Ch. 105; 47 L. T. 568.

1524. Concealment by plaintiff—Liability for costs though successful.—Parties coming for an injunction *ex p.* ought to state their case fully & fairly to the ct. If they do not, they will be made to pay costs, even though successful.—HOLDEN v. WATERLOW (1866), 15 W. R. 139, L. J.

1525. Delay.—A.-G. v. EASTLAKE, No. 469, *ante*.

SECT. 2.—WHEN DEFENDANT OFFERS TO SUBMIT.

SUB-SECT. 1.—BEFORE ACTION BROUGHT.

1526. Offer of all plaintiff could reasonably require—No costs given.—Deft. having in ignorance infringed pltf.'s patent, submitted, & he offered before suit to pay the amount of profits made, which were very trifling. At the hearing, though a perpetual injunction was granted, no costs were given, & an account was granted only upon pltf.'s request & at his peril.—NUNN v. D'ALBUQUERQUE (1865), 34 Beav. 596; 55 E. R. 765.

ns:—*Distd. Tonge v. Ward* (1869), 21 L. T. 480. *Proctor v. Bailey* (1888), 42 Ch. D. 339, *n*.

PART XIV. SECT. 1, SUB-SECT. 5.

1525 i. Delay.—Where an *ex p.* injunction was dissolved because pltf. had not fully stated the facts, deft. was

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refused costs in consequence of delay in applying to dissolve, he having allowed two applications to be made against him for attachments for breaches

1527. — Plaintiff liable for costs.—SNUGGS v. SEYD & KELLY'S CREDIT INDEX Co., [1894] W. N. 95.

1528. — — — — —.]—Pltf. having complained to defts. of their having infringed his patent, defts. offered unconditionally an undertaking during the existence of the patent. Pltf. commenced an action for an infringement & moved for an interlocutory injunction:—*Held*: the motion was not justified, & pltf. ought to pay the costs of it. By consent the motion was treated as the trial of the action, & an inquiry as to damages was directed, & defts. gave an undertaking not to infringe extending during the life of the patent. The costs of the inquiry were reserved, the costs of the motion being ordered to be set off against the costs of the action.—SPAUL v. MONOPOLE CYCLE & CARRIAGE Co., LTD. (1906), 23 R. P. C. 647.

1529. Passing off goods—Refusal to make public admission — Plaintiff entitled to costs.—W.'s manager, without the personal knowledge of W., affixed tickets with T.'s name printed thereon to certain goods of inferior quality to T.'s, & made by another manufacturer. On T.'s complaining of this, W. offered to give an undertaking that he would not use such tickets again, & to pay a certain sum, but declined to make a public admission that he had used the tickets in order to defraud T.:—*Held*: notwithstanding W.'s offer, T. was entitled to an injunction with costs, & also to an inquiry as to damages at his own risk.—TONGE v. WARD (1869), 21 L. T. 480.

SUB-SECT. 2.—AFTER WRIT ISSUED.

1530 Plaintiff refused costs—Abandonment of part of claim.—As a general rule, the costs of the cause should follow the result of the cause; but an exception will be made where a party has established his object by means of an unnecessary degree of litigation.

Pltfs. having filed a bill to restrain defts. from using certain trade marks, & for an account of the profits made by the sale of goods so marked, obtained an *ex p.* injunction. On the same day, pltfs. received a letter from defts.' solr., in which defts. stated, through their solr., that they had never used the marks since they were aware they were private property; & that they did not intend to use them again; & they offered to compensate pltfs. for any injury they might have sustained. Pltfs., however, prosecuted the cause to a hearing; & then, by their counsel, abandoned their title to the account, because it was so small as not to be worth taking. The Lord Chancellor, although he made the injunction perpetual, refused pltfs. the costs of the suit.—MILLINGTON v. FOX (1838), 3 My. & Cr. 338; 40 E. R. 956, L. C.

Annotations:—*Distd. Kelly v. Hooper* (1841), 1 Y. & C. Ch. Cas. 197. *Expld. Colburn v. Simms* (1843), 2 Hare, 543. *Apld. Pierce v. Franks* (1846), 15 L. J. Ch. 122. *Consd. Burgess v. Hills* (1858), 26 Beav. 244; *Moet v. Couston* (1864), 33 Beav. 578. *Distd. Tonge v. Ward* (1869), 21 L. T. 480. *Mentd. Crawshaw v. Thompson* (1842), 4 Man. & G. 357; *Perry v. Truefitt* (1842), 6 Beav. 66; *Spottiswoode v. Clark* (1846), 8 L. T. O. S. 230; *Burgess v. Burgess* (1853), 22 L. J. Ch. 675; *Edleston v. Vick* (1853), 18 Jur. 7; *Welch v. Knott* (1857), 4 K. & J. 747; *Clement v. Maddick* (1859), 1 Giff. 98; *Dixon v. Fawcus* (1861), 3 E. & E. 537; *Cartier v. Carlile* (1862), 31 Beav. 292; *Hall v. Barrows* (1863), 4 De G. J. & Sm. 150; *Leather Cloth Co. v. American Leather Cloth Co.* (1863), 4 De G. J. & Sm. 137; *M'Andrew v. Bassett* (1864), 10 L. T. 442; *Ainsworth v. Walsley* (1866), L. R. 1 Eq.

of the injunction, & having applied for time to answer both those applications. —FOSTER v. DOWLING (1868), N. B. Dig. 646.—CAN.

. 2.—When defendant offers to submit: Subsects. 2 & 3.]

518; *Lee v. Haley* (1869), 21 L. T. 546; *Wotherspoon v. Currie* (1870), 23 L. T. 443; *Ford v. Foster* (1872), 7 Ch. App. 611; *Singer Machine Manufacturers v. Wilson* (1877), 3 App. Cas. 376; *Levy v. Walker* (1879), 10 Ch. D. 436; *Orr Ewing v. Regr. of Trade Mks.* (1879), 4 App. Cas. 479; *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15; *Re Rivière & Trade Mks. Registration Acts, 1875-7* (1884), 53 L. J. Ch. 578; *Borthwick v. Evening Post* (1888), 37 Ch. D. 449; *Proctor v. Bayley* (1889), 42 Ch. D. 393, n.; *Baker v. Rawson, Re Baker's Trade Mks., Re Rawson's Appln.* (1890), 60 L. J. Ch. 49; *Thynne v. Shove* (1890), 45 Ch. D. 577; *Reddaway v. Bentham Hemp-Spinning Co.*, [1892] 2 Q. B. 639; *Paine v. Daniells' Breweries, Re Paine's Trade Mks.*, [1893] 2 Ch. 567; *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54; *Cellular Clothing Co. v. Maxton & Murray*, [1899] A. C. 326; *Valentine Meat Juice Co. v. Valentine Extract Co.* (1900), 83 L. T. 259; *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211; *Bow v. Hart*, [1905] 1 K. B. 592; *Re Du Cros*, [1912] 1 Ch. 644; *Yeatman v. Homberger* (1912), 107 L. T. 742; *Brinsmead v. Brinsmead* (1913), 30 R. P. C. 493.

1531. —.]—B. filed a bill against O. to restrain an infringement of a trade mark, & obtained an *interim* injunction; before the hearing of the cause C. offered to enter into an undertaking to refrain from using the trade mark & pay all costs, but declined to publish an apology, insisted upon by B., in the newspapers: the ct., at the hearing, while decreeing a perpetual injunction, ordered, in consequence of B.'s refusing C.'s offer, each party to pay his own costs.—*HUDSON v. BENNETT* (1866), 14 L. T. 698; 12 Jur. N. S. 519; 14 W. R. 911.

—Part costs.]—See Nos. 1537-1545, *post*.

1532. Plaintiff awarded whole costs.]—Deft., who was a china manufacturer, purchased abroad for his own private use a large number of cigars which were consigned to him at the docks here in cases bearing a spurious brand, purporting to be that of pltf's., who were cigar manufacturers. Deft. was not aware that the brand was spurious, nor, except from seeing it on the invoice, that any such brand was in use. Immediately upon pltf's. issuing their writ & serving deft. with notice of motion for an injunction to restrain him from selling the cigars, deft. stated that he had no intention of selling the cigars, & offered all the relief asked for by the writ, & afterwards at the motion agreed to an undertaking in the terms of the writ, the question of costs being reserved:—*Held*: deft. must pay all the costs of the action.

I hold it clear that it is not necessary in a case like the one before me to give notice. Pltf's. are clearly entitled to their costs (*CHITTY*, J.).—*UPMANN v. FORESTER* (1883), 24 Ch. D. 231; 52 L. J. Ch. 946; 49 L. T. 122; 47 J. P. 807; 32 W. R. 28.

Annotations:—*Fold. Wittman v. Oppenheim* (1884), 27 Ch. D. 260. *Consd. Sonnenschein v. Barnard* (1887), 57 L. T. 712. *Distd. American Tobacco Co. v. Guest*, [1892] 1 Ch. 630. *Refd. Walter v. Steinkopf*, [1892] 3 Ch. 489. *Mentd. Proctor v. Bayley* (1889), 42 Ch. D. 393, n.; *Sarpy v. Holland* (1908), 77 L. J. Ch. 637.

1533. —.]—J. J. & S., distillers of whisky in Dublin, which they sold in casks to retailers, supplied their customers with two descriptions of labels, one for three-year-old whisky bearing their registered trade mark "J. J. & S.," the other bearing the trade mark & three stars, for use on bottles containing whisky at least seven years old. C., having purchased from them some of their three-year-old whisky, & having been supplied with a number of labels of the first kind, got imitations made of the second description of label, with the distinctive mark of three stars, affixed same on bottles not containing seven-year-old whisky, & sold it as the seven-year-old whisky. On being written to he stated that he had used the label merely for ornament, & denied that he had sold the whisky as seven-year-old whisky or com-

mitted any fraud, & promised not to use the label again. The solrs. for J. J. & S. replied, "You have committed a gross fraud; pltf's. will require you to pay £50; also £10 to Belfast General Hospital & £10 for costs; also to sign an apology to be published in two newspapers & to deliver up all the imitation labels in your possession." The solr. for C. wrote characterising the terms as extortionate, but offering to pay any costs incurred up to date & sign a letter of regret. J. H. & S. then commenced an action against C. Thereupon his solr. wrote on Oct. 11, 1901, to pltf's. solrs. offering to sign a consent to an injunction & to pay pltf's. solrs. costs properly & necessarily incurred. Pltf's. went on to trial, & proved that deft. had on two occasions sold the whisky as pltf's. seven-year-old whisky. Deft.'s counsel, while not resisting the injunction, submitted that pltf's. were entitled only to the costs incurred prior to the date of the letter in which they offered to consent to & to pay the costs:—*Held*: deft. was not entitled to the exemption he asked for, & granted the injunction with costs.—*JAMESON & SON, LTD. v. CLARKE* (1902), 19 R. P. C. 255.

1534. — Defendant's offer not fulfilled.]—Upon the invasion of a patent right, the party complaining has a right to the protection of an injunction, although the other party may promise to commit no further infringement, & may offer to pay the costs of preparing the bill; & if deft. do not, after injunction obtained, offer to pay the costs of it, pltf. may bring the suit to a hearing, & will be entitled to the costs of the suit.—*GEARY v. NORTON* (1846), 1 De G. & Sm. 9; 63 E. R. 949. *Annotations*:—*Mentd. Davenport v. Rylands* (1865), L. R. 1 Eq. 302; *Proctor v. Bayley* (1889), 42 Ch. D. 393, n.

1535. — Motion not unnecessary.]—On June 12, 1886, one of defts.' travellers received an order from N., of Lavender Hill, for sixty dozen cardboard boxes, with labels bearing the words "Browne's Satin Polish for ladies' & children's boots & shoes, travelling bags, trunks, etc., manufactured by Browne, of Lavender Hill." On July 6, 1886, pltf., the owner of a registered trade mark, 14,127, bearing the words "Brown's Satin Polish," issued a writ to restrain the infringement of his trade mark. On July 7, 1886, defts. offered to compensate pltf. without the necessity of legal proceedings, & to destroy the labels, & comply with any reasonable request of pltf. On July 16, pltf. moved for an injunction:—*Held*: notwithstanding defts.' offer, the motion was not an unnecessary proceeding, & defts. must pay the costs caused by what they had done.—*FENNESSY v. DAY & MARTIN* (1886), 55 L. T. 161.

1536. — Conditional offer.]—In an action for infringement of a trade mark & for passing off, defts., by letter, offered to consent to a perpetual injunction with other relief, & to pay pltf's. taxed costs, upon the terms that the judgment should not be advertised, or that it should contain a statement that defts. submitted to the judgment for the sake of peace. Pltf's. refused to agree to the condition attached to the offer, & defts. put in a defence in which they pleaded this offer. At the trial of the action defts. asked that the costs from the date of the offer should be ordered to be paid by pltf's.:—*Held*: pltf's. were not bound to accept the condition, & an injunction was granted with other relief, & defts. were ordered to pay the costs of the action.—*HENRY CLAY & BOCK & CO., LTD. v. GODFREY PHILLIPS, LTD.* (1910), 27 R. P. C. 508.

1537. Plaintiff disallowed or liable for part costs —Costs after offer made.]—Where deft., having

rendered himself liable to be sued, & being sued, offers to submit to all the relief to which pltf. is entitled, the ct. will not give pltf. his costs of the subsequent prosecution of the suit.—**COLBURN v. SIMMS** (1843), 2 Hare, 543; 12 L. J. Ch. 388; 1 L. T. O. S. 75; 7 Jur. 1104; 67 E. R. 224.

Annotations:—**Mentd.** **Powell v. Aiken** (1858), 4 K. & J. 343; **Webster v. Power** (1868), L. R. 2 P. C. 69; **Mansell v. Valley Printing Co.**, [1908] 2 Ch. 441.

1538. ———.]—**BURGESS v. HILLS**, No. 1549, *post*.

1539. ———.]—The D. co. & the M. co. employed the same solrs. & the same contractors in the purchase of lands from K. & the prosecution of their works thereon. The M. co. were not to enter on their purchase till they had paid their purchase-money. The solrs. acting for the D. co. gave the contractors instructions to enter upon the land purchased by that co. & commence their works. The contractors did so, but by mistake they also entered on the land purchased, but not paid for, by the M. co., & although afterwards told by the solrs. of the M. co. to give up possession, they refused to do so, & in fact stayed in possession for three months, when the purchase-money was paid. In the meantime K. & W., his under tenant of the land sold to the M. co., had instituted injunction suits against that co. The co. offered to compromise the suits on each party paying their own costs. Those terms K. & W. refused, but did not suggest that the M. co. ought to pay all the costs of the suits:—**Held**: defts., the M. co., must pay all the costs of the suits up to the offer to compromise; but there must be no order as to the costs after that time.—**KENSINGTON (LORD) v. METROPOLITAN RY. CO.**, **WILLIAMS v. METROPOLITAN RY. CO.** (1866), 14 L. T. 580; 14 W. R. 754.

1540. ———.]—Pltfs. sued to restrain infringement of an important literary newspaper article & three trivial news paragraphs. Defts. offered an undertaking with costs not to publish again the first article, refusing to undertake as to the others. Pltfs. proceeded with the action; they were disallowed costs subsequent to defts.' offer.

Where an action is brought to enforce a legal right, such as an action to restrain the infringement of a very small part of pltf.'s copyright, the ct. will not, as a matter of course, order deft. to pay the costs of the action.—**WALTER v. STEINKOPFF**, [1892] 3 Ch. 489; 61 L. J. Ch. 521; 67 L. T. 184; 40 W. R. 599; 8 T. L. R. 633; 36 Sol. Jo. 556.

Annotation:—**Mentd.** **Walter v. Lane** (1900), 69 L. J. Ch. 699.

1541. ———.]—**JENKINS v. HOPE**, No. 364, *ante*.

1542. ———.]—**VERNON & SONS v. BUCHANAN'S FLOUR MILLS, LTD.** (1905), 23 R. P. C. 17.

1543. ———.]—Where a person uses a mark in ignorance that he is thereby infringing a registered trade mark, but stops the use of it as soon as the infringement is brought to his attention, he will be liable at the suit of the proprietor of the trade mark to a perpetual injunction restraining him from infringing the registered trade mark, but he will not be liable to account for profits or to pay damages. Where, in such a case, upon motion by the proprietor of the trade mark for an *interim* injunction, the innocent infringer offered to submit to a perpetual injunction & to pay all proper costs to date, the proprietor, having refused the offer, was made to pay the subsequent costs of the action.—

SLAZENGER & SONS v. SPALDING & BROTHERS, [1910] 1 Ch. 257; 79 L. J. Ch. 122; 102 L. T. 390; 27 R. P. C. 20.

1544. ———.]—A pltf. whose copyright is infringed has a right to an order of the ct. restraining the infringement, & is not prevented from exercising his rights by an offer of the infringer before action that he will promise not to do it again & will pay such damages as may be agreed upon. If such an offer is repeated after writ issued, with the addition of an offer to submit to an order & pay costs to date, pltf. may be deprived of any subsequent costs.—**SAVORY (E. W.), LTD. v. WORLD OF GOLF, LTD.**, [1914] 2 Ch. 566; 83 L. J. Ch. 824; 111 L. T. 269; 58 Sol. Jo. 707.

Annotation:—**Refd.** **Performing Right Soc. v. Mitchell & Booker Palais De Danse**, [1924] 1 K. B. 762.

1545. ———.]—**WINKLE & CO., LTD. v. GENT & SON** (1914), 31 R. P. C. 473, C. A.

Annotation:—**Distd.** **Davies v. Edinburgh Life Assce.** [1916] 2 K. B. 852.

1546. Plaintiff refused costs—Innocent infringement of trade mark.]—Where a retail trader innocently purchases & deals with a small quantity of goods which turn out to be an infringement of a trade mark, the ct. will not as a matter of course order him to pay the costs of an action for infringement of such trade mark.—**AMERICAN TOBACCO CO. v. GUEST**, [1892] 1 Ch. 630; 61 L. J. Ch. 242; 66 L. T. 257; 40 W. R. 364; 8 T. L. R. 300; 36 Sol. Jo. 254.

Annotation:—**Refd.** **Walter v. Steinkopff**, [1892] 3 Ch. 489.

SUB-SECT. 3.—OFFER EXCLUDING COSTS.

1547. Defendant liable for costs of suit—Cause brought to hearing—After interlocutory injunction granted.]—Where pltf. is entitled to have the injunction made perpetual, deft. will have to pay the costs of the suit, however trivial the subject matter of the suit may be, if he did not, after the injunction was granted, tender the costs up to that time.—**FRADELLA v. WELIER** (1831), 2 Russ. & M. 247; 39 E. R. 388.

1548. ———.]—**JAMIESON v. TEAGUE**, No. 691, *ante*.

1549. ———.]—Deft. innocently used pltf.'s trade marks, & on being served with the bill, he removed the labels, & gave an undertaking not to sell any more, but refused to pay the costs. The suit was continued to a hearing, & the account of profits, which were very trifling, was waived:—**Held**: deft. must pay the whole costs of suit. **Semble**: if deft. had offered to pay the costs up to the time when the proposal was made to submit to a perpetual injunction, the subsequent costs would have been thrown on pltf.—**BURGESS v. HILLS** (1858), 26 Beav. 244; 28 L. J. Ch. 356; 32 L. T. O. S. 328; 5 Jur. N. S. 233; 7 W. R. 158; 53 E. R. 891.

Annotation:—**Distd.** **Moet v. Couston** (1864), 33 Beav. 578.

1550. ———.]—In a suit to restrain the piracy of a literary work, pltf., who in opposition to deft.'s denial of his title, obtains an injunction, is entitled to an answer from deft., for the purpose of having his title admitted, in case, by arrangement between the parties, the title is not established at law; & also, of having an account from deft. of the profits made by the sale of the spurious work. Pltf., therefore, under such circumstances, is entitled to the costs of the suit, including the answer, as between party & party; & if by the refusal of deft. to pay those costs, pltf. is compelled to bring his cause to a hearing, he will be entitled to the whole costs of the suit, as between

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party & party, although at the hearing he may waive the account, & pltf's. equity in this respect will not be affected by his having offered to waive his right to an answer, with a view to obtain terms more beneficial to himself than the ct. would, under any circumstances, accord to him; as, for instance, with a view to receive costs as between solr. & client.—*KELLY v. HOOPER* (1841), 1 Y. & C. Ch. Cas. 197; 62 E. R. 852.

Annotation:—Reid. Colburn v. Simms (1843), 2 Hare, 543.

1551. ———.]—*A.-G. v. BOWEN* (1914), 78 J. P. Jo. 220.

SECT. 3.—INTERLOCUTORY APPLICATION.

SUB-SECT. 1.—IN GENERAL.

1552. *Costs costs in cause.*]—Pltf. was a young lady who had been a ward of ct.; & eighteen months after coming of age, while continuing to reside with her guardian, she had indorsed a promissory note, drawn by her guardian in her favour. The note was given by the guardian to certain creditors in part payment of a debt, & was by them presented to their bankers & discounted. It appeared that the bankers knew the relative position of pltf. & her guardian, & also knew that the guardian had been in embarrassed circumstances previous to the note being presented:—*Held*: it was the duty of the bankers to have investigated the transaction, & an injunction was granted to restrain them from taking proceedings at law upon the note.

As in all matters of injunction which are to protect parties or to protect property until the cause is heard, I think it is right that the costs of this application should be costs in the cause (*LORD COTTENHAM, C.*).—*MAITLAND v. BACKHOUSE* (1848), 16 Sim. 58; 17 L. J. Ch. 121; 11 L. T. O. S. 237; 12 Jur. 45; 60 E. R. 794, L. C.

Annotations:—Reid. Espey v. Lake (1852), 10 Hare, 260; *Dettmar v. Metropolitan & Provincial Bank* (1863), 1 Hem. & M. 641.

1553. ———.]—A bill was filed to restrain the infringement of a patent, & an injunction was obtained upon motion. defts. appearing & opposing & pltf's. undertaking to bring an action to try their right at law. Pltf's., failing to establish their right at law, the bill was ultimately dismissed with costs for want of prosecution:—*Held*: defts. were entitled to their costs of resisting the motion for an injunction as costs in the cause.—*STEVENS v. KEATING* (1850), 1 Mac. & G. 659; 2 H. & Tw. 176; 19 L. J. Ch. 407; 14 Jur. 157; 41 E. R. 1420, L. C.

Annotations:—Apld. Betts v. Clifford (1860), 1 John. & H. 74. *Consd. Webster v. Manby* (1869), 4 Ch. App. 372.

1554. ———.]—(1) The Act of Parliament, constituting a railway co., directed that the railway, branch railways & works should be completed to the satisfaction of the engineer of a broad gauge railway co., & should be of such gauge & construction as would admit of the railway to be constructed being worked continuously with the broad gauge railway; & after reciting that the railway to be constructed was intended to be connected with two narrow gauge railways at specified junctions, the Act directed that, along the portions of the railway north of a specified point on their line, additional rails should be laid down, so as to adapt the lines as well to the narrow as to the broad gauge there. The co. proceeded to form a line on the narrow-gauge for the whole length on the north of the specific point on their line, as also on a part of the line south of that

point, with earth work & timber work, so as to admit of the broad gauge rails being added, & of the railway being a mixed gauge line throughout, with double rails to the north of the specified point. The broad gauge co. were entitled to shares in the mixed gauge railway co.; & in a suit by the broad gauge co. suing on behalf of themselves & the other shareholders, against the directors of the mixed gauge co., they asked for an injunction to restrain the construction of the railway otherwise than upon the broad gauge throughout its entire length, or otherwise to restrain the laying down the narrow gauge at all south of the specified point; also to restrain the laying down the narrow gauge north of the specified point, until the rails on the broad gauge had been laid throughout the line; & also to restrain the opening the railway on any part till the rails on the broad gauge had been laid down on the whole line:—*Held*: the ct. could not grant an injunction for any of such objects.

(2) The course of the ct. provides for the costs of motions for injunctions in a way most just, by leaving the party moving, if his suit fails, to pay the costs, & if his suit succeeds, providing for his costs effectually.

(3) Parties who have lain by & permitted a large expenditure to be made in contravention of the rights for which they contend, cannot call upon this ct. for its summary interference. The jurisdiction to interfere is purely equitable & must be governed by equitable principles. One of the first of these principles is that parties coming into equity must do equity (*TURNER, L.J.*).—*GREAT WESTERN RY. CO. v. OXFORD, WORCESTER & WOLVERHAMPTON RY. CO.* (1853), 3 De G. M. & G. 341; 43 E. R. 133, L. JJ.; *affg.* (1852), 5 De G. & Sm. 437.

Annotation:—Generally, Mentd. Hawkes v. Eastern Counties Ry. (1852), 16 Jur. 1051.

1555. ———.]—*JENNINGS v. BRIGHTON, ETC. SEWERS BOARD, BRIGHTON, ETC. SEWERS BOARD v. JENNINGS* (1872), 4 De G. J. & Sm. 735, n.; 46 E. R. 1105, L. C.

1556. *Application improperly made.*]—A motion to dissolve an injunction restraining an action on a post obit, refused, with costs, such case being an exception to the general rule, that the costs of a motion for an injunction, or to dissolve an injunction refused, are costs in the cause.—*MARSACK v. REEVES* (1821), 6 Madd. 108; 56 E. R. 1033.

1557. ———.]—On the occasion of the sale of a freehold estate it was agreed that the purchase money should be paid in railway bonds, & the purchaser deposited with & assigned to A., who alleged himself to be the solr. of the vendor, one of such bonds in part payment of the purchase-money. The contract turned out to be a fraud on the purchaser & went off, & on the purchaser applying to A., for the return of the deposited bond, he was informed that A. had placed it in the hands of B., to secure a debt due from himself to B., B. had no notice of the terms upon which A. held the bond:—*Held*: in a suit by the purchaser against B. to restrain him from dealing with the bond, that the deposit & assignment of the bond by the purchaser to A. for the purpose above-mentioned did not make A. in the events which happened, a constructive trustee for pltf., & as B. was a *bond fide* purchaser of the bond for value without notice, he could not be restrained from dealing with it. Where the allegation upon which the principal equity of the bill was founded was disproved by the evidence brought forward upon an interlocutory motion for an injunction, the ct. in refusing the motion ordered pltf. to pay the costs thereof

instead of making them costs in the cause.—*ASHWIN v. BURTON* (1862), 32 L. J. Ch. 196; 7 L. T. 589; 9 Jur. N. S. 319; 11 W. R. 103.

1558. Costs of motion rendered ineffective by amendment of writ.]—Costs occasioned by a notice of motion, which was rendered ineffective by a subsequent amendment of the bill, must be paid by pltf.—*LONDON & BLACKWALL RY. CO. v. LIMEHOUSE DISTRICT BOARD OF WORKS* (1856), 3 K. & J. 123; 26 L. J. Ch. 164; 28 L. T. O. S. 140; 20 J. P. 789; 5 W. R. 64; 69 E. R. 1048.

Annotations:—Mentd. *Daw v. Metropolitan Board of Works* (1862), 12 C. B. N. S. 161; *L. & S. W. Ry. v. Myers* (1881), 45 J. P. 731; *C. & S. L. Ry. v. L. C. C.*, [1891] 2 Q. B. 513; *Hornsey District Council v. Smith*, [1897] 1 Ch. 843; *Ashton-under-Lyne Corp. v. Pugh*, [1898] 1 Q. B. 45; *Grand Junction Waterworks Co. v. Hampton U. C.* (1898), 67 L. J. Q. B. 903; *L. & N. W. Ry. & G. W. Ry. v. Runcorn R. C.*, [1898] 1 Ch. 34; *Uckfield R. C. v. Crowborough District Water Co.*, [1899] 2 Q. B. 664; *L. C. C. v. Wandsworth & Putney Gas Co.* (1900), 82 L. T. 562; *Kershaw v. L. M. & S. Ry.* (1924), 23 L. G. R. 592.

1559. Second motion for same purpose—Not made till costs of first motion paid.]—A second motion for the same object, which had previously failed with costs, cannot be made until those costs have either been paid or been secured by a payment into ct.—*BURDELL v. HAY* (1863), 33 Beav. 189; 55 E. R. 339.

1560. Order to pay all costs to certain time—Costs of motion included.]—The usual rules as to the costs of motions do not always apply; & where one of the parties is ordered to pay all the costs of a suit up to a given time, the costs of motions made during that time may be included in the costs of the suit.—*WEBSTER v. MANBY* (1869), 4 Ch. App. 372; 20 L. T. 387; 17 W. R. 545, L. JJ.

1561. Costs of interim injunction—Included in subsequent order continuing injunction.]—An order made on notice & continuing an injunction with costs will, in the absence of special directions to the contrary, include the costs of an *interim* injunction previously obtained on an *ex p.* application.—*BLAKEY v. HALL* (1887), 56 L. J. Ch. 568; 56 L. T. 400; 35 W. R. 592.

1562. Costs of motion to suspend injunction—Delay in application.]—A.-G. v. *FINCHLEY LOCAL BOARD* (1887), 3 T. L. R. 356.

SUB-SECT. 2.—MOTION ORDERED TO STAND OVER.

1563. Effect—Court reserves power to deal with costs.]—*SINGER v. AUDSLEY*, No. 1127, *ante*.

1564. ———.]—If the motion stands till the trial, it is not only unnecessary, but improper specially to reserve the costs. When the motion stands till the trial, the judge at the trial disposes of the motion including the costs. The practice is this:—where the parties agree that the question arising on the motion is the same as that at the trial, then the right course is to make the costs of the motion, costs in the action. Often, however, a different point arises on the motion from that involved in the action, such as the question whether it was right to make the motion at all, whatever the rights of the parties may be. In such a case the proper order is that the motion stands over until the trial (*CHITTY*, J.).—*BOURNEMOUTH COMRS. v. HOLDEN*, [1888] W. N. 205.

1565. ——— Where costs not mentioned—Costs in the cause.]—On a bill to restrain the infringement of a patent, a motion for injunction was ordered to stand over until after the trial of an action, nothing being said about costs. In the action pltf. succeeded on the issue as to the infringement,

but failed in establishing the validity of his patent. The bill was afterwards dismissed with costs:—*Held*: deft.'s costs of the motion were costs in the cause.—*BETTS v. CLIFFORD* (1860), 1 John & H. 74; 3 L. T. 36; 70 E. R. 667.

Annotations:—Refd. *Mounsey v. Lonsdale, A.-G. v. Lonsdale* (1870), 6 Ch. App. 141. *Mentd.* *Davies v. Marshall* (No. 1) (1861), 1 Drew. & Sm. 557; *Gale v. Abbott* (1862), 6 L. T. 852.

1566. ———.]—In a suit to restrain the erection of a jetty in a river, a motion for an injunction was ordered to stand over till the hearing, but no declaration was made as to costs. Pltf. then amended the bill, & turned it into an information & bill. When the suit came to a hearing, a decree was made for a perpetual injunction, & deft. was ordered to pay the costs of the suit; but the costs of the motion were not mentioned in the decree:—*Held*: (1) the motion was substantially a successful motion, & the costs of the motion were costs in the cause; (2) the amendment of the bill by which it was turned into an information & bill, did not affect the question.—*MOUNSEY v. LONSDALE (EARL), A.-G. v. LONSDALE (EARL)* (1870), 6 Ch. App. 141; 40 L. J. Ch. 198; 23 L. T. 794; 19 W. R. 235, L. JJ.

Annotations:—As to (1) *Expld.* *Begbie v. Fenwick* (1871), 24 L. T. 62. *Generally, Mentd.* *A.-G. v. Terry* (1873), 9 Ch. App. 425, n.; *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *Lawes v. Turner & Frere* (1892), 8 T. L. R. 584.

1567. ———.]—In a patent action a motion was made on behalf of pltf. for an *interim* injunction, but not heard on the merits, the order made being “motion to stand to trial.” No mention was then made as to costs. On the trial judgment was given for deft., with costs; but nothing was said as to the costs of the motion, & the registrar, in drawing up the judgment, refused to include them:—*Held*: where a motion is adjourned or stands over to the trial, & no mention is made as to the costs of it then or at the trial, the judgment carries the costs of the motion.—*GOSNELL v. BISHOP* (1888), 38 Ch. D. 385; 57 L. J. Ch. 642; 36 W. R. 505.

1568. ———.]—Where interlocutory applications have been ordered to stand to the trial & are not then mentioned to the judge, the costs of such applications are to be treated as costs in the action & taxed accordingly, & need not be mentioned in the judgment. Where interlocutory applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment or order, or allowed on taxation, without the special direction of the judge.—*BRITISH NATURAL PREMIUM PROVIDENT ASSOCN. v. BYWATER*, [1897] 2 Ch. 531; 66 L. J. Ch. 787; 77 L. T. 22; 46 W. R. 28; 13 T. L. R. 572; 41 Sol. Jo. 715.

1569. Where no order made—& motion stands over—Ultimately discharged—Costs reserved to hearing.]—A motion being made for an injunction, no order was made, & the motion stood over from time to time on an undertaking. A motion was then made to dismiss the bill for want of prosecution, when defts. having professed to act *bond fide*, the undertaking was discharged & leave given to amend the bill within a fixed time, & defts. carried out their professed intentions. No costs were given on either side, & the costs of the motion for the injunction were treated as costs in the cause. A motion was now made, asking for the costs of the injunction as costs of an abandoned motion:—*Held*: the consideration of the costs of the motion for the injunction must be reserved until the hearing, & there must be no costs of the application on either side.—*FELKIN v. LEWIS* (1863), 8 L. T. 788; 11 W. R. 981.

Annotation:—Mentd. *Felkin v. Herbert* (1863), 9 L. T. 635.

*Sect. 3.—Interlocutory application: Sub-sects. 2
Sects. 4 & 5.]*

1570. Action dismissed with costs—No order as to costs of motion.]—In an action for an injunction to restrain infringement of pltf.'s trade marks & passing off by defts. of their goods under a name only colourably differing from that under which the goods of pltf. were sold, pltf. had moved for an *interim* injunction until after judgment or further order in terms of the indorsement on the writ of summons. No order was made for an injunction, but an order was made for speedy trial, the parties were put under terms as to delivery of pleadings, & the costs of the motion were specially reserved. As the evidence stood on the motion, the learned judge would have felt himself bound to make the order asked for. At the trial the action was dismissed, & pltf. contended that defts. ought not to get costs:—*Held*: the proper order to make at the trial was that which would have been made if an order for an injunction had gone on the motion, viz., no order as to the costs of the motion, but that the action be dismissed with costs. Leave to pltf. to appeal on the question of costs was refused.—*COOMBE v. MENDIT, LTD.* (1913), 136 L. T. Jo. 86.

SUB-SECT. 3.—WHEN MOTION REFUSED.

1571. Costs reserved to hearing of cause—Whether costs in the cause.]—Injunction decreed to restrain a solr. from communicating to a party who was suing a former client documents or matters of evidence which had come to the possession or knowledge of the solr. in respect of his employment for such client, & to restrain the party suing from using in his action, or otherwise, any documents or matters of evidence which he had so obtained.

On a motion for an injunction being refused, the costs were reserved to the hearing of the cause; & at the hearing the injunction was decreed, & deft. was ordered to pay to pltf. the costs so reserved, as well as the general costs of the suit relating to the injunction. But, on appeal, this course of proceeding was disapproved by the Lord Chancellor, & the decree was altered by striking out the order for payment of the reserved costs.

The rule which forbids an appeal on the question of costs alone does not preclude the ct., where the appeal embraces other matters also, from varying the decree as to costs, though it affirm it as to such other matters; but such variations will not protect applt. from the costs of the appeal.—*LEWIS v. SMITH* (1849), 1 Mac. & G. 417; 12 L. T. O. S. 141; 41 E. R. 1326, L. C.

PART XIV. SECT. 4.

1574 i. Injunction discharged—Costs of original motion—Defendant entitled to.]—Where the result of a motion for an interlocutory injunction depended upon a question of law & not of fact, & the motion was reheard at the instance of deft., against whom an injunction had been ordered, the ct., on reversing such order, gave deft. the costs of the motion as well as of the rehearing.—*FIRE EXTINGUISHER CO. v. NORTH WESTERN (BABCOCK) FIRE EXTINGUISHER CO.* (1873), 20 Gr. 625.—CAN.

1574 ii. ———.]—A suit was brought for an injunction & other relief & application was made for an interlocutory injunction. Deft. opposed the motion, which was refused, with costs.

On appeal the motion was allowed. At the hearing of the suit a decree was made in pltf.'s favour. On appeal the decree was reversed, the bill was dismissed with costs, & the injunction order dissolved:—*Held*: deft. was entitled to the costs of opposing the interlocutory application as costs in the cause.—*NEW BRUNSWICK RY. CO. & BROWN v. KELLY* (1895), 1 N. B. Eq. Rep. 156.—CAN.

p. Appeal instead of motion.]—Deft., in a suit on the equity side of the county ct., had, before being served with an injunction restraining the removal of a building, removed the same by direction of the city inspector as being a nuisance, having been erected partly on the public street: notwith-

1572. —.]—Costs of a refused motion reserved, but made costs in the cause should the suit not come to a hearing.—*JONES v. BATTEN* (1853), 10 Hare, App. I., xi.; 1 W. R. 275; 68 E. R. 1119.

SECT. 4.—ON APPEAL AGAINST INJUNCTION.

1573. Failure by plaintiff to fulfil undertaking.]—Where, pending an appeal motion from an order dissolving an injunction, the cause was heard in the ct. below, when the injunction so dissolved had been revived in a modified form, upon the hearing of the appeal motion, no costs, which then formed the only question, were given to either side on the appeal; but pltf., the applt., having, by the non-performance of an undertaking he had given in the ct. below, when the injunction was granted, rendered an application to the ct. necessary:—*Held*: he was properly ordered to pay the costs of the motion for dissolving the injunction.

A motion having been made before the Vice-Chancellor to dissolve an injunction which restrained deft. from receiving his pension, that motion was granted upon an undertaking by pltf. to do certain things prescribed to him. Pltf. failed to do those things, & a second motion became necessary, & the injunction was then dissolved. I cannot say that the second motion was an improper one; & the costs of it must be paid by pltf. By the decree subsequently made in the cause, the injunction thus dissolved has been revived, & is now standing. There are, therefore, circumstances in this motion which prevent me from giving the costs of the appeal against the order made on the motion. There will be no costs on either side on the appeal (*LORD LYNTHURST, C.*).—*HALL v. LACK* (1846), 7 L. T. O. S. 77.

1574. Injunction discharged—Costs of original motion—Defendant entitled to.]—Where an order for an injunction was discharged upon an appeal, defts. were held entitled to the costs of the original motion.—*BEARDMER v. LONDON & NORTH WESTERN RY. CO.* (1849), 1 Mac. & G. 112; 5 Ry. & Can. Cas. 728; 1 H. & Tw. 161; 18 L. J. Ch. 432; 13 Jur. 327; 47 E. R. 1367, L. C.

Annotations:—Mentd. L. & N. W. Ry. v. Smith (1849), 13 L. T. O. S. 153; *A.-G. v. Tewkesbury & Malvern Ry.* (1863), 1 De G. J. & Sm. 423.

1575. — As to one co-plaintiff—Additional costs of joinder as such.]—Two persons, who respectively resided on opposite sides of defts.' cement works, joined in filing a bill to restrain defts. from carrying on the works, on the ground of nuisance. The Vice-Chancellor granted an injunction, & defts. appealed:—*Held*: as to one pltf. the appeal must be dismissed, but as to the

this, an order was made by the judge of the county ct. for the committal of deft., who, without moving to dissolve the injunction on the facts, appealed to this ct. In allowing the appeal, & directing deft.'s discharge, the ct. did not give him the costs of the application.—*MURPHY v. MORRISON* (1868), 14 Gr. 203.—CAN.

q. Rehearing.]—The decree in a cause gave pltf. the general costs thereof:—*Held*: this did not carry the costs of rehearing an interlocutory order made refusing an injunction, which order was reversed on rehearing; the practice requiring that, where costs of rehearing are intended to be given they must be expressly mentioned in the order giving the costs of the

other pltf. it must be allowed, & the latter pltf. must pay any additional costs of the suit caused by his having been joined as co-pltf.—**UMFREVILLE v. JOHNSON** (1875), 10 Ch. App. 580; 44 L. J. Ch. 752; 23 W. R. 844, L. JJ.

Annotations:—**Consd.** *D'Hormusgee v. Grey* (1882), 10 Q. B. D. 13. **Refd.** *Gort v. Rowney* (1886), 17 Q. B. D. 625; *King v. Sunday Pictorial Newspapers* (1920), Ltd. (1924), 133 L. T. 397. **Mentd.** *West v. White* (1877), 25 W. R. 342.

1576. Both parties at fault.—**HILLIARD v. HANSON**, No. 1518, *ante*.

1577. Bankruptcy of defendant—Trustee adopting bankrupt's defence.—An interlocutory order for an injunction & receiver having been made against defts. in an action, they gave notice of appeal, & shortly afterwards became bkpt. An order was made for carrying on the proceedings against their trustee. The trustee gave notice to pltf. that he should not proceed with the appeal. Shortly after this the trustee entered an appearance & called for a statement of claim. He declined to undertake to pay the costs of the appeal incurred by pltf. before the notice that the appeal would not be proceeded with, & the appeal came on that the question as to the costs might be decided:—**Held**: the appeal must be dismissed with costs to be paid by the trustee, for that having adopted the defence of the bkpts. he had placed himself in their position as to the whole of the action, & could not reject part of the proceedings in it.—**BORNEMAN v. WILSON** (1884), 28 Ch. D. 53; 54 L. J. Ch. 631; 51 L. T. 728; 33 W. R. 141; 1 T. L. R. 64, C. A.

Annotation:—**Refd.** *London School Board v. Wall* (1891), 7 T. L. R. 566.

SECT. 5.—TAXATION OF COSTS.

See, now, R. S. C., Ord. 65, r. 9; PRACTICE.

1578. Taxation on higher scale—Special reason—Interlocutory injunction—Matter of importance raised.—**GRAFTON v. WATSON**, No. 140, *ante*.

1579. — Submission to perpetual injunction.—A submission to a perpetual injunction with costs by deft. in an action for the infringement of a trade mark does not afford a special ground upon which the Ct. will direct taxation of the costs upon the higher scale under R. S. C., Ord. 65, r. 9.—**HUDSON v. OSGERBY** (1884), 50 L. T. 323; 32 W. R. 566.

1580. — Obstruction of ancient lights.—**HOLLAND v. WORLEY** (1884), 26 Ch. D. 578; 54 L. J. Ch. 268; 50 L. T. 526; 49 J. P. 7; 32 W. R. 749.

Annotations:—**Mentd.** *Greenwood v. Hornsey* (1886), 33

cause.—**MOSSOP v. MASON** (1873), 20 Gr. 406.—**CAN.**

r. Limitation of amount—7 & 8 *Edw. 7, c. 12, s. 1.*—A motion for an *interim* injunction is an interlocutory motion or application &, although an appeal from an order granting it is taken to the Ct. of Appeal & there allowed with costs, such costs & all other costs of the action payable by the opposite party are limited to \$300 & actual disbursements by above sect.—**TRADERS BANK v. WRIGHT** (1908), 17 Man. L. R. 695.—**CAN.**

PART XIV. SECT. 5.

t. Taxation on High Court scale—Claim for damages & injunction.—In an action brought in the High Ct. to restrain defts. by injunction from negotiating a promissory note for \$230,

& to compel them to deliver it up to pltf., or for damages for its detention, it was determined that the note was wrongfully held by defts., who had obtained it under the pretence of discounting it, but really with the view of making it the subject of garnishment:—**Held**: the action sounded in tort & not in contract, & could not have been brought in a county ct.; & the successful pltf. was therefore entitled to tax his costs on the High Ct. scale.—**PLUMMER v. COLDWELL** (1892), 15 P. R. 144.—**CAN.**

a. No order as to costs—Plaintiff's bill subsequently dismissed.—Upon a motion to continue an injunction, which was refused, no order was made as to costs. Afterwards pltf.'s bill was dismissed with costs:—**Held**: the costs of the motion were taxable, as costs in the

Ch. D. 471; *Dicker v. Popham, Radford* (1890), 63 L. T. 379; *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Martin v. Price*, [1894] 1 Ch. 276; *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.* (1894), 12 R. 112; *Cowper v. Laidler*, [1903] 2 Ch. 337; *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A. C. 851.

1581. — Infringement of trade mark.—Pltfs. had for many years carried on the business of steel manufacturers under the name of T. T. & Sons. Deft., J. T., had for many years carried on a similar business in the same town, at first as J. T., then as J. T. & Co. In 1888 he took his two sons into partnership & carried on the same business as J. T. & Sons. There was no evidence that defts. imitated the trade marks or labels of pltfs. or otherwise attempted to deceive the public:—**Held**: although there was a probability that the public would be occasionally misled by the similarity of the names, pltfs. were not entitled to an injunction restraining defts. from the use of the name J. T. & Sons. Pltfs. were ordered to pay the costs of the action on the higher scale.—**TURTON v. TURTON** (1889), 42 Ch. D. 128; 58 L. J. Ch. 677; 61 L. T. 571; 54 J. P. 151; 38 W. R. 22; 5 T. L. R. 545, C. A.

Annotations:—**Mentd.** *Lewis's v. Lewis* (1890), 45 Ch. D. 281; *Tussaud v. Tussaud* (1890), 44 Ch. D. 678; *Otard Dupuy v. Otard de Montebello Cognac Co.* (1893), 9 T. L. R. 295; *Saunders v. Sun Life Assce. of Canada*, [1894] 1 Ch. 537; *Powell v. Birmingham Brewery Co.*, [1896] 2 Ch. 54; *Reddaway v. Banham*, [1896] A. C. 199; *Valentine Meat Juice Co. v. Valentine Extract Co.* (1900), 83 L. T. 259; *Cash v. Cash* (1901), 84 L. T. 349; *Rodgers v. Simpson* (1906), 23 R. P. C. 297; *Daimler Motor Co. (1904), Ltd. v. London Daimler Co.* (1907), 24 R. P. C. 379; *Brinsmead v. Brinsmead & Waddington* (1913), 29 T. L. R. 237; *Teofani v. Teofani, Re Teofani's Trade Mk.*, [1913] 2 Ch. 545; *Baird & Tatlock (London) v. Baird & Tatlock* (1916), 34 R. P. C. 85; *Waring & Gillow v. Gillow & Gillow* (1916), 32 T. L. R. 389; *Dutton Massey (Liverpool) v. Dutton Massey* (1923), 40 R. P. C. 413; *Rodgers v. Rodgers* (1924), 41 R. P. C. 277.

1582. Taxation on High Court scale—Claim for damages & injunction—Ten pounds recovered as damages—Injunction waived.—In this action pltf. claimed damages for breach of a covenant contained in a lease not to make any alteration in the demised premises, & also an injunction restraining the breach. During the progress of the action deft. restored the premises to their former condition. At the trial pltf. recovered £10 damages with costs to be taxed, but did not ask for an injunction as deft. stated that he did not intend to interfere again with the premises:—**Held**: County Courts Act, 1888 (c. 43), s. 116, did not apply, & pltf. was entitled to costs upon the High Ct. scale.—**DOHERTY v. THOMPSON** (1906), 94 L. T. 626, C. A.

County court action.—*See* COUNTY COURTS, Vol. XIII., p. 522, Nos. 722, 723.

cause.—**FRONTENAC LOAN CO. v. MORICK** (1887), 4 Man. L. R. 439.—**CAN.**

b. Under *præcipe* order.—Pending a motion for injunction pltf. took out a *præcipe* order to dismiss his bill:—**Held**: deft.'s costs of the injunction motion were properly taxable under this order.—**JENKINS v. RYAN** (1888), 5 Man. L. R. 112.—**CAN.**

c. Scale fixed by reference to loss caused by not granting injunction.—Where damages & an injunction were claimed, & deft. obtained judgment, the scale upon which costs were allowed to deft. was fixed by reference to the loss which the granting of an injunction would have caused to him, & not merely by reference to the amount of damages claimed.—**WELLINGTON EDUCATION BOARD v. ANDREWS** (1900), 19 N. Z. L. R. 628.—**N.Z.**

INJURIA ABSQUE DAMNO.

See ACTION ; TORT.

INJURIOUS AFFECTION.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION.

INLAND BILL.

See BILLS OF EXCHANGE, PROMISSORY NOTES, AND NEGOTIABLE INSTRUMENTS.

INLAND REVENUE.

See ESTATE AND OTHER DEATH DUTIES ; INCOME TAX ; LAND TAX ; REVENUE.

END OF VOL. XXVIII.

